

Securities and Investment Business Act, 2010 - Key Considerations for Existing BVI Funds

With the enactment of the Securities and Investment Business Act, 2010 ("SIBA") in the BVI, which comes into force on 17 May 2010, the Mutual Funds Act, 1996, the statute which has regulated the BVI funds industry for more than a decade will be repealed and replaced by SIBA (of which Part III relates to funds) and its underlying secondary legislation, the Mutual Funds Regulations, 2010 (the "Mutual Funds Regulations") and the Public Funds Code.

The regulatory regime applicable to private and professional funds (the two categories of funds pursuant to which approximately 2,700 of the 3,000 licensed BVI funds are registered) is not substantially changed as a consequence of SIBA, with many of the "changes" merely representing the codification of existing regulatory policies operated by the Financial Services Commission (the "FSC"), which have evolved over time in line with international standards.

The regulatory regime applicable to public funds, which is a category of fund utilised for retail offerings by BVI funds (of which currently approximately 300 of the 3,000 licensed BVI funds are registered) will be changing under SIBA, although the precise regulatory landscape has not been finalised, as a consultation of the draft Public Funds Code (pursuant to which most regulatory changes will be contained within) is currently ongoing.

Transitional provisions exist under both SIBA and the Mutual Funds Regulations, in order to facilitate the smooth transition for existing funds to the new regulatory regime.

The key regulatory changes for existing private and professional funds are as follows:

- A requirement to have at least 2 directors, one of whom must be an individual, as opposed to a corporate director - *under the transitional provisions, existing funds with a single director have until 3 August 2010 to appoint a second director;*
- A requirement to have at all times an investment manager, administrator and custodian, although significantly, upon written application to the FSC, the FSC can exempt a fund from the requirement to appoint a custodian or investment manager - *under the transitional provisions, existing funds without an investment manager or custodian have until 3 August 2010 to either appoint such functionary or apply to the FSC for an exemption;*
- A change in the minimum investment threshold for professional funds, requiring all investors to make an initial investment of at least US\$100,000 (excluded from this requirement are "exempted investors", being essentially investors affiliated with the fund's investment manager) - *under the transitional provisions, existing professional funds may continue to accept initial investments of less than US\$100,000 (provided that the majority of investors have invested not less than US\$100,000) until 11 October 2010;*
- A requirement to have an auditor and to file audited financial statements with the FSC with 6 months of the financial year end - *under the Mutual Funds Regulations, the FSC may, on written application made by or on behalf of a private or professional fund, exempt a fund from the requirement to appoint an auditor;*
- A requirement to appoint an authorised representative, who must be authorised by the FSC for the provision of such services to entities licensed under SIBA - *under the transitional provisions, existing funds have until 12 October 2010 to appoint an authorised representative;*
- An obligation to notify the FSC of changes to any functionary of the fund; any director, authorised representative or auditor ceasing to act; any change in the fund's place of business; any amendment to its offering memorandum or supplements; any amendment to its memorandum and articles of association within 14 days - *whilst not previously a statutory requirement, by convention as a consequence of stated FSC preference, this is something that existing funds typically did in any event;*
- A requirement for the fund's offering memorandum to contain a specified investment warning set out in Regulation 9(4) of the Mutual Funds Regulations - *whilst most existing funds already contain a form of investment warning not dissimilar to the investment warning now required by Regulation 9(4) of the Mutual Funds Regulations, all existing funds will need to update their fund documents to come into compliance with this requirement. Under the transitional provisions, existing funds have until 3 August 2010 to ensure that this investment warning is specified in their offering documents;*



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- A requirement for each investor to provide a written acknowledgment that he has received, understood and accepted the investment warning set out in Regulation 9(4) of the Mutual Funds Regulations (this acknowledgment would typically be contained within the fund's subscription documents) - *whilst we assume not intended, the transitional provisions are silent as to there being a transitional period for existing funds to implement this change;*
- A requirement for the fund's constitutional documents to contain the statements provided for within Section 55(2)(b) or (c), as applicable - *For private funds this statement is substantially identical to the statement that was previously required. However, this is a new requirement for professional funds. Under the transitional provisions, existing funds have until 12 October 2010 to come into compliance with this requirement; and*
- A requirement to maintain financial records sufficient to show and explain its transactions and to enable the fund's financial position to be determined with reasonable accuracy. Such records must be retained for a period of 5 years - *this requirement to maintain financial records was a requirement under the BVI Business Companies Act, 2004 in any event. Under the transitional provisions, existing funds must come into compliance with this requirement by 3 August 2010.*

The above regulatory changes will therefore necessitate certain updating changes to be made to both the offering documents and constitutional documents of existing funds, in addition to introducing additional ongoing regulatory obligations.

If you would like to discuss any of the changes required by the enactment of SIBA, please contact your usual Ogier contact.

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