

Fund Management



2018

GETTING THE DEAL THROUGH

GETTING THE
DEAL THROUGH 

Fund Management 2018

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2015
Fourth edition
ISBN 978-1-78915-026-1

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between April and May 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

British Virgin Islands	5	Luxembourg	53
Ayana S Hull Harney Westwood & Riegels		Marc Meyers and Veronica Aroutiunian Loyens & Loeff Luxembourg Sàrl	
Cayman Islands	9	Norway	59
Daniella Skotnicki Harney Westwood & Riegels		Karl Rosén and Elin Haugen Advokatfirmaet Grette AS	
Cyprus	15	Portugal	66
Aki Corsoni-Husain, Elina Mantrali and Irene Panayidou Harneys Aristodemou Loizides Yiolitis LLC		Pedro Simões Coelho, Ricardo Seabra Moura and Carlos Filipe Couto Vieira de Almeida	
Germany	21	South Africa	71
Tarek Mardini and Sebastian Käpplinger P+P Pöllath + Partners		Johan Loubser and Jessica Blumenthal ENSafrica	
Greece	28	Sweden	78
Michael Tsibris and Giannis Koumettis Souriadakis Tsibris		Fredrik Wilkens, Emma Stuart-Beck and Lave Nilsson Advokatfirman Vinge	
Hong Kong	34	Switzerland	84
Vivien Teu and Christina Suen Vivien Teu & Co LLP		Lukas Weinmann and Urs Hofer HSW Legal Ltd	
Ireland	40	United Kingdom	91
Sarah Cassidy and Shane Geraghty Dillon Eustace		Michelle Moran and Rodney Smyth K&L Gates LLP	
Japan	47	United States	99
Kiyomi Kikuchi and Kazuyuki Wakasa TMI Associates		Michael W McGrath, Clair E Pagnano and Pablo J Man K&L Gates LLP	

Preface

Fund Management 2018

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Fund Management*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Hong Kong and Luxembourg.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise.

GETTING THE
DEAL THROUGH 

London
May 2018

British Virgin Islands

Ayana S Hull

Harney Westwood & Riegels

Fund management

1 How is fund management regulated in your jurisdiction?

Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

The provision of fund management to funds by way of business is a regulated activity in the British Virgin Islands (BVI), pursuant to the Securities and Investment Business Act 2010 (as amended) (SIBA). SIBA prohibits any person from carrying on, or holding him or herself out as carrying on, investment business of any kind in or from within the BVI unless he or she holds a licence authorising the carrying on of this type of investment business. The management of investments is regarded as investment business, pursuant to the provisions of SIBA. In the BVI, the primary responsibility for regulating funds, fund managers and promoters of funds rests with the BVI Financial Services Commission (the BVI FSC).

2 Is fund administration regulated in your jurisdiction?

The provision of fund administration services to mutual funds by way of business is an investment activity and therefore a regulated activity in the BVI, pursuant to SIBA.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

Five types of funds may be given approval to operate as BVI funds under the BVI's regulatory regime, namely, the private fund, the professional fund, the public fund, the approved fund and the incubator fund. An application is required to be made to the BVI FSC by each particular entity as specified in SIBA.

Key requirements applying to BVI licensees that are managers and operators of investment funds in the BVI include the following:

- there is a general prohibition against the conduct of unauthorised (without a licence) investment business;
- once licensed by the BVI FSC, a licensee is required to maintain its business in a financially sound condition and maintain adequate capital resources (as prescribed by the BVI FSC);
- a fund manager must have two directors appointed at all times (at least one of whom is an individual);
- the appointment of directors and senior officers of a fund manager must obtain the prior approval of the BVI FSC;
- the disposition or acquisition of significant interests in a fund manager must obtain the prior written approval of the BVI FSC;
- authorisation is required where a fund manager desires to open, maintain or carry on business through a branch or a representative office outside the BVI, or to incorporate, form or acquire a subsidiary;
- a BVI licensee must:
 - maintain professional indemnity insurance (in the amount prescribed by the BVI FSC) at all times;
 - notify the BVI FSC of any changes to the name of a BVI fund manager within 21 days of the change;
 - maintain appropriate financial records to show and explain its transactions and to enable its financial position to be determined with reasonable accuracy;

