Introduction of a private investment funds regime in the BVI

Update prepared by Rachael McDonald (Partner, British Virgin Islands)

The Securities and Investment Business (Amendment) Act, 2019 has brought into force a new supervisory regime for private investment funds in the British Virgin Islands.

Background

The British Virgin Islands (BVI) Securities and Investment Business Act, 2010 (the Act) was amended on 31 December 2019 to further comply with the EU Code of Conduct economic substance requirements for collective investment funds by introducing a new supervisory regime for private investment funds (PIFs). The amendments provide for a PIF regime which will require closed-ended BVI fund vehicles to apply for "recognition" by the Financial Services Commission (FSC) prior to promoting or operating the fund. The Private Investment Funds Regulations 2019 (the Regulations), which came into force at the same time, set out the application procedures for such recognition.

What is a private investment fund?

The Act defines a PIF as a company, partnership, unit trust or any other body incorporated, registered, formed or organised in the BVI or any other country, which:

- collects and pools investor funds for the purpose of collective investment and diversification of portfolio risk; and
- issues fund interests, which entitle the holder to receive 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, partnership, unit trust or other body.

Which PIFs are eligible to apply for recognition under the new regime?

The FSC may recognise a PIF if it is satisfied that:

- the fund is lawfully incorporated, registered, formed or organised under the laws of the BVI or a country outside the BVI;
- the constitutional documents of the fund specify that:
  - the fund is not authorised to have more than 50 investors, or
  - an invitation to subscribe for, or purchase, fund interests shall be made on a private basis only, or
  - the fund interests shall be issued only to professional investors1 with a minimum initial investment of $100,000;

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1 The Act defines a "professional investor" as a person:

- whose ordinary business involves, whether for that person's own account or the account 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 $1,000,000 and that he consents to being treated as a professional investor.
- the fund meets such other criteria as may be specified in the Regulations, and, on recognition, the fund will be compliant with the Act, the Regulations and any applicable practice directions; and
- recognising the fund is not against the public interest.

**What are the restrictions imposed by the new regime?**

As a general rule, if a PIF is not recognised by the FSC under the Act, it is prohibited from:

- carrying on business as a PIF in or from within the BVI (including operating the fund from a place of business in the BVI); or
- soliciting an individual within the BVI to subscribe for, or purchase, any of the fund interests; or
- promoting the fund in or from within the BVI, including by the communication of an invitation or inducement to any other person, or by advising or procuring any other person to become an investor in the fund.

A PIF from outside the BVI will not be considered to be soliciting subscriptions from an individual within the BVI where the subscription has been made as the result of an unsolicited approach by such individual.

**What is the application process?**

The Act provides for a 21 day grace period from the commencement of carrying on business for making the application. However, PIFs relying on this grace period must submit their applications within 14 days of commencement of business.

The initial application fee for recognition by the FSC will be $700. The application will need to include:
- the address of the fund’s place of business in the BVI;
- the name and address of each of the fund’s directors;
- if the fund is a unit trust, the name and address of the trustee;
- if the fund is a limited partnership, the name and address of the general partners;
- the name and address of the fund’s authorised representative;
- the name and address of each appointed person;
- the address of any place or places of business that the fund may have outside the BVI;
- copies of:
  - the fund’s constitutional documents;
  - the fund’s certificate of incorporation, formation, registration or equivalent document;
  - the fund’s valuation policy;
  - the offering document or term sheet, or the proposed offering document or term sheet, if applicable; and
- such other information as may be required.

Once the FSC has granted the application for recognition, it will add the PIF to the Register of Private Investment Funds and issue a certificate of recognition upon receipt of a fee of $1,000 (for PIFs approved in the period up to 30 June 2020) or $500 (for PIFs approved after that date).

**What are the ongoing obligations?**

The regime introduces new ongoing regulatory obligations for PIFs which include:
- an annual renewal fee;
- a requirement to appoint an "authorised representative" to liaise with the FSC;
- an obligation to operate in accordance with constitutional documents and maintain financial records;
- a requirement to have at least two directors, at least one of whom must be an individual;
- a requirement to have "appointed persons" responsible for the management, valuation and safekeeping of fund property (including the segregation of fund property); and

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2 According to the Private Investment Funds Regime Guidelines issued on 31 December 2019, where a private investment fund is not a company, it must provide certain prescribed details of its general partner (where it is a limited partnership) or trustee (where it is a unit trust).
• an obligation to comply with the Anti-Money Laundering and Terrorist Financing Code.

There are also requirements in relation to offering documents or term sheets, valuation policies in respect of fund property, financial statements and audits.

**Are there any enforcement provisions?**

Carrying on PIF business without being recognised will result in potential fines of $40,000 on summary conviction and $75,000 on indictment for companies, partnerships or unit trusts. The equivalent fines for individuals will be $25,000 on summary conviction and $40,000 on indictment. Similar penalty provisions are in place for acting as an appointed person of a PIF that has not been recognised. Any person operating or promoting a PIF which has not been recognised will face a fine of $40,000 on summary conviction and $50,000 on indictment ($25,000 on summary conviction and $30,000 on indictment for individuals).

**What is the timing for existing private investment funds?**

Existing funds which now fall within the definition of a PIF must apply for recognition by 1 July 2020.

**Next steps**

This update provides a brief summary of the new private investment funds regime in the BVI. Please contact your usual Mourant contact with any questions or, alternatively, please get in touch with one of the contacts named below.

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