

UPDATE

## Private investment funds in the BVI

The Securities and Investment Business (Amendment) Act, 2019 introduced a new supervisory regime for private investment funds in the British Virgin Islands with effect from 31 December 2019. For private investment funds existing prior to that date, the transition period for compliance with the new regime ended on 1 July 2020.

### 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. The amendments introduced a new supervisory regime for private investment funds (**PIFs**), requiring 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 recognition of a PIF. The transition period for existing PIFs to apply for recognition ended on 1 July 2020.

### 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.

It is expected that the FSC will publish additional regulations or guidance notes to clarify the scope of the PIF regime, and that the FSC may also provide further clarifications on the definition of PIF, later this year.

### 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;
  - 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 investors<sup>1</sup> with a minimum initial investment for each investor of US\$100,000 (or its equivalent in any other currency);
- 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 within the BVI);
- 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.

In addition, no person is to act as an appointed person<sup>2</sup>, or otherwise be concerned with the management or valuation of a PIF carrying on business in or from within the BVI, unless the fund is recognised as a PIF.

### 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 is US\$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<sup>3</sup>;
- 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;

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<sup>1</sup> The Act defines a **professional investor** as meaning 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.

<sup>2</sup> The Act defines the **appointed person** in respect of a PIF as meaning the person responsible for undertaking:

- the management of the PIF's assets;
- the valuation of the PIF's assets;
- the safekeeping of the PIF's assets; or
- such other function as may be specified in the Regulations.

<sup>3</sup> The authorised representative (amongst other things) acts as the main intermediary between the PIF and the FSC, and must be a BVI business company, a BVI partnership or an individual who is ordinarily resident in the BVI.

- 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 US\$500.

### **What are the ongoing obligations?**

The regime introduces new ongoing regulatory obligations for PIFs, which include:

- an annual renewal fee of US\$1,000;
- a requirement to appoint an authorised representative to liaise with the FSC;
- an obligation to operate in accordance with the PIF's constitutional documents and to maintain financial records sufficient to explain the PIF's transactions and to enable its financial position to be determined at any time;
- a requirement to have at least two directors, at least one of whom must be an individual<sup>4</sup>;
- a requirement to have appointed persons responsible for the management, valuation and safe-keeping of fund property (including the segregation of fund property);
- an obligation to notify the FSC:
  - upon the resignation, termination or other change in an appointed person within 7 days of the change, together with a statement of the reason behind the change;
  - of any change in the PIF's directors, authorised representative, auditors, place of business, constitutional documents, offering document, valuation policy and (in the case of a PIF incorporated or formed outside the BVI) of any material change in the nature and scope of the PIF's business, within 14 days of the change;
- an obligation to prepare audited financial statements which comply with the requirements under the Regulations<sup>5</sup> and
- an obligation to comply with the Anti-Money Laundering and Terrorist Financing Code of Practice, 2008 (as amended).

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

### **Are there any enforcement provisions?**

Carrying on PIF business without being recognised will result in potential fines of US\$40,000 on summary conviction and US\$75,000 on indictment for companies, partnerships or unit trusts. The equivalent fines for individuals are US\$25,000 on summary conviction and US\$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 US\$40,000 on summary conviction and US\$50,000 on indictment (US\$25,000 on summary conviction and US\$30,000 on indictment for individuals).

### **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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<sup>4</sup> 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).

<sup>5</sup> There is no specific requirement in relation to the auditors appointed by the PIF, as long as the audited financial statements meet the requirements and standards prescribed under the Regulations.

## Contacts

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