- ensure that client assets are identified, identifiable, appropriately segregated and accounted and properly protected;
- appoint an authorised representative to act as the main intermediary between the licensee and the BVI FSC;
- appoint an auditor for the purposes of auditing its financial statements and must keep an auditor appointed for this purpose at all times;
- file its audited financial statements within six months of the end of each financial year to which they relate (in accordance with an accounting standard prescribed by SIBA); and
- appoint a compliance officer and maintain compliance procedures commensurate with the Anti-Money Laundering Regulations and Terrorist Financing Code of Practice 2008 (as amended); and
- a BVI licensee may not issue any bearer shares.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

At its core, SIBA provides that no person may, by way of business, in or from within the BVI, carry on an investment activity in relation to an investment without a licence from the BVI FSC (unless one of the safe harbours in SIBA apply). The words 'in or from within the BVI', therefore, encompass the territorial scope of the BVI regime. An overseas manager (not domiciled in the BVI) would not generally be subject to the scope of SIBA if it conducts its business purely on a cross-border basis outside the BVI.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

The acquisition of a controlling or non-controlling stake in a fund manager in the BVI is subject to the BVI FSC's prior written approval. See also question 3.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

No.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Marketing of investment funds in the BVI requires authorisation. No person, including a mutual fund itself, whether in or from within the BVI, can promote a mutual fund unless the fund is governed or exempted by SIBA.

8 What marketing activities require authorisation?

Marketing activities that require authorisation include a person communicating, or causing to be communicated, an invitation or inducement to any other person, or advising or procuring any other person, to become an investor, or offering them to become an investor, in a mutual fund.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

The words 'in or from within the BVI' encompass the territorial scope of the BVI investment business regime. Subject to certain safe harbours contained in SIBA, although operating from outside the BVI, an overseas entity would still be considered as being 'in' the BVI where it solicits BVI persons in order to offer them the services that would constitute investment business to those BVI persons.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

Cross-border business activities that include the services and solicitation of BVI persons in relation to the services, are permitted, in general, only if:

- the BVI person is an excluded person, that is:
 - the corporate client or prospect itself has only a nominal link or nexus with the BVI (ie, a registered office or registered agent with no activities taking place in the BVI), and the solicitation is conducted outside the BVI; and
 - no documents are received or executed on behalf of the corporate client domiciled in the BVI by any person domiciled or physically based in the BVI other than its duly appointed professional services provider (eg, a registered agent or other equivalent intermediary); or
- the BVI persons are not 'members of the public'. BVI persons that are not members of the public would not need to fall within the nominal link provisions referred to above in order to be legitimately solicited by an overseas entity. In other words, BVI persons that are not members of the public could be subjected to unrestricted solicitation by such overseas entities.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

Intermediaries earning commission payments in relation to their marketing activities into the BVI are also subject to the territorial scope of SIBA and are prohibited from soliciting BVI persons in order to offer them services that would constitute investment business. See also question 9.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

The main legal vehicles used to set up retail funds in the BVI are business companies, international limited partnerships and unit trusts.

Companies that are established to structure retail funds are governed by the BVI Business Companies Act 2004 (as amended). International limited partnerships that are formed to structure retail funds are governed by the BVI Limited Partnership Act 2017. Trusts are governed principally by the BVI Trustee Act 1961 and the Virgin Islands Special Purpose Trusts Act 2003.

13 What are the key laws and other sets of rules that govern retail funds?

Pursuant to SIBA, a retail fund must:

- be registered with the BVI FSC as a public fund;
- register its prospectus with the BVI FSC for approval;
- have a minimum of two directors appointed at all times (only an individual can be appointed as a director of a public fund);
- have a fund manager, a fund administrator and a custodian (unless the custodian is exempt by the BVI FSC) at all times;
- have an auditor appointed for the purposes of auditing its financial statements (and in accordance with an accounting standard prescribed by SIBA);
- file its audited statements within six months of the end of the financial year to which they relate (in accordance with the specifications of SIBA);
- appoint an authorised representative to act as the main intermediary between the licensee and the BVI FSC; and

- comply with the Public Funds Code 2010 on matters of:
 - corporate governance;
 - its governing policies and procedures;
 - conflict of interests;
 - segregation and safekeeping of fund property;
 - valuation and pricing;
 - dealing and managing of customers' accounts;
 - record-keeping;
 - investors' rights;
 - reporting obligations to the BVI FSC; and
 - its general relationship with the BVI FSC.

