

# Retail investment funds in the British Virgin Islands: regulatory overview

Clinton Hempel, Carey Olsen

[global.practicallaw.com/4-503-9241](http://global.practicallaw.com/4-503-9241)

## MARKET OVERVIEW

### 1. What is the structure of the retail funds market? What have been the main trends over the last year?

#### Open-ended retail funds

The majority of investment funds established in the British Virgin Islands (BVI) are non-retail funds. In the BVI, the laws governing investment funds are mainly geared towards attracting sophisticated investors. Investment funds that give investors a right to redeem their interests in the investment fund are defined as mutual funds under the Securities and Investment Business Act 2010 (SIBA). Mutual funds are regulated by the BVI Financial Services Commission (FSC) subject to limited exceptions. There are currently three types of mutual funds that are open to investors regardless of the amount invested: private funds, professional funds and public funds.

In addition, the BVI recently created two new fund products: the approved fund and incubator fund. These are aimed at smaller groups of investors and emerging managers. These two fund products can be incorporated via a fast-track process and are not as heavily regulated as the public, private and professional funds.

Private, professional, incubator and approved funds are restricted from marketing interests to the public and, in the case of private, approved and incubator funds, are limited as to the number of investors which they can have (50 for private funds and 20 for approved and incubator funds). Private, professional, approved and incubator funds are therefore not typical retail fund products.

Public funds may be used as retail funds as such funds can market their interests to any member of the public in or from within the BVI. Public funds must be registered with the FSC. The public funds market is relatively small with currently around 37 public funds registered with the FSC. While the number of overall funds has remained steady over the last year, there has been a 20% drop in the number of public funds, with a marked increase in the number of approved and incubator funds.

#### Closed-ended retail funds

Closed-ended funds (that is funds whose interests cannot be redeemed at the option of the investor), whether retail or not, are currently not regulated by the FSC. In the author's experience it is difficult for closed-ended funds to comply with retail market restrictions in other jurisdictions and the number of closed-ended funds admitting retail investors is statistically not significant. Therefore, *Question 2 to 15* focus on open-ended retail funds registered as public funds under SIBA.

## REGULATORY FRAMEWORK AND BODIES

### 2. What are the key statutes, regulations and rules that govern retail funds? Which regulatory bodies regulate retail funds?

#### Open-ended retail funds

**Regulatory framework.** Public funds are regulated by the Securities and Investment Business Act 2010 (SIBA). The Mutual Funds Regulation 2010 (MF Regs) and the Public Funds Code 2010 (PF Code) are secondary legislation issued under SIBA.

**Regulatory bodies.** The Financial Services Commission (FSC) is the regulatory body for open-ended funds, including public funds.

#### Closed-ended retail funds

**Regulatory framework.** There is no regulatory framework for closed-ended retail funds in the BVI (see *Question 1, Closed-ended retail funds*).

**Regulatory bodies.** There is no regulatory framework for closed-ended retail funds in the BVI (see *Question 1, Closed-ended retail funds*).

### 3. Do retail funds themselves have to be authorised or licensed?

#### Open-ended retail funds

**BVI fund.** A public fund can be established as a company or unit trust but not as a limited partnership. A public fund carrying on business in or from within the BVI must be registered under the Securities and Investment Business Act 2010 (SIBA). A company or unit trust is deemed to carry on business from within the BVI even if it carries on business outside the BVI, if either:

- It is incorporated in the BVI (in the case of a company) or governed by BVI laws (in the case of a unit trust).
- It solicits an individual within the BVI to subscribe for or purchase its fund interests. However, a fund does not solicit an individual where the subscription or purchase is a result of an approach made by the individual to the fund without any solicitation being made by or on behalf of the fund.

A foreign fund (that is, a fund incorporated outside of the BVI in the case of a company or governed by a non-BVI law in the case of a unit trust) does not carry on business in the BVI solely by reason of the fact that it is managed or administered in or from within the BVI, or otherwise appoints a BVI functionary.

