

No. 12 of 2019

VIRGIN ISLANDS

SECURITIES AND INVESTMENT BUSINESS (AMENDMENT) ACT, 2019

ARRANGEMENT OF SECTIONS

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I Assent
(Sgd.) Augustus J. U. Jaspert
Governor.

23rd December, 2019

VIRGIN ISLANDS

No. 12 of 2019

An Act to amend the Securities and Investment Business Act, 2010 (No. 2 of 2010) to include provisions relevant to the regulation of private investment funds.

[Gazetted _____, 2019]

ENACTED by the Legislature of the Virgin Islands as follows:

Short title and commencement.

1. (1) This Act may be cited as the Securities and Investment Business (Amendment) Act, 2019.

(2) Subject to subsection (3), the provisions of this Act shall come into force on such date as the Minister may, by Notice published in the *Gazette*, appoint.

(3) Section 3 (which inserts section 14A) shall come into force on the 1st day of July, 2020.

Section 2 amended.

2. Section 2(1) of the Securities and Investment Business Act (hereinafter referred to as “the principal Act”) is amended by inserting in their appropriate alphabetical order, the following new definitions:

““licensed private investment fund manager” means a licensee holding a category 3, sub-category E licence that provides investment management services to a private investment fund or a fund with equivalent characteristics in another jurisdiction;

Section 14A inserted.

3. The principal Act is amended by inserting after section 14, the following new section:

“Undertaking new fund business.

14A. (1) A licensed fund manager and a licensed private investment fund manager shall notify the Commission within 21 days of commencing to act as an investment manager of a mutual fund or a private investment fund, or a fund with equivalent characteristics to a mutual fund or a private investment fund.

(2) Notification under subsection (1) shall include the following in relation to any fund undertaken

- (a) the name of the fund;
- (b) the jurisdiction and date of incorporation, registration or formation of the fund; and
- (c) confirmation as to whether the fund is
 - (i) a private fund;
 - (ii) a professional fund;
 - (iii) a public fund;
 - (iv) a private investment fund; or
 - (v) a fund with equivalent characteristics of one of the types of funds specified in subparagraphs (i) to (iv).”.

Part IIIA inserted.

4. The principal Act is amended by inserting after Part III, the following new Part:

“Part IIIA

PRIVATE INVESTMENT FUNDS

Interpretation

Interpretation for this Part.

63A. In this Part, unless the context otherwise requires,

“appointed person”, in relation to a private investment fund, means a person responsible for undertaking

- (a) the management of a fund’s assets;
- (b) the valuation of a fund’s assets;

- (c) the safekeeping of a fund's assets; or
- (d) such other function with respect to a fund as may be specified in the Private Investment Fund Regulations;

“constitutional documents” means

- (a) in the case of a company, the memorandum and articles of association, the company's constitution or such other equivalent constituting instrument;
- (b) in the case of a partnership, the agreement or other instrument by which the partnership is formed and governed;
- (c) in the case of a unit trust, the trust deed or other equivalent instrument by which the unit trust is organised or governed;
- (d) in the case of a private investment fund that does not fall within paragraph (a), (b) or (c), the principal instrument by which the fund is constituted, formed or organised and governed;

“private investment fund” means a company, a partnership, a unit trust or any other body that is incorporated, registered, formed or organised, whether under the laws of the Virgin Islands or the laws of any other country, which

- (a) collects 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 of the company, partnership, unit trust or other body;

“professional investor” means a person

- (a) whose ordinary business involves, whether for that person's own account or the account of others, the acquisition or disposal of property of the same kind as the property, or a substantial part of the property, of the fund; or

- (b) who has signed a declaration that he, whether individually or jointly with his spouse, has net worth in excess of such sum as shall be specified in the Private Investment Funds Regulations or its equivalent in any other currency and that he consents to being treated as a professional investor.

Prohibitions and recognition of private investment funds

Prohibition with respect to business of unrecognised private investment funds.

