

## Continuing obligations for British Virgin Islands public funds

Service area / [Corporate](#)

Location / [British Virgin Islands](#)

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No mutual fund may carry on business or hold itself out as carrying on business in or from within the British Virgin Islands (the "BVI") unless the mutual fund is a public fund, professional fund, private fund or recognised foreign fund under the Securities and Investment Business Act ("SIBA").

### Continuing obligations for British Virgin Islands public funds

In addition to the continuing obligations and fees which generally apply to BVI companies or partnerships, public funds are subject to a number of on-going administrative requirements in the BVI pursuant to SIBA, the Mutual Funds Regulations, 2010 (the "Regulations"), the Public Funds Code, 2010 (the "Code") and other associated legislation. Failure to comply with these obligations can result in fines being imposed against the fund and / or the fund's registration being revoked by the BVI Financial Services Commission (the "FSC").

This guide summarises the annual filings and the continuing obligations applicable to public funds in the BVI. Please refer to our client guide "Continuing Obligations for BVI Private and Professional Funds" in relation to the continuing obligations applicable to private and professional funds.

### Annual filing requirements

**Annual Mutual Fund Fee** - a fund must pay its annual mutual fund fee to the FSC by 31 March in each year.

**Mutual Funds Annual Return** - pursuant to the Financial Services (Prudential and Statistical Returns) Order, 2009, a fund must file its statistical return with the FSC by 30 June in each year ("Return"). The Return may be completed by any director, officer or other authorised representative of the reporting fund. All non-US dollar amounts must be converted to their US dollar equivalent using the rate of exchange prevailing as at the date ending the reporting period.

**Financial Statements** - a fund must provide a copy of its annual financial statements to the FSC within six months after the end of its financial year or such extended period, not exceeding 15 months, as the FSC may approve in writing. The financial statements of a fund must comply with: (i) the International Financial Reporting Standards promulgated by the International Accounting Standards Board; (ii) UK GAAP; (iii) US GAAP; (iii) Canadian GAAP; or (iv) another internationally recognised and generally accepted accounting standard equivalent to the standards set out in limbs (i), (ii) and (iii).

## Continuing obligations

**Directors and Functionaries** – a public fund must at all times have:

- an adequate number of directors, being at least two (only an individual may be appointed as a director of a public fund) who are capable of exercising independent judgment, have sufficient time and commitment to undertake their duties and have sufficient knowledge, skills, experience and understanding of the fund's business to ensure that the governing body is able to fulfil its obligations. Where a public fund breaches this requirement it must immediately notify the FSC in writing and within 21 days of the breach submit an application to the FSC for the appointment of one or more new directors;
- in the case of a public fund that is a unit trust, a trustee that is a body corporate;
- a fund manager;
- a fund administrator; and
- a custodian (unless the fund is exempted by the FSC from this requirement).

Each functionary of a public fund must be functionally independent from each other functionary of the fund. A public fund must ensure that at all times it has a custodial agreement with its custodian which includes provisions for the appropriate segregation of the fund property and the taking of adequate measures by the custodian to ensure the safekeeping of the fund property.

**Authorised Representative** – a fund must appoint and at all times have an authorised representative who shall be a person or entity resident in the BVI and certified by the FSC, unless the fund has a significant management presence in the BVI determined in accordance with the Regulatory Code, 2009 (the "Regulatory Code"). CO Authorised Representative Ltd. can provide this service if required. The functions of the authorised representative are to:

- act as the main intermediary between the fund and the FSC;
- accept service of notices and other documents on behalf of the fund; and
- keep such records or copies of such records as may be prescribed from time to time.

Failure to comply with this requirement carries a fine of US\$15,000 on summary conviction.

All documents to be submitted to the FSC by the fund must be submitted by its authorised representative and all fees to be paid by a fund must be paid by its authorised representative on behalf of the fund.

**Auditor** – a fund must appoint and at all times have an auditor for the purpose of auditing its financial statements. A public fund must, within 14 days of the appointment of its auditor,

submit a notice of appointment to the FSC. The FSC may at any time, by notice in writing, direct a public fund to supply to the FSC a report prepared by its auditor or such other person as may be nominated by the FSC on such matters as the FSC may determine which may include an opinion on the adequacy of the accounting systems and controls of the fund. If a public fund fails to appoint an auditor then FSC may appoint an auditor for the fund.

The auditor has an obligation to report immediately to the FSC any information relating to the affairs of the public fund that he or she has obtained in the course of acting as its auditor that, in his or her opinion, suggests that:

- the fund is insolvent or is likely to be unable to meet its obligations as they fall due;
- the fund is in breach of its obligations regarding the maintenance of a financially sound condition or maintenance of capital resources;
- the fund has significant weaknesses in its internal controls which render it vulnerable to significant risks or exposures that have the potential to jeopardise the fund's financial viability;
- a criminal offence has been or is being committed by the fund in connection with the business of the fund; or
- serious breaches or SIBA or the Regulatory Code or money laundering or terrorist financing legislation have occurred in respect of the fund in connection with the business of the fund,

the above obligation not being removed by the resignation of the auditor or the termination of their appointment.

