Introduction of a new regime for the regulation of BVI close-ended funds

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With the enactment of the Securities and Investment Business (Amendment) Act, 2019 (the **SIBA Amendment Act**), the British Virgin Islands (**BVI**) has for the first time introduced a regulatory regime to regulate close-ended funds.

Historic position

The historic position in the BVI has been that in order for a collective investment scheme to be considered to be a "fund" under BVI law and so required to be licensed as such by the BVI Financial Services Commission (the **FSC**), it has been required to fall within the definition of a "mutual fund"/ "fund" under section 40(1) of the Securities and Investment Business Act, 2010 (**SIBA**). To come within this definition, a collective investment scheme was required to satisfy a two part test, being to:

(i) collect and pool investor funds for the purpose of collective investment; and

(ii) issue fund interests (i.e. shares; limited partnership interests; or units) 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.

What this has therefore meant from a practicable perspective has been that open-ended collective investment schemes have fallen within this definition of a "mutual fund"/"fund" for the purposes of section 40(1) of SIBA and so have been required to be licensed by the FSC, while close-ended collective investment schemes have fallen outside this definition and so have been unregulated.

New regulatory regime for close-ended funds

In response to the requirements of the European Union that the BVI should also regulate close-ended collective investment schemes, the BVI has enacted the SIBA Amendment Act and introduced the accompanying Private Investment Funds Regulations, 2019 (the **PIF Regulations**), which

legislation introduces a new regulatory regime for close-ended funds.

This new regulatory regime came into force on 31 December 2019.

What close-ended funds are caught by these changes?

The SIBA Amendment Act introduces a new category of fund requiring regulation, being a "private investment fund". A close-ended collective investment scheme will come within the new definition of a "private investment fund" where the following two-part test is satisfied, namely where it:

(i) collects and pools investor funds for the purpose of collective investment and diversification of portfolio risk; and

(ii) 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.

How will the licensing process work for funds that fall within the definition of a "private investment fund"?

For new funds which fall within the definition of a "private investment fund", they will be required to submit an application for recognition as a "private investment fund" within 14 days of commencing business. Prior to receiving their certificate of recognition such funds may still operate as such for a period not exceeding 21 days - during this intervening 21 day period, they will be deemed to have been recognised as a "private investment fund".

Eligibility criteria

To be eligible to be recognised as a "private investment fund", the following eligibility criteria must be satisfied:

(i) the fund must be lawfully incorporated, registered, formed or organised (whether in the BVI or elsewhere);

(ii) the fund's constitutional documents must specify that:

- the fund is not authorised to have more than 50 investors; or
- an invitation to subscribe for or purchase, fund interests issued by the fund must be made on a private basis only; or
- the fund interest shall be issued only to professional investors, with an initial investment of each professional investor, other than an exempted investor, not being less than US$100,000.

(iii) the fund must satisfy such other criteria as may be specified for recognition of a private investment fund in the PIF Regulations;

(iv) the fund will, on being recognised, be in compliance with the SIBA Amendment Act, the PIF Regulations and any practice directions applicable to the fund; and

(v) recognising the fund as a private investment fund is not against the public interest.

What happens to pre-existing close-ended funds now caught by the SIBA Amendment Act?

There is a six month transition period applicable for existing close-ended funds which now fall within the definition of a "private investment fund" and so will be required to apply to the FSC to become recognised as a private investment fund under this new regulatory regime.

This six month transition period ends on 1 July 2020.

New regulatory obligations for private investment funds

As a consequence of now needing to become recognised as a "private investment fund", close-ended funds will going forward be required to comply with the following ongoing obligations:

(i) to have at all times "appointed persons" responsible for undertaking:

- the management of fund property;
- the valuation of fund property; and
- the safekeeping of fund property;

(ii) to have at all times an "authorised representative" in the BVI;

(iii) if structured as a company, to have at all times at least two directors;

(iv) its offering terms shall contain the regulatory disclosures required by the PIF Regulations;

(v) to maintain a clear and comprehensive policy for the valuation of fund property, which must be followed by the "appointed person" responsible for the valuation of fund property;

(vi) to prepare each year audited financial statements and file a copy of these audited financial statements with the FSC within 6 months of the financial year to which they relate (although it is possible to apply for an exemption from this requirement to audit);

(vii) to provide notification to the FSC within 14 days of certain key changes (i.e. change of director; material changes to the fund's business; amendments to constitutional or fund offering documents; amendments to the fund's valuation policy etc.); and

(viii) to maintain financial records that: are sufficient to show and explain its transactions; at any time enable its financial position to be determined with reasonable accuracy; and enable it to prepare such financial statements and make such returns as it is required to prepare and make

under the SIBA Amendment Act and the PIF Regulations (and such financial records are required to be maintained for a period of at least 5 years after completion of the transaction to which they relate).

If you would like to discuss any aspects of the impact of the introduction of the SIBA Amendment Act and the PIF Regulations, or whether your funds or clients may be affected, please speak to your usual Ogier contact.

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