

**BRITISH VIRGIN ISLANDS
FINANCIAL SERVICES COMMISSION**



**FUND CUSTODIAN AND MANAGER EXEMPTION
APPLICATION GUIDELINES**

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INTRODUCTION

1. Proper maintenance and protection of client assets is paramount to the provision of competitive investment business services. To ensure this is achieved, the Securities and Investment Business Act, 2010 (“the Act”) requires persons wishing to provide custodian and management services to be licensed and makes it a requirement under section 18 for all licensees to make arrangements for the proper protection of clients’ assets. The Mutual Funds Regulations, 2010 (“the Regulations”) also specify that private, professional and public funds (“the mutual funds”) must at all times have a fund manager, an administrator and a custodian. This is to ensure that a mutual fund is properly managed and administered at all times and its assets are appropriately kept safe.

2. There are some circumstances, however, in which the requirement to appoint a custodian or fund manager may not be necessary or feasible, and the Commission is cognizant of the need to maintain some flexibility in respect of the regime without compromising proper and effective regulation. As such, the Regulations make provision for a private fund and professional fund to be exempted from the requirement to appoint a custodian or fund manager and for public funds to be exempted from the requirement to appoint a custodian. Any request for such an exemption must be made in written form and submitted to the Commission in accordance with regulation 7(2) or 16 (2) of the Regulations.

3. These Guidelines essentially seek to provide guidance on the circumstances in which an exemption may be granted. They also outline the documentation and other supporting information that are required to be submitted when making an application for exemption from appointing a custodian or fund manager. It is essential therefore that an applicant adheres as closely as possible to the guidelines set out herein as the Commission will rely on them in processing an application for exemption from appointing a custodian or fund manager in respect of a private fund, professional fund or a public fund (where applicable).

4. The Guidelines for Applying for an Exemption to Appoint a Custodian or Fund Manager issued in 2012 (“the 2012 Guidelines”), spoke primarily to private and professional funds. The Commission has however always applied the requirements of the 2012 Guidelines to public funds in seeking an exemption from the requirement to appoint a custodian. These Guidelines replace the 2012 Guidelines and solidifies the requirements for public funds when seeking an exemption from the requirement to appoint a custodian.

5. These Guidelines are deemed to have taken effect as of 31st December, 2019.

PART I: EXEMPTION FROM APPOINTING A CUSTODIAN

6. Application for exemption

6.1 A private, professional or public fund that wishes to be exempted from appointing a custodian pursuant to regulation 7 (2) of the Regulations (in the case of a private or professional funds) or regulation 16 (2) of the Regulations (in the case of a public fund) must prepare and submit a written application in accordance with **Form IB-E1** of the Schedule.

6.2 An application under sub-paragraph 6.1 may be submitted either at the time of submitting an application for recognition or registration or at any time after recognition or registration is granted by the Commission.

6.3 An application under this paragraph must comply with the requirements of regulation 7 of the Regulations or regulation 16 of the Regulations, as applicable.

7. **Information to be submitted when making an application for exemption**

7.1 A private, professional or public fund applying for an exemption from appointing a custodian must provide the Commission with its reason for making the application. The reason must be sufficiently detailed to enable the Commission to understand and have a good appreciation of the rationale for the application.

7.2 The application must also indicate the safekeeping arrangements the mutual fund has or will put in place if the exemption sought is granted.

7.3 The scenarios listed below outline some of the safekeeping arrangements that the Commission may consider as acceptable reasons for a fund not to appoint a custodian, although other reasons advanced by applicants for exemption will be given due consideration. Taking into account the nature, type and complexity of investments of the fund concerned, the Commission may grant exemptions in any of the following circumstances:

