

BVI Legal and Regulatory developments

Deals - 12/02/2020

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The following highlights some recent and upcoming BVI legal developments which may be of interest.

December 2019

BVI Funds

In December 2019 there were a number of amendments to financial services legislation.

The Mutual Funds (Amendment) Regulations 2019 (which amends the Mutual Funds Regulations 2010) and Securities and the Investment Business (Incubator and Approved Funds) (Amendment) Regulations 2019 (which amends the Investment Business (Incubator and Approved Funds) Regulations 2015) were both Gazetted on 20th December 2019 and came into force on 31st December 2019.

The amendments are in relation to the requirements for the valuation of fund property. Under these amendments, all funds are required to maintain a clear and comprehensive policy for the valuation of fund property, with procedures that are sufficient to ensure that the valuation policy is effectively implemented and to ensure that the fund administrator (or, in the case of a fund that does not have an independent administrator, the person responsible for controlling the fund's valuation process) adheres to these policies.

The amended legislation requires the valuation policy and procedures to:

- (a) be appropriate for the nature, size, complexity, structure and diversity of the fund and the fund property
- (b) be consistent with the provisions concerning valuations contained in the fund's

constitutional documents and offering documents

(c) require valuations to be undertaken on at least an annual basis

(d) include procedures for preparing reports on the valuation of fund property and

(e) specify the mechanisms in place for the dissemination of valuation information and reports to investors

In addition, in the event that there is either no independence between the investment manager and the fund administrator (or other person having responsibility for the fund valuation process), or the investment manager is involved in the valuation process, there is an express requirement for a fund to identify, manage and monitor any potential conflicts of interest which may arise and to disclose to investors the existence of a potential conflict of interest and how such potential conflict of interest will be managed.

The amendments requires all funds to put in place stand-alone policies and procedures for dealing with the valuation of fund property and dealing with conflicts in relation to fund valuations. It is anticipated that these requirements will largely replicate the existing best practices and disclosures which are already appearing in fund documents.

The Securities and Investment Business (Incubator and Approved Funds) Amendment Regulations 2019 also introduces requirements in relation to the safekeeping and segregation of fund property for all incubator and approved funds. This brings the requirements for these types of fund closer to the existing requirements for other types of BVI fund.

The Mutual Funds (Amendment) Regulations 2019 also stipulates the applicable auditing standards required to be followed for the audit of a fund's financial statements, namely requiring US GAAP; International Standards on Accounting (UK); International Standards on Auditing; Hong Kong Standards on Auditing; Canadian Auditing Standards; or such other recognised international auditing standard as may be approved by the FSC on a case by case basis.

This change is not expected to have any practical impact as it largely codifies the accounting standards used by BVI funds and retains the ability for the FSC to approve the accounting standards on application.

The Securities and Investment Business (Amendment) Act, 2019 which was Gazetted on 31st December 2019 and came into force on the same day (save with respect to section 3 (which is a notification requirement in respect of a fund manager or licensed private investment fund manager commencing to act as investment manager of a mutual fund or private investment fund) which is effective from 1st July 2020) amends the Securities and Investment Business Act, 2010. This amendment is accompanied by the new Private Investment Funds Regulations 2019,

which also came into force on 31st December 2019, and together they introduce a regulatory scheme for close-ended funds.

If a close-ended collective investment scheme falls within the new two part definition of "private investment fund", namely where it:

- (a) collect and pools investor funds for the purpose of collective investment and diversification of portfolio risk and
- (b) 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

then it will be subject to regulation under the Securities and Investment Business Act 2010.

For pre-existing close-ended collective investment schemes, there is a six month transition period, during which time such funds will be required to put in place all changes necessary for them to comply with the new regulatory requirements and apply to the FSC to become recognised as a private investment. The transition period ends on 1st July 2020.

As the definition of "private investment fund" is relatively wide, it is anticipated that most existing close-ended funds will be caught by the new requirements and will be regulated by the FSC.

The Mutual Funds (Foreign Funds) Regulations 2019 was Gazetted on 20th December 2019 and came into force on 31st December 2019. These regulations codify the existing regulatory regime and practices applicable to foreign funds registered with the FSC. They introduce the equivalent requirements in relation to the valuation of fund property and accounting standards as have been introduced for other categories of BVI fund. This provides certainty for foreign funds intended to be marketed into the BVI.

Register of Directors

The Business Companies (Amendment) Act 2019 came into force on 1st January 2020. It amends the Business Companies Act, 2004 and provides for a company, that has been struck off but not dissolved, to be restored to the Register upon, inter alia, the filing of its register of directors with the Registrar.

Substance requirements

The Limited Partnership (Amendment) Act 2019 amends the Limited Partnership Act 2017 and was Gazetted on 24th December 2019. It provides that the International Tax Authority may only make an application to appoint a liquidator if the limited partnership is carrying on an relevant activity in breach of the economic substance requirements.

The Insolvency (Amendment) Act 2019 which was gazetted on 24th December 2019 amends the Insolvency Act 2003. It also provides that the International Tax Authority may only make an application to appoint a liquidator if the company has been carrying on a relevant activity in breach of the economic substance requirements or is found to be in breach of the Mutual Legal Assistance (Tax Matters) Act 2003.

Data Protection

A draft bill Data Protection Act 2019 was Gazetted in December 2019. This will introduce data protection requirements into the BVI for the first time and is based upon the EU's General Data Protection Regulations 2016/679. Once enacted this will require the making of specific amendments to fund documents to deal with the use and retention of investors' personal data. This legislation will bring the BVI in line with other jurisdictions who have enacted similar legislation in recent times.

February 2020

Substance Requirements

On 10th February 2020 the International Tax Authority published a second revision of the Rules on Economic Substance in the Virgin Islands, issued under the Economic Substance (Companies and Limited Partnership) Act, 2018 (**the Rules**). The amendments are not considered to be substantial and are generally to improve or clarify existing provisions.

In summary, it is understood that the changes to the Rules include the following:

- the anticipated duration of compliance plans has been clarified in paragraph 2.12
- the procedure to file tax residency claims has been clarified in new paragraph 4.3
- the reference to 'general partner' has been corrected in paragraph 5.26;
- paragraphs 5.28 and a related sentence in 2.7 have been deleted
- clarification and examples of IP holding business have been added to paragraphs 5.31 and 5.32
- clarification and an example of distribution and service centre business has been added to paragraph 5.36
- where strategic decisions are to be taken has been clarified in paragraph 7.4
- where core income generating activities are to be performed have been clarified in paragraph 7.19
- clarifications on outsourcing added to paragraph 7.22 and 7.23

- paragraph 8.2 has been shortened and
- the summary on the applicability of the Rules has been set out more clearly in paragraph 11.10

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