A public fund must appoint an investment manager, administrator (see *Question 6, Open-ended retail funds*), custodian (see *Question 7, Open-ended retail funds*) and auditor, all of which must satisfy the Financial Services Commission's (FSC's) fit and proper criteria, together with an authorised representative which is approved

---

pursuant to SIBA. The FSC also assesses the directors (in the case of a company, there must be at least two, at least one of which must be an individual) or the trustee (in the case of a unit trust) against the FSC's criteria to determine whether they are fit and proper persons to fulfil the contemplated roles.

In addition, to qualify to invite any member of the public to subscribe for fund interests, the invitation must be made in a prospectus registered with the FSC. The prospectus must:

- Be approved by the board (or the trustee).
- Provide a full and accurate disclosure of all information that investors would reasonably require and expect to find for the purposes of making an informed investment decision.
- Comply with the requirements for a prospectus set out in the Mutual Funds Regulation 2010 (MF Regs) and the Public Funds Code 2010 (PF Code).

Section 12 of the MF Regs contains brief requirements for the contents of a prospectus, while the PF Code contains a schedule of more prescriptive contents.

The fund must submit a written application to the FSC for registration as a public fund using the FSC's omnibus application form. An application is typically made at the same time as the application for registration of the fund's first prospectus. The application must be accompanied by a completed Form A for each of the directors of the fund (unless such persons have previously been approved by the FSC's Approved Person's Unit). The prospectus and copies of each of the agreements between the fund and its functionaries must also be submitted. An application fee of USD1,000 is payable for the registration of the fund. An additional application fee for the registration of the prospectus of USD250 is payable. Upon registration of the fund and the prospectus further fees of USD1,500 and USD500 respectively are payable. The annual registration fee for the fund is USD1,500.

**Non-BVI fund.** A non-BVI fund (that is, a fund domiciled outside of the BVI) can seek registration as a public fund or recognition as a recognised foreign fund. It generally only needs to do this if it either:

- Wishes to solicit an individual within the BVI to subscribe for or purchase its fund interests.
- Is otherwise carrying on business in or from within the BVI. However, appointing a manager or administrator located in the BVI is expressly excluded from the meaning of carrying on business in or from within the BVI.

A non-BVI fund may be recognised as a recognised foreign fund under SIBA if all of the following apply:

- It is subject to an authorisation and supervisory regime in the jurisdiction in which it is constituted, which, in the FSC's opinion, provides BVI investors with protection at least equivalent to the protection provided under SIBA for investors in public funds.
- Adequate arrangements exist for co-operation between the authorities in the home jurisdiction of the fund and the FSC.
- The fund is being operated and managed in compliance with the authorisation and supervisory regime to which it is subject.

An application must be made to the FSC for recognition as a foreign fund using the omnibus application form. A full explanation must be provided as to how the criteria for recognition are satisfied. An application fee of USD700 is payable and the annual recognition fee is USD1,000.

#### **Closed-ended retail funds**

See *Question 1, Closed-ended retail funds*.

---

## **MARKETING**

---

### **4. Who can market retail funds?**

---

#### **Open-ended retail funds**

A fund cannot be promoted in or from within the BVI unless the fund is registered or recognised as a mutual fund or a foreign fund (see *Question 3, Open-ended retail funds*). The person carrying on the promotion may need to be licensed under the Securities and Investment Business Act 2010 (SIBA) to promote the fund. For example, subject to limited exceptions (such as acting for a company within the same group, or providing business to a company for which you act as a director without receiving remuneration), a licence is required under SIBA to either:

- Carry on business as an investment adviser (promotion of a mutual fund by a third party in or from within the BVI may, depending on the circumstances, amount to regulated investment business as set out in SIBA).
- Arrange transactions in mutual fund interests.

#### **Closed-ended retail funds**

See *Question 1, Closed-ended retail funds*.

---

### **5. To whom can retail funds be marketed?**

---

#### **Open-ended retail funds**

Public funds can be marketed to any member of the public both in and outside of the BVI (subject to foreign regulations). However, the offer must be made by way of a registered prospectus (see *Question 3*).

A recognised foreign fund is permitted to market its interests in the BVI in accordance with the authorisation and supervisory regime of its home jurisdiction.