- 63B.** (1) Subject to subsection (2) and sections 63D and 63E
- (a) a company shall not carry on business or hold itself out as carrying on business as a private investment fund in or from within the Virgin Islands;
 - (b) the partners of a partnership that is a private investment fund shall not carry on or hold themselves out as carrying on the business of the fund in or from within the Virgin Islands;
 - (c) the trustee of a unit trust that is a private investment fund shall not carry on or hold itself out as carrying on the business of the unit trust in or from within the Virgin Islands; and
 - (d) a private investment fund that does not fall within paragraph (a), (b) or (c) shall not carry on or hold itself out as carrying on business as a private investment fund in or from within the Virgin Islands.
- (2) The restrictions outlined in subsection (1) shall not apply
- (a) to a private investment fund that is recognised under the Act; or
 - (b) to any fund or person or class of funds or persons specified by the Commission, through an Order published in the *Gazette*.
- (3) A person shall not act as an appointed person, or otherwise be concerned with the management or valuation, of a private investment fund that carries on business in or from within the Virgin Islands, unless the fund concerned is recognised as a private investment fund.

(4) For the purposes of this section, but without limiting the section

(a) a private investment fund, whether incorporated, registered, formed or organised within or outside the Virgin Islands, is deemed to carry on business in the Virgin Islands if

(i) it operates from a place of business in the Virgin Islands; or

(ii) it solicits an individual within the Virgin Islands to subscribe for, or purchase, any of its fund interests; and

(b) a private investment fund that carries on business outside the Virgin Islands, is deemed to carry on business from within the Virgin Islands if it is

(i) a BVI business company;

(ii) a partnership formed or organised under the laws of the Virgin Islands; or

(iii) a unit trust governed by the laws of the Virgin Islands and managed from within the Virgin Islands.

Prohibition against promotion of private investment funds.

63C. (1) A person, including the private investment fund itself, shall not, whether in or from within the Virgin Islands, promote a private investment fund unless

(a) the fund is recognised as a private investment fund and is promoted as permitted by this Act; and

(b) the communication or advice is exempted by the Private Investment Funds Regulations made in accordance with subsection (3).

(2) A person promotes a private investment fund if he or she communicates, or causes to be communicated, an invitation or inducement to any other person, or advises or procures any other person, to become an investor, or to offer to become an investor, in a private investment fund.

(3) The Private Investment Funds Regulations may provide that subsection (1) does not apply in relation to communications or advice

- (a) of a specified category or description; or
- (b) made or given in specified circumstances.

General exemptions to prohibition.

63D. (1) A private investment fund incorporated, registered, formed or organised outside the Virgin Islands does not solicit an individual within the Virgin Islands to subscribe for, or purchase, any of its fund interests in circumstances where the subscription or purchase is a result of an approach made by the individual to the fund without any solicitation being made on or on behalf of the fund.

(2) The Private Investment Funds Regulations may specify circumstances in which section 63B (1) or (2) does not apply with respect to certain specified categories or descriptions of private investment fund or person.

Specific exemptions.

63E. (1) A private investment fund may carry on business in or from within the Virgin Islands as if a private investment fund, prior to submitting its application for recognition, for a period not exceeding 21 days, if the fund

- (a) satisfies the criteria for a private investment fund specified in section 63F (2) (a), (b) and (c); and
- (b) complies with the requirements of this Act and the Private Investment Funds Regulations relating to private investment funds, other than with respect to recognition.

(2) A private investment fund that commences business in reliance on subsection (1) shall submit an application with the Commission for recognition as a private investment fund within 14 days after the commencement of its business.

(3) For the purposes of the Financial Services Commission Act, a fund that commences business in reliance on subsection (1) is deemed to have been recognised as a private investment fund for the period in which it carries on business in reliance on subsection (1).

(4) During the period in which a private investment fund carries on business in accordance with subsection (1)

- (a) the fund, a partner of the fund or, where the fund is a unit trust, the trustee, does not commit an offence under section 63B (1);
- (b) a person does not commit an offence under section 63B (2) by acting as the appointed person of or being concerned with the management or administration of the fund; and

- (c) a person does not commit an offence under section 63C (1) by promoting the fund.

Recognition of private investment funds.