Additional requirements include the following:

- each functionary of a public fund must be functionally independent from every other functionary of the fund;
- appointments of directors and functionaries of public funds require the prior written approval of the BVI FSC; and
- the termination of directors, functionaries and authorised representatives of public funds must notify the BVI FSC of such terminations within the time limits specified by SIBA.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes; at present, no security may be offered to the public (ie, the receipt of the offer of such securities by any person in the BVI) in the BVI for purchase or subscription unless it confirms with the provisions of SIBA. A retail fund is required to be registered as a public fund with the BVI FSC and to file a copy of its prospectus with the BVI FSC for approval.

15 Who can market retail funds? To whom can they be marketed?

Provided the marketing of retail funds meets the requirements of SIBA, such funds can be marketed by anyone and to any person in the BVI.

16 Are there any special requirements that apply to managers or operators of retail funds?

There are no key requirements set out in SIBA for managers and operators of retail funds over and above the general prohibition to conduct unauthorised investment business. The requirements of a retail fund as they pertain to managers and operators are set out in questions 13 to 15 and 17.

17 What are the investment and borrowing restrictions on retail funds?

SIBA does not contain restrictions on the borrowing ability of retail funds. However, the Public Funds Code 2010 stipulates that material information (which would include borrowing restrictions), which investors and their professional advisers would reasonably require and expect to be found in the fund prospectus, should be stated therein.

18 What is the tax treatment of retail funds? Are exemptions available?

Retail funds, together with other BVI-formed entities, are not required to pay any income tax under the BVI Income Tax Act (Chapter 206). Further, shareholders do not have to pay any BVI income tax or capital gains tax on payments received from the fund. Provided the fund has no employees in the BVI, it will have no liability for BVI payroll taxes. Capital gains realised with respect to any interests are also exempt from income tax in the BVI.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The portfolio of assets of a retail fund must be held by a custodian (separate and distinct from other functionaries). The custodian is a mandatory functionary required by the FSC (unless exempt). SIBA, the Regulatory Code 2009 and the Public Funds Code 2010 all contain provisions to protect fund assets.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

Aside from the standard regulatory obligations of regulated public funds, a company is required to be registered as a BVI business company at the Registry of Corporate Affairs and to pay its annual fees each year in order to remain in good standing. Each company is required to file and maintain an accurate register of directors with the Registry of Corporate Affairs. Each company is also required to keep the following documents and records at its registered office:

- memorandum and articles of association;
- register of members or a copy of the register of members (where a copy is kept, the registered agent should be notified in writing within 15 days of any change);
- register of directors or a copy of the register of directors (where a copy is kept, the registered agent should be notified in writing within 15 days of any change);
- copies of all notices and other documents filed by the company in the previous 10 years;
- minutes of meetings and resolutions of members and directors; and
- records and underlying documentation of transactions of the company (which allows the financial position of the company to be determined with reasonable accuracy) for the previous five-year period.

21 What are the periodic reporting requirements for retail funds?

Retail funds are subject to the specific conditions contained in their certificates of registration with the BVI FSC. Additionally, a fund must file its audited statements within six months of the end of the financial year to which it relates and it must also file a mutual fund annual return electronically with the BVI FSC by 30 June of each calendar year.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

A manager or operator of a retail fund can place restrictions on the issue, transfer and redemption of interests in retail funds. However, such restrictions must be clearly specified in the prospectus of the funds to be issued to investors prior to investment. Further, investors must provide consent to any changes made to these terms that affect existing investors to a material extent prior to such changes being effected. Changes to the prospectus of public funds must also be notified to the BVI FSC and a copy of the amended prospectus filed with the BVI FSC (in accordance with the specifications contained in SIBA) for the BVI FSC's review and approval.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

The main legal vehicles used to set up non-retail funds in the BVI are BVI business companies and international limited partnerships.