#### **Closed-ended retail funds**

See *Question 1, Closed-ended retail funds*.

---

## **MANAGERS AND OPERATORS**

---

### **6. What are the key requirements that apply to managers or operators of retail funds?**

---

#### **Open-ended retail funds**

A public fund must have at all times appointed an investment manager and an administrator, which must satisfy the Financial Services Commission's (FSC's) fit and proper criteria (see *Question 3, Open-ended retail funds*). There is no requirement for either the investment manager or the administrator to be located in the BVI. An investment manager or administrator generally satisfies the FSC's fit and proper criteria if it both:

- Carries on business in a recognised jurisdiction (the FSC has issued a list of recognised jurisdictions, comprising 41 of the most widely used financial services centres).
- Meets the local requirements to carry on the business including, where applicable, holding any licence (however, if there is no local requirement to hold a licence, this does not prevent the functionary from satisfying the FSC's fit and proper criteria).

An investment manager or administrator requires a licence under the Securities and Investment Business Act 2010 (SIBA) if it is a BVI entity or has a physical presence in the BVI.

---

## Closed-ended retail funds

Carrying on business as a closed-ended fund is currently not regulated (see *Question 1*). However, a BVI investment manager or adviser of a closed-ended fund requires a licence under SIBA or the Investment Business (Approved Managers) Regulations 2012 (Approved Manager Regulations). An administrator requires a licence under SIBA to provide certain activities for closed-ended funds. A non-BVI company acting as investment manager, adviser or administrator to a BVI closed-ended fund does not generally require a licence, unless it carries on business through a physical presence in the BVI.

## ASSETS PORTFOLIO

---

### 7. Who holds the portfolio of assets? What regulations are in place for its protection?

---

#### Open-ended retail funds

A public fund is required to appoint a custodian in the BVI or a recognised jurisdiction. The custodian must be functionally independent from the investment manager and the administrator and meet the Financial Services Commission's fit and proper criteria (see *Question 6, Open-ended retail funds*).

#### Closed-ended retail funds

See *Question 1, Closed-ended retail funds*.

#### Legal fund vehicles

---

### 8. What are the main legal vehicles used to set up a retail fund and what are the key advantages and disadvantages of using these structures?

---

#### Open-ended retail funds

**Legal vehicles.** A public fund can be formed as a company or a unit trust.

**Advantages.** A company limited by shares registered under the BVI Business Companies Act as amended (BCA) is by far the most common type of legal vehicle used. Investors are issued with shares in the company. The BCA is widely admired for its flexible and comprehensive company regime.

**Disadvantages.** A unit trust formed under the laws of the BVI is also flexible (like a company), but it does not benefit from the backing of company legislation. Investors in a unit trust are issued with units.

#### Closed-ended retail funds

**Legal vehicles.** See *Question 1, Closed-ended retail funds*.

**Advantages.** See *Question 1, Closed-ended retail funds*.

**Disadvantages.** See *Question 1, Closed-ended retail funds*.

## INVESTMENT AND BORROWING RESTRICTIONS

---

### 9. What are the investment and borrowing restrictions on retail funds?

---

#### Open-ended retail funds

There are no statutory investment or borrowing restrictions for open-ended public funds.

#### Closed-ended retail funds

The position is the same for closed-ended funds (see *above, Open-ended retail funds*).

---

### 10. Can the manager or operator place any restrictions on the issue and redemption of interests in retail funds?

---

#### Open-ended retail funds

Open-ended funds can agree any restrictions on the issue and redemption of interests with their investors at the time they subscribe for such interests. In addition, the Public Funds Code 2010 (PF Code) requires a public fund to adopt policies and procedures for the issue and redemption of fund interests. The policies must be appropriate for the nature, size, complexity, structure and diversity of the fund and the fund property. They must also meet prescribed minimum criteria set out in the PF Code including the timing of dealing and redemption of fund interests. The introduction of additional restrictions in respect of an investor's existing interest can only be achieved in accordance with the consent mechanisms contained in the fund's constitutional documents.

