Waterford

## BRITISH VIRGIN ISLANDS

## Private Investment Funds

### History

For many years, funds that did not offer investors a right to redeem on demand were outside the regulatory regime in most offshore jurisdictions, including the British Virgin Islands. These funds were referred to as "closed end funds" given their restricted redemption rights. These funds were popular structures for venture capital, real estate and private equity funds and there was some international pressure being exerted to regulate these funds.

As a result, the Securities and Investment Business (Amendment) Act, 2019 ("Amending Act"), coupled with the Private Investment Funds Regulations, 2019 ("Regulations") now require these fund to apply to the Financial Services Commission ("FSC") for recognition as private investment fund.

### Definition

A private investment fund is a company, partnership or unit trust which:

1. collects and pools investor funds for the purposes of collective investment and diversification of portfolio risk; and

2. issues fund interests that entitle the holder to receive an amount computed by reference to the value of a proportionate interest in the net assets of the fund.

### Eligibility

In order to be recognised by the FSC, a private investment fund's constitutional documents will need to specify that (i) it will have no more than 50 investors, (ii) an invitation to subscribe for or purchase shares or fund interests issued by the fund is to be made on a private basis[1] only or (iii) shares or fund interests are made available only to professional investors[2] and the initial

[1] An invitation made on a "private basis" includes an invitation which is made (a) to specified persons and is not calculated to result in shares or fund interests becoming available to other persons or to a large number of persons or (b) by reason of a private or business connection between the person making the invitation and the investor

[2] A "professional investor" is defined as a person (i) 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 (ii) who has signed a declaration that he, whether individually or jointly with his spouse, has net worth in excess of US$1,000,000 (or its equivalent in another currency) and that he consents to being treated as a professional investor.

investment of each investor in the fund is not less than US$100,000 or its equivalent in another currency.

## Regulation

A private investment fund is subject to the following requirements:

- A private investment fund that is a company (or the general partner in the case of a limited partnership or the trustee in the case of a unit trust) must have two directors, one of whom must be an individual. As well, the fund will need an authorised representative in the BVI.

- A private investment fund must at all times have an appointed person or persons who is or are responsible for undertaking (a) the management of fund property, (b) the valuation of fund property and (c) the safekeeping of fund property, including the segregation of fund property. The application for recognition must include the name and address of each appointed person. An appointed person may be (i) a person licensed by the FSC or a regulatory authority in a recognised jurisdiction to perform the specified functions, (ii) an independent third party with experience in performing the specified functions or (iii) a director, partner or trustee of the private investment fund. The same appointed person may carry out more than one of the functions of managing, valuing and safekeeping of fund property except that the appointed person responsible for the fund's management function must be independent from the appointed person responsible for the valuation process.

- An offer or invitation to an investor or a potential investor to purchase or subscribe for fund interests in a private investment fund must be made within an offering document or a term sheet. The offering document or term sheet must clearly indicate that the fund is recognised by the FSC as a private investment fund and contain (a) an indication as to whether (i) the fund is suitable for private investors only and is limited to 50 investors, or any invitation to subscribe for fund interests may be made on a private basis only, or (ii) the fund is only suitable for professional investors and a minimum investment of US$100,000 (or such larger sum as may apply with respect to the fund) is required, (b) the investment objective of the fund, (c) a written statement that investors do not have the right to redeem or withdraw fund interests on demand, (d) the names and addresses of the appointed persons for the fund and (e) any fees to be paid by the fund. The fund may choose not to issue an offering document or term sheet subject to providing to the FSC the reason for not doing so and explaining how relevant information concerning the fund and any invitation or offer will otherwise be provided to investors or potential investors.

- A private investment fund is required to prepare financial statements complying with the International Financial Reporting Standards promulgated by the International Accounting Standards Board, UK GAAP, US GAAP, Canadian GAAP or internationally recognised and generally accepted accounting standards equivalent to any of the foregoing. Each private investment fund is required to provide a copy of its audited financial statements to the FSC within six months after its financial year end. Application may be made to the FSC for (a) an exemption from the requirement to prepare and submit financial statements or (b) an extension of time to prepare and submit financial statements, in each case under certain limited circumstances. There is no requirement for a local BVI auditor or local BVI auditor sign-off.

## Ongoing Requirements

The FSC is required to be notified of (i) any change to the directors, appointed persons, authorised representative or auditor of a private investment fund, (ii) any change in the address of the fund's place of business, (iii) any material change in the nature and scope of the fund's business, in the case of a fund incorporated, constituted, formed or organised under the laws of a country outside the BVI, (iv) any amendment to the constitutional documents of the fund, (v) the issue of an offering document or a term sheet that was not previously provided to the FSC, (vi) the amendment of any offering document or term sheet previously provided to the FSC and (vii) any amendment to the fund's valuation policy.

## Application Process

The application process is straightforward. A simple application form must be completed and submitted to the FSC together with the relevant application fee and supporting documentation in respect of the fund, including a copy of the (i) certificate of incorporation or formation, (ii) constitutional documents, (iii) register of directors (if a company), (iv) curriculum vitae for each director, or director of the general partner or trustee; (v) the offering document or term sheet and (vi) the fund valuation policy. A new fund may carry on business for a period of 21 days prior to submitting an application provided that such application is made within 14 days of commencing business.

## Fees

The application fee payable to the FSC is US$750 and the annual fee payable to the FSC is US$1,000. There will also be fees for the registered agent fee, authorised representative and legal fees, but generally there are no other fees, such as director registration fees or local auditor sign off fees, payable by the fund in the BVI.

## What can Waterford do for you?

We have played a leading role in establishing numerous funds in the BVI. As part of our service in establishing and launching a fund we will provide advisory and drafting services with respect to the formation of a fund in the BVI and attend to the recognition process. Our services will include:

1. Establishing the fund as a BVI business company and drafting memorandum and articles to conform to the offering document (corporate structure is by far the most common);
2. Drafting the offering document;
3. Drafting the subscription documents;
4. Drafting the redemption notices;
5. Drafting corporate launch minutes;
6. Drafting application for recognition with Commission and lodging same;
7. Attending to payment of government fees on BVI company formation and recognition of Fund
8. Acting as liaison with Commission; and
9. Attending to all incidental and related matters.

Please contact us on info@waterford.sg to arrange a consultation or request a detailed estimate of fees.