

TIME IS RUNNING OUT FOR YOUR EXEMPT FUND

by Sarita Ebbin

21 January 2016

The clock is ticking for exempted investment funds set up under the old legislative regime, which face an October 3 deadline to be reclassified under legislation enacted in 2013.

The Investment Funds Act 2006 was amended with effect from 4 October 2013 by the Investment Funds Amendment Act 2013 (**Amendment Act**). The Amendment Act introduced two new classes of exempt funds to the Bermuda fund landscape – the Class A Exempt Fund (**Class A Fund**) and Class B Exempt Fund (**Class B Fund**), and repealed the existing exemption provision.

The introduction of the new classes of exempt fund was a result of collaboration between the Bermuda Government, the Bermuda Monetary Authority (**BMA**) and local and overseas industry stakeholders with a view to streamlining the exemption process.

While the Amendment Act immediately introduced the two new classes of exempt fund, it did not immediately repeal the pre-Amendment Act (**old regime**) exempt funds. Instead, any fund that on the date of commencement of the Amendment Act qualified for exemption under the repealed provisions was deemed to continue to be exempt in accordance with the repealed provisions, and be subject to those provisions for a transition period of three years.

As such, exempt funds under the old regime have co-existed alongside Class A Funds and Class B Funds since 4 October 2013. However, on 3 October 2016 the transition period for exempt funds under the old regime will end.

If on 4 October 2016 any old regime exempt fund still exists, it will cease to qualify for exemption. Therefore, if an old regime exempt fund desires to be classified as an exempt fund under the laws of Bermuda on that date, it must satisfy the requirements of a Class A Fund or Class B Fund, and apply to and obtain approval from the BMA for reclassification before 4 October 2016.

To be eligible for qualification as a Class A Fund, a fund must:

- only be open to qualified participants (i.e. sophisticated investors);
- have an investment manager who:
 - is licensed under the Investment Business Act 2003; or
 - is authorised or licensed by a foreign regulator recognised by the BMA (e.g. the Securities Exchange Commission in the United States); or
 - is carrying on business in or from Bermuda or a jurisdiction recognised by the BMA and who has gross assets under management in excess of \$100 million or is a member of an investment management group that has consolidated gross assets under management of not less than \$100 million;
- appoint an officer, trustee, or representative that is resident in Bermuda and has access to the books and records of the fund;
- appoint an auditor, fund administrator, registrar and a custodian or prime broker; and
- prepare financial statements in accordance with International Financial Reporting Standards (**IFRS**) or Generally Accepted Accounting Principles (**GAAP**).

On or before the date of commencement of business, the operator of a Class A Fund must certify to the BMA via its electronic filing system "ERICA" that it meets the requirements for Class A exemption. At the time of filing of the certificate, the operator must also file a copy of the fund's prospectus. Class A Funds can commence business immediately upon filing the exemption notification with the BMA.

If a fund does not qualify for Class A Fund status, it can make an application to be a Class B Fund.

To qualify as a Class B Fund, a fund must:

- only be open to qualified participants;
- have an officer, trustee, or representative that is resident in Bermuda and has access to the books and records of the fund;
- appoint an auditor, investment manager, fund administrator, registrar and a custodian or prime broker who are fit and proper to perform the respective functions of their office; and

- prepare financial statements in accordance with IFRS or GAAP.

A fund that qualifies for Class B exemption must apply to the BMA via ERICA. The application is accompanied by the fund's prospectus. Once the application and prospectus have been submitted, the fund will be notified of the outcome of its application within ten days of the application date.

Class A Funds and Class B Funds, like old regime exempt funds, must be registered as a non-licensed AML/ATF regulated financial institution under the Proceeds of Crime Regulations (Supervision and Enforcement) Act 2008 and Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008.

Should an old regime exempt fund no longer wish to be exempt, but still wish to fall under the Investment Funds Act 2006, it could apply to be classified as an authorised fund. Authorised funds are more stringently regulated by the BMA and include classes such as an institutional fund and standard fund.

Administrators, investment managers and legal advisors alike should take stock of their current funds to determine if any of them are old regime exempt funds. If they are, steps should be taken to have them reclassified as a Class A Fund, Class B Fund or authorised fund as soon as possible before time runs out.

This article has been written by:

Bermuda

Sarita Ebbin

Associate

+1 441 298 3281

sebbin@applebyglobal.com

Attorney Sarita Ebbin is an associate in the Corporate Department at Appleby.