Where an auditor resigns or their appointment is terminated before the expiration of their term of office, the auditor shall inform the FSC of the termination of his or her appointment or his or her resignation and disclose to the FSC the circumstances that gave rise to such termination or resignation.

**Notification to the FSC** – a public fund must, immediately after becoming aware of such matter or having reasonable grounds for believing that the matter has occurred or may occur in the foreseeable future, disclose to the FSC any matter that might reasonably be expected to have a significant regulatory impact including, but not limited to, the suspension of valuation, dealing or redemptions, any matter that could impact on the ability of the fund to continue to carry on business and any incidence of fraud or criminal activity which is material to the safety, soundness or reputation of the fund or that is connected with, or may affect, the fund's business. In addition, a public fund must provide written notice to the FSC:

- within 14 days following the occurrence of:
  - a. the appointment of a director, authorised representative or auditor;

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- b. a director, authorised representative or auditor ceasing, for whatever reason, to hold office;
  - c. any change in the place or places where the fund's financial or other records are kept; and
  - d. any change in the address of the fund's place of business, whether within or outside of the BVI;
- no less than 21 days prior to the occurrence of any proposed:
    - a. amendment to its constitutional documents;
    - b. issue of an offering document that was not provided to the FSC with the fund's application for registration; and
    - c. amendment of any offering document previously provided to the FSC;
  - giving reasonable prior notice of:
    - a. any change in its name or business name under which it carries on regulated business;
    - b. any change in the address of its principal office or place of business, whether within or outside the BVI;
    - c. any change in the address of its registered office;
    - d. any change in its authorised representative;
    - e. any material change in investors' rights; and
    - f. any proposed significant re-structuring or reorganisation of the fund or its regulated business or activities;
  - as soon as reasonably practicable following any material change in the nature or scope of the fund's business in the case of a fund incorporated or organised under the laws of a country outside the BVI; and
  - immediately on the occurrence of:
    - a. the appointment of a liquidator, receiver or administrator;
    - b. a proposal for a creditors' arrangement or composition;
    - c. the striking of the fund off the register of companies maintained by the BVI Registry of Corporate Affairs;
    - d. any equivalent action to that specified in limbs (i)-(iii) above occurring outside of the BVI;
    - e. the bringing of civil proceedings against the fund where the size of the claim is significant with respect to the fund's property or is likely to affect the fund's reputation;
    - f. the commencement of an investigation with respect to the business or affairs of the fund by an overseas regulatory authority or the taking of any enforcement action against the fund by a foreign regulatory authority;
    - g. the prosecution or conviction of the fund or any of its directors, within or outside of the BVI, for any offence relating to financial services or involving fraud or dishonesty;
    - h. the fund becoming aware of any fraud committed against it;
  - i. any matter that the fund considers to be material to the fit and properness of any of its directors or functionaries;
  - j. any significant failure in the fund's procedures;
  - k. the fund becoming aware that information or documentation that the fund has provided to the FSC is inaccurate or incomplete; and
  - l. the fund becoming aware of any matter that might reasonably be expected to have a significant regulatory impact.

**Maintenance of records** – as is the case for BVI incorporated companies and partnerships, a fund must keep orderly records for at least five years (even after the cancellation or revocation of its registration) which include records of all transactions relating to assets that form part of the fund property and all transactions in or relating to fund property that: (i) are sufficient to show and explain its transactions and to enable the FSC to monitor the fund's compliance with SIBA, the Regulations and the Code; (ii) allow its financial position to be determined with reasonable accuracy at any time; (iii) enable it to prepare such financial statements and make such returns as it is required to make under SIBA and the Regulations; and (iv) to enable its financial records to be audited in accordance with SIBA. Failure to comply with this requirement carries a fine of US\$20,000 on summary conviction.

A public fund must keep such accounting records and its audited financial statements so that they can be readily retrieved in the BVI in legible form and in the English language and available for inspection by the FSC, all investors and any other authorised person.

**Prospectus and rights of investors** – a public fund must make its prospectus available to each of its investors and provide a copy on request. Failure to comply with this requirement carries a fine of US\$25,000 on summary conviction.

Where the required information disclosed in the prospectus of a public fund ceases to be accurate in a material particular, the public fund must register an amended prospectus with the FSC within 14 days of the change occurring and, when registered, provide a copy of the amended prospectus to each of its investors. Failure to comply with this requirement carries a fine of US\$25,000 on summary conviction or US\$40,000 on indictment.

In addition, where a public fund proposes to make any changes to the rights of investors which the investors are not required to approve, the fund must give each investor notice of the change (where possible prior to such change being made).

**Principles for business** – a public fund must at all times carry on business in accordance with the following four principles:

- integrity;

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- **management and control** – a public fund shall take reasonable care to organise and control its affairs effectively taking into account the nature, scale, complexity and diversity of its business and the risks that it faces;
- **investors’ interests** – a public fund shall have due regard for in the interests of its investors and treat them fairly; in addition a public fund shall make appropriate arrangements to protect the fund property and take all reasonable steps to identify and manage conflicts of interests; and
- **relationship with the FSC** – a public fund shall deal with the FSC in an open and cooperative manner.



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