- (a) *Funds that have appointed Prime Brokers* – such funds generally do not need a strict custodial arrangement given the nature of their investments and utilization of a prime broker, as the broker will have the responsibility for the safekeeping of the assets of the fund;
- (b) *Feeder funds in a master/feeder structure* – as feeder funds invest all their assets in master funds it is therefore expected that all appropriate custodial and safekeeping arrangements would be evidenced at the master fund level;
- (c) *Funds operating as a fund of funds* – in these cases the assets of the fund are invested directly into a series of other mutual funds which in themselves would have appropriate measures in place for safekeeping of the assets;
- (d) *Funds in the final process of winding down* – in such cases these funds would have entered into voluntary or involuntary liquidation, or alternatively, these funds would have distributed a majority of their assets to investors and would, therefore, only have a limited number or portion of illiquid assets; and
- (e) *Funds that invest in esoteric assets* – esoteric assets include tangible items such as land, real estate, equipment, private equity, collectibles, and structured settlements that have an intrinsic value. The nature of these assets are such that these funds do not require the typical custody arrangements.

7.4 If at any time the circumstances of a private or professional fund were to change where it would then be required to appoint a custodian, the exemption would no longer be valid. It is therefore the duty of any private or professional fund that has been granted an exemption, to notify the Commission of its intention to appoint a custodian within seven days of the proposed appointment, or such shorter time as the Commission may allow¹, in the event of any change to its circumstances that would affect the validity of the exemption. Where the circumstances of a public fund were to change where it would then be required to appoint a custodian, a public fund should notify the Commission and seek prior approval for the appointment of a custodian in accordance with section 54 (1) of the Act.

8. **General information required**

In addition to the requirements outlined in paragraphs 7.1 and 7.2 above, an application for an exemption from appointing a custodian must include the following:

- (a) confirmation of the name and address of the fund's bank(s) including where subscription and redemptions are processed; and
- (b) confirmation of the signatories on the fund's bank account(s).

9. **Additional Information Required by the Commission**

9.1 The Commission may, in cases where it considers it necessary, require additional information to be submitted by an applicant for exemption under this Part. This would normally be based on the type of fund that is making the application for exemption.

9.2 Accordingly, an application by a mutual fund for an exemption must take into account the matters outlined below and provide the necessary information at the time of submission of the application. Failure to do so may result in delay in processing the application or in a refusal in granting the application sought:

- (a) **Prime Brokers** - in cases where the fund maintains a prime broker only, the name and address of the prime broker must be provided;
- (b) **Feeder Funds** - if the fund is operating as a feeder fund, the request for exemption must also include the name of the master fund, confirmation that the appropriate brokerage or custodial arrangements are being maintained, as well as details of the person(s) or entity responsible for maintaining the record of the fund's investments into the master fund;
- (c) **Fund of Funds** – similar to feeder funds, a fund operating as a fund of funds must submit information on whether the underlying funds maintain appropriate brokerage or custodial arrangements. Details of

¹ As specified in regulation 7 (5) and (6) of the Mutual Funds Regulations, 2010

the person(s) or entity responsible for maintaining the record of the fund's investments into the underlying funds must also be submitted;

- (d) *Fund in the Process of Winding Down* - in the case of a fund that is in the process of winding down, the following information must also be provided at the time the application for exemption is submitted:
 - (i) a copy of the Resolution of the Board of Directors confirming that the fund is in the process of winding down;
 - (ii) the number of investors in the fund;
 - (iii) the value of the fund's remaining assets;
 - (iv) anticipated time for the completion of the winding down process;
 - (v) the bank account(s) details, including the accounts from which redemptions will be paid out; and
 - (vi) the signatories on the bank account(s) from which redemptions will be paid out;
- (e) *Funds Investing in Esoteric Assets* - in relation to a fund that invests in esoteric assets, the application for exemption must also be accompanied by the name of the person or entity responsible for maintaining the records of the fund's investments, as well as the person or entity responsible for maintaining all contracts relating to the fund's investments.

PART II: EXEMPTION FROM APPOINTING A MANAGER

10. Application for exemption

- 10.1 A private or professional fund that wishes to be exempted from appointing a manager pursuant to regulation 7 (2) of the Regulations must prepare and submit a written application in accordance with **Form IB-E2** of the Schedule.
- 10.2 An application under sub-paragraph 10.1 may be submitted either at the time of submitting an application for recognition or at any time after recognition is granted by the Commission.
- 10.3 An application under this paragraph must comply with the requirements of regulation 7 of the Regulations.

