

SUMMARY GUIDE TO THE MUTUAL FUNDS ACT, 1996

The primary legislation in the British Virgin Islands (“BVI”) which regulates the investment funds industry is the Mutual Funds Act, 1996 (the “Act”). The Act regulates both funds and fund functionaries operating in or from within the BVI. The BVI legislature is currently considering the Securities and Investment Business Act (“SIBA”) which is expected to come into force during the first half of 2010. The SIBA and the accompanying regulations will, among other things, update the Act and codify some of the policies already imposed by the BVI Financial Services Commission (“FSC”) for funds and fund functionaries.

1. Definition of a mutual fund

Under the Act, a “mutual fund” is defined as a company incorporated, a partnership formed, a unit trust organised or other similar body formed or organised under the laws of the BVI or of any other country or jurisdiction which:

- (a) collects and pools investor funds for the purpose of collective investment; and
- (b) issues shares (defined as shares in the share capital of a company, an interest in a mutual fund partnership and a unit in a mutual fund unit trust) that 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 in a part of the net assets of the company, the partnership, the unit trust or other similar body, as the case may be; and includes
 - i. an umbrella fund whose shares are split into a number of different class funds or sub-funds, and
 - ii. a fund which has a single investor which is a mutual fund not registered or recognised under the Act.

Pursuant to the above definition, the Act only regulates: (i) open-ended funds (whose equity interests are redeemable at the option of the investor), and (ii) administrators and managers of such open-ended funds. The Act does not regulate closed-end funds.

2. Advantages of BVI investment funds

Some of the recognised advantages of setting up an investment fund in the BVI include:

- a stable political and economic jurisdiction which is committed to international compliance;
- a tax neutral environment;
- a recognised and respected legal system supported by English common law, modern local legislation and a well developed court system;

- no regulatory restrictions on investment policies or strategies or on performance and other fee arrangements;
- no requirement to appoint local directors or local functionaries;
- various types of fund structures including, single class funds, multi-class funds and master feeder funds are facilitated;
- statutory segregated portfolio ring-fencing;
- low start-up and ongoing fees and costs; and
- no requirement for a local auditor sign off on the fund's accounts.

2. Categories of mutual funds

Funds regulated by the Act fall within three categories, namely: private funds, professional funds and public funds.

- Private fund – this is a mutual fund whose constitutional documents specify that it will have no more than 50 investors or that the making of an invitation to subscribe for or purchase shares is made on a private basis.
- Professional fund – this is a mutual fund in which shares are only made available to professional investors and the initial investment by a majority of the investors is not less than \$100,000 (or equivalent).
- Public fund – this is a mutual fund that is neither a private fund nor a professional fund.

All private and professional funds must be recognised under the Act, whilst all public funds must be registered under the Act.

3. Recognition or registration of a mutual fund and acceptance of their functionaries

The FSC requires a fund wishing to be recognised or registered to submit an application which must include evidence of the fund's status together with details of each of the fund's functionaries (being the investment manager, investment advisor, administrator and custodian).

In considering an application for recognition or registration, the FSC has issued Policy Guidelines which in summary require that the manager, investment advisor, administrator and custodian of a BVI mutual fund be incorporated in either the BVI, or a “recognised jurisdiction”, which, for the purposes of the Act, are currently as follows:

Australia	Italy
Bahamas	Japan
Belgium	Jersey
Bermuda	Luxembourg
Canada	Malta
Cayman Islands	Netherlands
France	Singapore
Germany	Spain
Gibraltar	Sweden
Guernsey	Switzerland
Hong Kong	United Kingdom
Ireland USA	
Isle of Man	

However, the Policy Guidelines also indicate that functionaries incorporated in other jurisdictions may be acceptable if the jurisdiction is regarded by the FSC as having a prudent system of regulation and supervision of mutual funds business.

4. Types of investment fund vehicles

Investment funds in the BVI are usually set up using either: (a) a BVI business company, (b) a limited partnership, or (c) a unit trust. The BVI business company is the most popular of the three vehicles.

- BVI business company – this is a separate legal entity from the investing shareholders and would be structured as a limited liability company. BVI business companies are regulated by the BVI Business Companies Act, 2004 which has a great deal of flexibility in terms of structuring funds.
- BVI limited partnership – this can be established pursuant to the Partnership Act, 1996. A limited partnership is formed in the BVI by a general partner and at least one limited partner executing Articles of Partnership and by submitting a Memorandum of Partnership to the FSC.
- Unit trusts are – this can be established pursuant to a deed of trust. A unit trust arrangement is not a separate legal entity. It is the trustee who has legal capacity and who holds the assets of the fund on the terms of the deed of trust for the investors in the unit trust scheme. Under BVI law, the holders of units in a unit trust scheme are the beneficial owners of the trust assets.

O’Neal Webster is able to assist with all aspects of fund formation and related services. For further information please contact Kerry Anderson at kanderson@onealwebster.com or Christopher Simpson at csimpson@onealwebster.com.

This Guide is general in scope and is not intended to be comprehensive. It is not a substitute for legal advice.

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