63F. (1) An application for the recognition of a private investment fund may be made to the Commission by

- (a) in the case of a private investment fund that is a company, the fund itself;
- (b) in the case of a private investment fund that is a partnership, a partner;
- (c) in the case of a private investment fund that is a unit trust, the trustee; and
- (d) in any other case, the manager, or proposed manager, of the fund.

(2) The Commission may recognise a private investment fund if it is satisfied that

- (a) the fund is lawfully incorporated, registered, formed or organised under the laws of the Virgin Islands or under the laws of a country outside the Virgin Islands;
- (b) the constitutional documents of the fund specify that
 - (i) the fund is not authorised to have more than 50 investors;
 - (ii) an invitation to subscribe for, or purchase, fund interests issued by the fund shall be made on a private basis only; or
 - (iii) the fund interests of the fund shall be issued only to professional investors with an initial investment of each professional investor, other than exempted investors, of not less than such sum as may be prescribed in the Private Investment Funds Regulations;
- (c) the fund satisfies such other criteria as may be specified for recognition of a private investment fund in the Private Investment Fund Regulations;

- (d) the fund will, on being recognised, be in compliance with this Act, the Private Investment Fund Regulations and any practice directions applicable to the fund; and
- (e) recognising the fund as a private investment fund is not against the public interest.

(3) For the purposes of subsection (2) (b) (ii), an invitation to subscribe for, or purchase, fund interests issued by a private investment fund on a private basis includes an invitation which is made

- (a) to specified persons (however described) and is not calculated to result in fund interests becoming available to other persons or to a large number of persons; or
- (b) by reason of a private or business connection between the person making the invitation and the investor.

(4) For the purposes of subsection (2) (c), the minimum investment limit referred to does not apply in respect of an investment made by a person specified in the Private Investment Funds Regulations as an exempted investor.

(5) Where the Commission grants an application for recognition under subsection (1), it shall

- (a) register the fund in the Register of Private Investment Funds; and
- (b) issue the fund with a certificate of recognition, upon payment of the fee prescribed in accordance with section 62 of the Financial Services Commission Act.

(6) The recognition of a private investment fund is subject to such conditions as may be imposed by the Commission under section 40B of the Financial Services Commission Act.

Obligation to act in accordance with constitutional documents.

63G. (1) No private investment fund shall make any offer or invitation of its fund interests, issue any fund interests or carry on business in any manner that would result in the fund

- (a) in the case of a fund whose constitutional documents make specifications in accordance with section 63F (2) (i), having more than 50 investors;
- (b) in the case of a fund whose constitutional documents make specifications in accordance with section 63F (2) (ii),

making any invitation to subscribe for, or purchase, its fund interests otherwise than on a private basis; or

- (c) in the case of a fund whose constitutional documents makes specifications in accordance with section 63F (2) (iii), issuing fund interests where the initial investment, in respect to a professional investor who is not an exempted investor, is less than the sum prescribed in the Private Investment Funds Regulations.

(2) Without limiting subsection (1), no person shall be accepted as an investor in a private investment fund whose constitutional documents make specifications in accordance with section 63F (2) (iii), unless that person has provided written confirmation that he or she is a professional investor within the meaning specified in section 63A (1).

Provisions applicable generally to recognised private investment funds

Maintenance of financial records.

63H. (1) A private investment fund shall maintain records that are sufficient

- (a) to show and explain its transactions;
- (b) at any time, to enable its financial position to be determined with reasonable accuracy; and
- (c) to enable it to prepare such financial statements and make such returns as it is required to prepare and make under this Act and the Private Investment Funds Regulations.

(2) The Private Investment Funds Regulations may specify

- (a) the form and manner in which the records specified in subsection (1) are to be maintained;
- (b) the place where records required to be maintained under subsection (1) and under the Private Investment Funds Regulations are required to be kept; and
- (c) other records required to be maintained by a private investment fund to which this section applies, and the form, manner and place in which such records are to be maintained.

(3) A private investment fund to which this section applies shall retain the records required to be maintained under this section for a period of at least 5 years after the completion of the transaction to which they relate.

(4) Subsection (3) applies to a private investment fund after the cancellation or revocation of its recognition as if the recognition had not been cancelled or revoked.”.

Section 65
amended.