11. Information to be submitted when making an application for exemption

- 11.1 A private or professional fund applying for an exemption from appointing a manager must provide the Commission with its reason for making the application. The reason

must be sufficiently detailed to enable the Commission to understand and have a good appreciation of the rationale for the application.

11.2 The application must also indicate the management arrangements the private fund or professional fund has or will put in place if the exemption sought is granted.

11.3 The scenarios listed below outline some of the circumstances the Commission may consider as acceptable reasons for a fund not to appoint a fund manager, although other reasons advanced by applicants for exemption will be given due consideration. Taking into account the nature, type and complexity of investments of the fund concerned, the Commission may grant exemptions in any of the following circumstances:

(a) *The fund's management function is being carried out by the directors* – this relates to the circumstance where the board of directors actively carries out the discretionary management functions or where the investment management decisions are infrequent due to the fund's investment objectives and assets. Additionally, this may relate to circumstances where a fund invests in relatively illiquid assets or where the assets are intended to be held for a long period of time and investment decisions are rarely made;

(b) *The fund is in the final process of winding down* - in such cases the fund would have entered into voluntary or involuntary liquidation or alternatively, the fund would have distributed a majority of its assets to investors and would therefore only have a limited number or portion of illiquid assets; and

(c) *The fund is not currently carrying out any fund business* – if a fund is not currently carrying out any fund business it would be unnecessary for a fund manager to be appointed by the fund.

11.4 If at any time the circumstances of a fund were to change where it would then be required to appoint a fund manager, the exemption would no longer be valid. It is therefore the duty of any fund that has been granted an exemption, to notify the Commission of its intention to appoint a fund manager within seven days of the proposed appointment, or such shorter time as the Commission may allow², in the event of any change to its circumstances that would affect the validity of the exemption.

12. Additional Information Required

12.1 In addition to the requirements outlined in paragraphs 11.1 and 11.2 above, an application for an exemption from appointing a fund manager must include the following:

(a) confirmation of the individual(s) who will carry out the fund's management function, including a biography or resume of the named individual(s); and

² Ibid

(b) details of how the fund's assets will be managed.

12.2 For the purposes of sub-paragraph 12.1 above, where the management of the fund is to be carried out by the fund's directors and one director is a corporate director, the name and address of each of the directors of the corporate director must be provided.

SCHEDULE

[Paragraphs 6.1 and 10.1]

FORM IB-E1

**Application by a Private Fund, Professional Fund or Public Fund for Exemption from
Appointing a Custodian Under regulation 7 (2) or 16 (2) of the Mutual Funds
Regulations, 2010**

1. Name of mutual fund to which this application relates (“the applicant”)
.....
.....
2. Name and address of person submitting application on behalf of the applicant
.....
.....
.....
3. State the nature of the relationship with the applicant (*whether director, manager or other senior officer (specify)*)
.....
4. Is this application being submitted together with the application for recognition or registration?

YES NO
5. If your answer to question 4 is NO, please indicate when recognition was granted to the applicant
.....
6. Please state the reason(s) for applying for exemption from appointing a custodian (*please note that the reason(s) must be sufficiently detailed to provide an understanding and appreciation of the rationale for the application*)
.....
.....
.....
.....
.....
7. What are the current or proposed safekeeping arrangements for the applicant?
.....
.....
.....

8. Please state

(a) the name and address of the financial institution(s) where the applicant's bank account(s), including those for subscription and redemption, are held

.....
.....
.....

(b) the names that are signatories to the applicant's bank account(s)

.....
.....
.....

9. Does the applicant maintain a prime broker only? YES NO

10. If the answer to question 9 is YES, please provide the name of the prime broker

.....

11. Does the applicant operate as a feeder fund? YES NO

12. If the answer to question 10 is YES, please provide the following information:

(a) Name of the master fund

(b) Name and address of person responsible for safekeeping of the master fund's assets

.....
.....
.....
.....

(c) Details of the person(s) responsible for maintaining record of the applicant's investments into the master fund:

.....
.....
.....