24 What are the key laws and other sets of rules that govern non-retail funds?

Non-retail pooled funds that invest in illiquid assets (such as private equity and real estate) are typically closed-ended funds that fall outside the scope of BVI securities legislation. These funds are governed principally by the respective legislation they are established under.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

There is no requirement for non-retail pooled funds to be authorised or licensed to be established in the BVI. In order to market non-retail pool funds in the BVI, the rules prohibiting solicitation in SIBA (as discussed in questions 9 and 10) will apply.

26 Who can market non-retail funds? To whom can they be marketed?

Provided the marketing of non-retail funds meets the requirements of SIBA, they can be marketed by anyone and to any person in the BVI.

Update and trends

The BVI has recently seen an explosion of interest in the Fintech market and in establishing funds that invest in digital assets such as cryptocurrencies. We have seen increased attention on the impact that BVI regulatory legislation has on initial coin offerings structured through BVI companies; and on Fintech initiatives in general, including the common anti-money laundering and counter-terrorist financing risks attendant to these structures.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

Investor-protection rules contained in BVI securities legislation do not restrict ownership in non-retail funds to certain classes of investor.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

Part II of SIBA, which deals with the public issues of securities, is not currently in force; therefore, non-retail funds cannot be marketed to members of the public in the BVI. However, provided that the manager or operator of a non-retail fund complies with SIBA as regards the prohibition on conducting unauthorised business and soliciting, non-retail pooled funds can be marketed to persons, specified by SIBA as not being members of the public, for these purposes.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

Non-retail pooled funds, together with other BVI-formed entities, are not required to pay any income tax under the BVI Income Tax Act. Furthermore, shareholders do not have to pay any BVI income tax or capital gains tax on payments received from the fund. Provided the fund has no employees in the BVI, it will have no liability for BVI payroll taxes. Capital gains realised with respect to any interests are also exempt from income tax in the BVI.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

From a commercial perspective, a non-retail pooled fund would be expected to have a custodian to custody the assets of the fund.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

Non-retail pooled funds that are closed-ended vehicles are not regulated in the BVI. Non-regulated entities have no reporting requirements in the BVI. An unregulated company is only required to be registered as a BVI business company at the Registry of Corporate Affairs and to pay its annual fees each year in order to remain in good standing. See question 20 for full requirements.

32 What are the periodic reporting requirements for non-retail funds?

Non-retail funds that are not regulated in the BVI have no specific reporting requirements to BVI regulators.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

A managed investment account itself is not usually structured using BVI-domiciled vehicles. However, the provision of services to these types of accounts is typically undertaken by a BVI approved manager (which is an entity regulated by the BVI FSC).

34 What are the key legal issues to be determined when structuring a separately managed account?

If a management investment account is structured through a BVI entity, the same rules applicable to a standard BVI business company, which is not regulated, apply. These rules are discussed in questions 23 to 32 in relation to non-retail pooled funds.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

The management and marketing of separately managed accounts are regulated in the BVI under the same regime regulating fund management.

General**36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?**

There are currently no proposals for further regulation of funds, fund managers or marketers of funds in the BVI.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

There are no specific requirements in the BVI for stock-exchange listing of retail and non-retail funds. Such stock-exchange listing requirements are driven by the particular listing requirements in the jurisdiction in which the listing will occur.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Yes.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

There are certain special rules relating to the ability of foreign investors to invest in funds established or managed in the BVI. Investors in professional funds must be professional investors. Under SIBA, a professional investor means the following:

- a person who has signed a declaration that he or she, whether individually or jointly with his or her spouse, has net worth in excess of US\$1 million or its equivalent in another currency, and that he or she consents to being treated as a professional investor; or
- a person whose ordinary business involves, whether for his or her own account or the account of others, the acquisition or disposal of property of the same kind as the property, or as a substantial part of the property, of the fund.

Subject to the rules on conducting unauthorised business in or from within the BVI and the rules on soliciting, pursuant to SIBA, there are no special rules relating to the ability of domestic investors to invest in funds established or managed abroad.

HARNEYS

Ayana S Hull

ayana.hull@harneys.com

PO Box 71
 Craigmuir Chambers
 Road Town
 Tortola VG-1110
 British Virgin Islands

Tel: +1 284 494 2233
 Fax: +1 284 494 5047
 www.harneys.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes

Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust

Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com