5. Section 65 of the principal Act is amended

(a) in subsection (1) by inserting after the word “professional”, the words “, private investment”;

(b) by repealing subsection (4) and substituting the following new subsection:

“(4) Where an authorised representative resigns or his appointment is terminated or becomes vacant for any reason, a licensee or a public, private, professional, foreign or private investment fund does not commit an offence, if it appoints another authorised representative within 21 days of the date of the previous authorised representative ceasing to do so.”; and

(c) by repealing subsection (5) and substituting the following new subsection:

“(5) No person shall accept appointment, or act, as the authorised representative of a licensee or a public, private, professional, foreign or private investment fund unless the person has the benefit of a certification issued under section 64.”

Section
66amended.

6. Section 66 of the principal Act is amended

(a) in subsection (1),

(i) by repealing paragraph (a) and substituting the following new paragraph:

“(a) to act as the main intermediary between the licensee, mutual fund or private investment fund that he or she represents, and the Commission; ”

(ii) in paragraph (c) (ii), by inserting after the word “Regulations”, the words “or a private investment fund in the Private Investment Funds Regulations”; and

(b) by repealing subsection (2) and substituting the following new subsection:

“(2) Except to the extent provided in the Regulatory Code, the Mutual Funds Regulations or the Private Investment Funds Regulations, as the case may be

Section 95 amended.

7. Section 95 of the principal Act is amended

- (a) all documents to be submitted by a licensee, a mutual fund or a private investment fund to the Commission shall be submitted by its authorised representative; and
- (b) all fees to be paid by a licensee, a mutual fund or a private investment fund shall be paid by its authorised representative on behalf of the licensee, mutual fund or private investment fund.”

(a) in subsection (1) (a), by repealing sub-paragraph (i) and substituting the following new sub-paragraph:

“(i) the words or terms “fund” or “mutual fund” or any combination or derivative thereof or any word or phrase specified in the Mutual Funds Regulations or Private Investment Fund Regulations as a word or phrase that suggests a person is operating as a mutual fund or a private investment fund;”;

(b) in subsection (1) (b), by

- (i) deleting the word “or” at the end of sub-paragraph (i);
- (ii) deleting the full stop at the end of sub-paragraph (ii) and substituting the word “; or”;
- (iii) inserting the following new sub-paragraph after sub-paragraph (ii):
“(iii) is operating, or recognised, as a private investment fund or otherwise entitled to operate as a private investment fund.”; and

(c) by deleting subsection (2) and substituting the following new subsection:

“(2) Subsection (1) does not apply to a person holding an investment business licence, or to a public fund, a private or professional fund, or a private investment fund, provided that the name under which it is registered or the name which it uses does not suggest that

- (a) in the case of a person holding an investment business licence, he or she carries on any business required to be licensed under this Act other than the business that he or she is authorised by its licence to carry on; or
- (b) in the case of a mutual fund or a private investment fund, that the fund is of a different type than that for which it is registered or recognised.”.

Section 98 amended.

8. Section 98 of the principal Act is amended in paragraph (b) of subsection (1), by inserting after the words “Mutual Fund Regulations”, the words “or the Private Investment Funds Regulations”.

Section 100 amended.

9. Section 100 of the principal Act is amended in paragraph (a) of subsection (1), by inserting after the words “Mutual Fund Regulations”, the words “or the Private Investment Funds Regulations”.

Section 101 amended.

10. Section 101 of the principal Act is amended by repealing subsection (2) and substituting the following new subsection:

“(2) The Investment Business Regulations, the Mutual Funds Regulations and the Private Investment Funds Regulations may provide for a system enabling documents required or permitted to be submitted to the Commission under this Act to be submitted in electronic form.”.

Schedule 7 amended.