13. Does the applicant operate as a fund of funds? YES NO

14. If the answer to question 13 is YES, please provide the following information:

(a) Do the underlying funds maintain appropriate brokerage or custodial arrangements?

YES NO

(b) Details of the person(s) responsible for maintaining record of the applicant's investments into the underlying funds:

.....
.....
.....

15. Is the applicant in the process of liquidation (voluntary or involuntary)?

YES NO

16. If the answer to question 15 is YES, please provide the following information:

- (a) Copy of board of directors' resolution confirming liquidation process (attached)
- (b) Total number of investors in the applicant
- (c) The value of the applicant's remaining assets (if any) \$.....
- (d) Anticipated time for the completion of the liquidation process
- (e) The account, including the financial institution holding the account, from which redemptions will be paid out
- (f) Does the fund invest in esoteric assets (*tangible assets such as equipment or machinery, real estate, private equity, structured settlements, etc.*)?
YES NO

(g) If the answer to question (f) above is YES, please provide the following information:

- (i) Name of the person(s) responsible for maintaining records of applicant's investments.....
.....
- (ii) Name of person(s) responsible for maintaining contracts relating to the applicant's investments

Declaration:

I,(name) of
.....(address), being the person submitting this application on behalf of (name of mutual fund) do hereby declare that the information provided in this application for the exemption of (name of mutual fund) from the requirement to appoint a custodian is true and accurate to the best of my knowledge and all other documents submitted with this application in respect thereof are authentic. I understand that providing false or misleading information in respect of this application may cause the Commission to deny the application and such denial is without prejudice to any other action that may be taken against me and/or in respect of the applicant herein under the laws of the Virgin Islands.

Signed by:

Name (Print):

Date:

BVI Financial Services Commission Use Only

Date Application Received:

Application Processed by:

Date Considered by FSC:

Application Status: Approved Denied Deferred

Reason(s) for denial or deferral (if applicable)

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.....

FORM IB-E2

Application by a Private Fund/Professional Fund for Exemption from Appointing a Fund Manager Under regulation 7 (2) of the Mutual Funds Regulations, 2010

1. Name of private fund/professional fund to which this application relates (“the applicant”)
.....
.....
2. Name and address of person submitting application on behalf of the applicant
.....
.....
.....
3. State the nature of the relationship with the applicant (*whether director, manager or other senior officer (specify)*)
.....
4. Is this application being submitted together with the application for recognition?

YES NO
5. If your answer to question 4 is NO, please indicate when recognition was granted to the applicant
.....
6. Please state the reason(s) for applying for exemption from appointing a fund manager (*please note that the reason(s) must be sufficiently detailed to provide an understanding and appreciation of the rationale for the application*)
.....
.....
.....
.....
.....
.....
7. Please provide
 - (a) The current or proposed management arrangements for the applicant
.....
.....
.....

(b) The name and address of the individual(s) who will carry out the applicant's management function

.....
.....
.....

(c) A copy of the curriculum vitae of the individual(s) named in sub-paragraph (a) above (attached)

8. Is the management of the applicant to be carried out by the applicant's directors wherein any of the directors is a corporate director? YES NO

9. If the answer to question 9 is YES, please provide the names and addresses of all the directors of the corporate director

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.....
.....

Declaration:

I, (name) of
.....(address), being the person submitting this application on behalf of
..... (name of private fund/professional fund) do
hereby declare that the information provided in this application for the exemption of
..... (name of private fund/professional fund)
from the requirement to appoint a fund manager is true and accurate to the best of my
knowledge and all other documents submitted with this application in respect thereof are
authentic. I understand that providing false or misleading information in respect of this
application may cause the Commission to deny the application and such denial is without
prejudice to any other action that may be taken against me and/or in respect of the applicant
herein under the laws of the Virgin Islands.

Signed by:

Name (Print):

Date:

BVI Financial Services Commission Use Only

Date Application Received:

Application Processed by:

Date Considered by FSC:

Application Status: Approved Denied Deferred

Reason(s) for denial or deferral (if applicable)

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ISSUED by the Financial Services Commission this 6th day of April, 2020.

[Sdg.] Kenneth Baker
Ag. Managing Director
Financial Services Commission