

A guide to custodians of British Virgin Islands funds

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Introduction

The purpose of this guide is to provide a brief summary of the duties and liabilities which a custodian would be subject to if it was appointed to act as custodian of BVI funds.

On the basis that there are a number of fund products available in the BVI (each of which cater to the different levels of regulatory oversight required for that fund, the type of investor and the level of investment), the liabilities and duties of a custodian also vary depending on the fund product in question.

There is no requirement for Approved Funds and Incubator Funds to appoint a custodian (rather, such appointment is optional) and as such, we have limited the scope of this guide to private, professional and public funds only.

Mutual funds

Section 41(2) of the Securities and Investment Business Act 2010 (as amended) ("SIBA") states that no person shall act as a functionary (including as a custodian) of a mutual fund that carries on business in or from within the British Virgin Islands ("BVI"), unless the mutual fund concerned is a public fund, a professional fund, a private fund or a recognised foreign fund.

A mutual fund will always be deemed to be carrying on business in or from within the BVI if it is incorporated/formed/established under the laws of the BVI (even if it does not carry on any business in or from within the BVI).

a) Public funds

A public fund must ensure that an independent custodian, which meets the Commission's fit and proper criteria (which will involve an assessment of such factors as the custodian's honesty, financial soundness, competence and capability), is appointed at all times, unless an exemption from the requirement to appoint a custodian pursuant to regulation 16(2) of the Mutual Funds Regulations, 2010 (the "Regulations") has been granted by the BVI Financial Services Commission (the "Commission"). An application for exemption can be made to the Commission in writing, setting out an explanation as to why it is not considered necessary for a custodian to be appointed and confirming the arrangements which have been made to ensure the appropriate segregation, and safekeeping, of fund property.

It is unlikely that a fund established as Segregated Portfolio Company would be granted an exemption from the requirement to appoint a custodian, due to the importance of ensuring the safe custody and separation of each Segregated Portfolio's assets.

b) Private and professional funds

Similarly, unless a private or professional fund is exempted from the requirement to appoint a custodian pursuant to regulation 7(2) of the Regulations (upon written application being made by or on behalf of the private or professional fund to the Commission), private and professional funds are required at all times to have a custodian. The custodian must

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be functionally independent from the fund manager and fund administrator or, where the custodian is the same person as the fund manager or fund administrator, it must be a company having systems and controls that ensure that the persons fulfilling the custodial function are functionally independent from the persons fulfilling the fund management and fund administration functions.

Seven days prior notification of a custodian's proposed appointment as custodian of a private or professional fund must be given to the Commission.

Duties

Unless a custodian is required to obtain a licence in order to carry out its activities pursuant to SIBA (please see 'licensing' below), there are very few statutory duties set out in respect of a custodian under BVI law. A custodian must ensure that it takes adequate measures to ensure the safekeeping of the fund property, and all fund property relating to a public fund must be transferred into the custody, or taken under the control, of the custodian as soon as reasonably practicable after it is acquired.

To a greater extent, the scope of a custodian's duties will be agreed contractually and set out in the custodial agreement entered into between the custodian and the fund. Indeed, any application made to the Commission for registration as a public fund must be accompanied with a copy of the custodial agreement, which must include provisions for the appropriate segregation of fund property and the taking of adequate measures by the custodian to ensure the safekeeping of such fund property.

A custodian which is based or incorporated in the BVI would also be subject to common law duties and given the nature of the role, would be in a fiduciary position with all the duties such a position entails. Of course, it is rare for a custodian to be based or incorporated in the BVI. Where, as is more typical, a custodian is incorporated and performing its role in another jurisdiction, the custodian will also need to be aware of any regulatory, statutory and/or common law duties and obligations arising under the jurisdiction in which it is based or in which the assets in its custody are located.

Liabilities and enforcement

The extent of a custodian's potential liability arising from the performance of its duties as custodian to a BVI mutual fund will primarily be determined with reference to the terms of the custodial agreement and the applicable law and regulation of the jurisdiction in which it is based or where the assets in its custody are located.

It should be noted that if at any time during the custodian's appointment, it does not, in the Commission's opinion, satisfy the Commission's fit and proper criteria, enforcement action may be taken against the fund. This may involve requiring that the fund suspend the issuance or redemption of fund interests or the imposition of administrative penalties.

Licensing

Any person providing custodial services with respect to investments in or from within the BVI (meaning that it occupies premises in the BVI for the purpose of carrying on investment business or it solicits a person in the BVI for the purpose of offering to provide custodial services) is required to be licensed under SIBA. If the custodian does not, however, service a BVI fund in or from within the BVI, the Commission can (and generally does as a matter of practice) recognise and accept the appointment of such custodian without the need for it to be licensed by the Commission where the custodian is established, located and regulated in a recognised jurisdiction (with the statutory list of recognised jurisdictions set out in the Securities and Investment Business (Recognised Jurisdictions) Notice, 2010).

A custodian which is required to be licensed by the Commission will be subject to the provisions of the Regulatory Code, 2009 and the common law as applied in the BVI. It will therefore have much more extensive duties under BVI law to comply with, not only in relation to the safe custody of client assets but also with regard to such factors as risk management, outsourcing, maintenance of internal controls and record keeping.

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