



## Funds in the British Virgin Islands

### Regulation

The statutory legislation governing funds in the BVI is the Mutual Funds Act, 1996 (the “Act”). The criteria for a BVI domiciled fund vehicle to qualify for regulation under the Act is for it to:

(a) collect and pool investor money; and (b) issue shares in a company, interests in a limited partnership or units in a unit trust which entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or part of the net assets of the fund. Accordingly, all open-ended fund vehicles (with the exception of funds set up for investment by (i) one or more members of the same family or (ii) a single investor) will be subject to the Act and so will require licensing by the BVI Financial Services Commission (the “FSC”).

Close-ended fund vehicles are outside the scope of both the Act and the FSC and consequently can be set up and launched without needing to go through a licensing procedure with the FSC. BVI funds may be organised using one of three vehicles, namely as a company limited by shares; a limited partnership; or a unit trust, of which a company incorporated under the BVI Business Companies Act, 2004 (the “BVIBCA”) is the most commonly used vehicle. Unit trusts are used by investors for tax specific reasons and are less common. Additionally, funds which are set up under the BVIBCA may also be set up as segregated portfolio companies, the effect of which is to legally segregate the assets and liabilities of one portfolio in the event of an insolvency (such portfolio can comprise either a single class of shares or multiple classes of shares) in the fund, from the assets and liabilities of other portfolios in the fund.

There are three categories of licensed BVI funds, namely, private funds, professional funds, and public funds.

#### (a) Private funds

A private fund is essentially a fund whose constitutional documents specify that it will have no more than fifty investors and that the making of an invitation to investors to subscribe for shares (or interests of a limited partnership or units of a unit trust) in the fund is to be made on a private basis. Unlike professional funds, there are no minimum investment or investor suitability requirements for private funds. An invitation to subscribe “on a private basis” is likely to include an invitation which is either made to specified persons (however described) and is not calculated to result in shares (or interests or units) becoming available

to other persons or to a large number of investors or by reason of a private or business connection between the person making the invitation and the potential investor.

The guidelines to the Act suggest that the making of invitations to as many as 300 persons might be considered as an offering on a private basis if it can be demonstrated that the person made the invitations to specified persons and had no deliberate intention of making invitations to other persons. The guidelines also suggest that the making of invitations to a significantly greater number of persons than 300 would cast doubt upon compliance with the spirit of “private basis” which is embodied in the Act on the grounds that a large number of persons is not consistent with what is commonly understood to be “private”.

#### (b) Professional funds

BVI professional funds are the category of fund most suitable for sophisticated investors. The eligible criteria to be classified as a professional fund is essentially that the shares (or interests or units) are only made available to “professional investors” and that the initial investment of the majority of such investors is not less than US\$100,000 or its equivalent in any other currency. A “professional investor” will be a person whose ordinary business involves, whether for its own account or the accounts of others, the acquisition or disposal of property of the same kind as the property, or a substantial part of the property, of the fund or who has signed a declaration that he, whether individually or jointly with his spouse, has net worth in excess of US\$1,000,000 or its equivalent in any other currency and that he consents to being treated as a professional investor.

Aside from the fact that professional funds are subject to minimum investment and investor suitability requirements, which is something to which private funds are not subject, the only other real distinction between private and professional funds is that a professional fund is permitted to operate for 14 days before receiving its license from the FSC. By contrast, a private fund is unable to commence business until such time as it is licensed to do so by the FSC.

#### (c) Public funds

A public fund is essentially a BVI open-ended fund which is not a private or professional fund. The regulatory requirements (and so licensing procedure) for a public fund are more stringent than those required for private or professional funds, given the nature of the investors who are likely to be investing in a public fund (public funds are for retail investors). As with private funds, a public fund is unable to commence business until such time as it is licensed to do so by the FSC.

### **Tax**

BVI funds are not subject to any income, withholding or capital gains taxes in the BVI and there are no capital or stamp duties levied in the BVI on the issue, transfer or redemption of shares, interests or units of the fund. Additionally, investors in BVI funds will not be subject to any income, withholding or capital gains taxes in the BVI with respect to the shares, interests or units of the fund owned by them and distributions (if any) received on such shares, interests or units, nor will they be subject to any estate or inheritance taxes in the BVI.

## Functionaries

BVI funds are required to have the following functionaries:

- (a) an investment manager - principally engaged to provide investment management services in respect of the assets of the fund. Provided that the investment manager is domiciled in a “recognised” jurisdiction for the purposes of the Act, there is no need to separately license the investment manager with the FSC.
- (b) For these purposes, the following are “recognised” jurisdictions”:

(i) Australia;	(ii) Bahamas;	(iii) Belgium;	(iv) Bermuda;
(v) Canada;	(vi) Cayman Islands;	(vii) France;	(viii) Germany;
(ix) Gibraltar;	(x) Guernsey;	(xi) Hong Kong;	(xiii) Isle of Man;
(xiv) Ireland;	(xv) Italy;	(xvi) Japan;	(xvii) Jersey;
(xviii) Luxemburg;	(xix) Malta;	(xx) the Netherlands;	(xxi) Singapore;
(xxii) Spain;	(xxiii) Sweden;	(xxiv) Switzerland;	(xxv) UK; and (xxvi) USA.

Additionally, investment managers domiciled in non “recognised” jurisdictions will be acceptable to the FSC provided that it can be demonstrated that the jurisdiction of the investment manager’s domicile has a sufficiently prudent system of financial services regulation and supervision, for instance, jurisdictions such as the Dubai International Financial Centre will also be acceptable to the FSC without the need to separately license the investment manager with the FSC. Where, separate licensing of the investment manager is required by the FSC or preferred by the investment manager, the process for licensing the investment manager in the BVI will be more complicated than the process for licensing a fund, mainly because the FSC will want to satisfy itself that those persons connected with the operation of the investment manager are fit and proper and have adequate knowledge and expertise and, as such, the FSC will want to investigate the background and industry experience of the investment manager’s principals.

There are no similar licensing considerations for investment advisors to BVI funds and the investment manager of a BVI fund is free to delegate various of its responsibilities to an investment advisor. In terms of what constitutes being an investment advisor, the guidelines to the Act provide that a person who provides only investment advice (“advice” being investment recommendations which carry no explicit or implied obligation of acceptance) would not be regarded as falling within the definition of an investment manager for the purposes of the Act; (b) administrator - engaged by the fund to provide net asset value calculations and often shareholder services and transfer agency. There is no requirement for the administrator chosen to be based in the BVI; (c) auditor – there is no legal requirement under the Act for a local sign off from an auditor based in the BVI and consequently investment managers are free to choose which ever firm of auditors they may wish to use; and (d) a subscription bank- for the purpose of receiving subscription moneys from investors.

A BVI fund is only legally obligated to have a custodian if it is a public fund or is set up as a segregated portfolio company. However, where a fund does not engage a custodian, the FSC will want to be told about the custodianship arrangements for the fund (for instance,

whether a prime broker or the fund's directors will be responsible for the safekeeping of the fund's assets).

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