11. Schedule 7 of the principal Act is amended, by inserting in their appropriate section numerical order, the following:

“63B (1) (a)	A company or other body, not being recognised as a private investment fund, carrying on or holding itself out as carrying on business as a private investment fund, in or from within the Virgin Islands	Summary	\$40,000	\$25,000
		Indictment	\$75,000	\$40,000
63B (1) (b)	The partners of a partnership that is a private investment fund carrying on, or holding themselves out as carrying on the business of the fund, the partnership not being recognised as a private investment fund in the Virgin Islands	Summary	\$40,000	\$40,000
		Indictment	\$75,000	\$75,000
63B (1) (c)	The trustee of a unit trust carrying on, or holding itself out as carrying on business as a private investment fund,	Summary	\$40,000	\$40,000

	the unit trust not being recognised as a private investment fund, in the Virgin Islands	Indictment	\$75,000	\$75,000
63B (1) (d)	A private investment fund not falling under section 63B (1) (a), (b) or (c) carrying on the business of a private investment fund without being recognised as a private investment fund, in the Virgin Islands	Summary	\$40,000	\$40,000
		Indictment	\$75,000	\$75,000
63B (3)	A person acting as an appointed person, or otherwise being concerned with the management or valuation of a private investment fund that carries on business in or from within the Virgin Islands, where the private investment fund is not recognised as a private investment fund	Summary	\$40,000	\$40,000
		Indictment	\$75,000	\$75,000
63C (1)	Person promoting a private investment fund in contravention of section 63C (1)	Summary	\$40,000	\$25,000
		Indictment	\$50,000	\$30,000
63H (1)	Private investment fund failing to maintain records in compliance with section 63G (1)	Summary	\$20,000	\$15,000".

Schedule 8 amended

Schedule 8 amended.

12. Schedule 8 of the principal Act is amended

- (a) in paragraph 1, by inserting, after the definition of “transition date” the following new definition:

““transition period” means the period beginning on the date this Act (“Securities and Investment Business (Amendment) Act, 2019”) is brought into force and ending on 1st July 2020;” and

- (b) by inserting immediately after Part III, the following new Part:

“PART IIIA

Existing
private
investment
funds.

16A. A person who, immediately before or after the coming into force of this Act, was carrying or carries on business as a private investment fund of any kind, shall not be guilty of an offence under section 63B and shall be deemed not to be carrying on unauthorised financial services business within the meaning of the Financial Services Commission Act by virtue of his or her carrying on that business

- (a) during the transition period;
- (b) if the person applies for recognition as a private investment fund during the transition period, until the date the application is determined by the Commission or is withdrawn, whichever comes earlier; or
- (c) if an appeal is lodged during the transition period with the Financial Services Appeal Board established under section 3 of the Financial Services Appeal Board Act, until the appeal is determined by the Board or is withdrawn, whichever comes earlier.”.

Passed by the House of Assembly this 17th day of December, 2019.

Julian Willock,
Speaker.

Phyllis Evans,
Clerk of the House of Assembly.

LEGAL REPORT

This Act amends the Securities and Investment Business Act (“the Act”) to effect reforms considered necessary to further comply with the requirements of the Council of the European Union’s Code of Conduct for Business Taxation (“Code of Conduct”). This reform is geared towards improving the funds’ regime in the Territory and attaining acceptable economic substance requirements for collective investment funds, as established by the Code of Conduct.

The Act specifically expands the scope of the principal Act to include the supervision of all types of collective investment funds classified within the Code of Conduct, by introducing a new supervisory regime for private investment funds. The Act establishes the requirements for private investment funds to be recognised by the Commission, the criteria to be satisfied in order for the Commission to grant recognition and a requirement for these entities to act in accordance with the provisions established within their constitutional documents. The Act also requires private investment funds to appoint authorised representatives to act as liaison between the Commission and each fund (a provision that currently exists with respect to all other entities subject to the requirements of the principal Act). The Act also allows for further requirements relating to private investment funds to be imposed through Private Investment Funds Regulations.

In addition, the Act includes a new provision requiring persons that undertake management functions for new fund entities to provide notifications to the Commission. This provision is also required to satisfy relevant economic substance requirements.

This Act is therefore commended to the Honourable Members of the House of Assembly for their consideration and support as the Territory continues along the path of regularising its position against all relevant international standards.

This Act was introduced in the House of Assembly on the 14th day of November, 2019, taken through its remaining stages and passed on the 17th day of December, 2019.

.In my opinion, His Excellency the Governor may properly assent to this Act in the name and on behalf of Her Majesty.

Baba Aziz
Attorney General
18th December, 2019