#### Closed-ended retail funds

See *Question 1, Closed-ended retail funds*.

---

### 11. Are there any restrictions on the rights of participants in retail funds to transfer or assign their interests to third parties?

---

#### Open-ended retail funds

There are no statutory restrictions on the ability of investors in open-ended funds to transfer their interests to third parties, although the constitutional documents of the fund will normally contain restrictions.

#### Closed-ended retail funds

The position is the same for closed-ended funds (see *above, Open-ended retail funds*).

## REPORTING REQUIREMENTS

---

### 12. What are the general periodic reporting requirements for retail funds?

---

#### Open-ended retail funds

**Investors.** The audited financial statements must be made available to investors with the registered prospectus within six months of the year end.

**Regulators.** A public fund's audited financial statements must be filed with the Financial Services Commission (FSC) within six months of the year end. A fund must submit an annual return to the FSC by 30 June each year, in relation to the position of the fund as at 31 December of the previous year.

#### Closed-ended retail funds

Closed-ended funds have no statutory reporting requirements.

#### Tax treatment

---

### 13. What is the tax treatment for retail funds?

---

#### Open-ended retail funds

**Funds.** A fund registered under the Securities and Investment Business Act 2010 is exempt from all provisions of the Income Tax Act. It will not be liable to BVI payroll tax unless it has employees in the BVI. Customary fees paid to directors are generally outside the scope of the payroll tax.

---

**Resident investors.** The following are exempt from income tax (*Income Tax Act*):

- All dividends and amounts that a fund formed as a BVI company pays to investors (including redemption proceeds).
- Capital gains realised by investors in relation to fund interests of a fund formed as a BVI company.

There are no estate, inheritance, succession or gift taxes payable in the BVI in relation to shares in a fund. Technically, income tax may apply to income and capital gains arising from interests in funds. However, as the income tax rate is currently zero, and is not expected to change, this is academic.

**Non-resident investors.** The following are exempt from payment of income tax (*Income Tax Act*):

- All dividends and amounts paid by a fund to non-resident investors (including redemption proceeds).
- Capital gains realised by non-resident investors from fund interests.

There are no estate, inheritance, succession or gift taxes payable in the BVI in relation to shares in funds.

#### **Closed-ended retail funds**

**Funds.** A closed-ended fund established as a company is exempt from all provisions of the *Income Tax Act*. The same rules apply as

for open-ended retail funds (see above, *Open-ended retail funds: Funds*).

**Resident investors.** The same rules apply as for open-ended retail funds (see above, *Open-ended retail funds: Resident investors*).

**Non-resident investors.** The same rules apply as for open-ended retail funds (see above, *Open-ended retail funds: Non-resident investors*).

### **QUASI-RETAIL FUNDS**

---

#### **14. Is there a market for quasi-retail funds in your jurisdiction?**

---

The author is not aware of any significant market for quasi-retail funds.

### **REFORM**

---

#### **15. What proposals (if any) are there for the reform of retail fund regulation?**

---

The author is not aware of any proposal to reform retail fund regulation.

---

## **Practical Law Contributor profile**

---

### **Clinton Hempel**

Carey Olsen

T +1 284 394 4030

F +1 284 494 4155

E [clinton.hempel@careyolsen.com](mailto:clinton.hempel@careyolsen.com)

W [www.careyolsen.com](http://www.careyolsen.com)

**Professional qualifications.** South Africa, Attorney, 1996; England and Wales, Solicitor, 1997; British Virgin Islands, Solicitor, 1999

**Areas of practice.** Investment funds and private equity; joint ventures and finance regulation.

#### **Recent transactions**

- Advising on the launch of two multi-billion US dollar hedge funds.
- Advising a US pension fund manager on investment in a BVI private equity fund.
- Advising a sovereign fund on investment in a BVI company operating in various Latin American countries in the telecommunications sector.

**Professional associations/memberships.** Member of the British Virgin Islands Bar Association.

**Publications.** *Private equity in British Virgin Islands: market and regulatory overview Private Equity Global Guide 2015/16* (co-author).