

## When is an Investment Structure, a Fund?

One of the most frequently asked questions about an investment structure is quite simply, is it a Fund? By having in mind a legal expert's definition as well as checking against the features listed below hopefully the answer will be found.

### Fund Definition

"A Fund is a legal vehicle in which one or more investors place their money in exchange for an ownership or participation interest in the vehicle. The monies so obtained will be aggregated and managed to as great an extent as possible, as a single pool, irrespective of the identity or subsequent views of investors. Although funds may be structured on other bases, most funds (authorised or alternative) are established as "blind pools". As a result, once an investor has committed his money, another party (or parties) will have discretion on what to buy and what to sell, as well as in many instances when and on what terms an investor can be given his money back".<sup>1</sup>

### Fund Features

There are a number of features that assist judgement on the scale between being a private investment vehicle and a fund. Whilst it is often not entirely clear as to which part of the scale a structure falls, the following features give guidance, and if only one of these features indicates a fund, then it is prudent to treat the structure as such, or otherwise run the risk of falling foul of a regulatory authority.

**Number of Investors** – If the absolute number of investors in a structure be unknown from the inception it is a signal of a potential fund. It implies that further investors may need to be sourced and in order to do this some form of promotion will take place. Promotion

is of course a fund-like and generally regulated activity. Furthermore, the greater the number of investors the more likely it is that the entity will be considered as a fund.

**Passive Investors** – A non-fund investment structure tends to imply investors who are well known to each other. The key words being, 'well known', i.e. friends or associates, perhaps having invested together before. However, a classic fund feature is that investors are passive to each other, not knowing one another, being brought together by a promoter and just sharing in the common goal of investment and the subsequent returns.

**Passive Investment** – A common facet of a private investment structure is that the friendly investors actively manage the investments or have some ongoing involvement with the investments. Whereas, for a fund, investors are passive, having employed a third party promoter and asset manager to provide management and investment expertise and therefore having no ongoing relationship with the underlying investments.

**Prospectus** – Another classic fund feature is some form of prospectus/offering document/information memorandum/scheme particulars. Such a document has selling restrictions, risk warnings, subscription/redemptions procedures and forms, and a comprehensive disclosure on the parties involved and the investment opportunity. For a private investment structure involving friends and associates, it is harder to argue that for example, risk warnings are required. Such a private structure normally only has a brief investment opportunity summary.

## When is an Investment Structure, a Fund? (CONTINUED)

**Existence of a Promoter** – Where there is a promoter driving the establishment of the structure, identifying potential investors and promoting the opportunity to potential investors, the entity is more likely to be considered a fund.

**Terminology** – Where the word “fund” (or similar) is used in the documentation and materials that are circulated, it is difficult to argue that the entity should not be treated as a fund, as inevitably the parties involved in reality view it as a fund.

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To find out how PFS can assist you with fund formation and administration contact: Chris Gambrell at [chris.gambrell@pfs.gg](mailto:chris.gambrell@pfs.gg) or telephone +44 (0) 1481 737600

<sup>1</sup> A Practitioner’s Guide to Alternative Investment Funds – Timothy Spangler, Kaye Scholer LLP