

Private investment funds in the BVI

Insights - 24/08/2023

For investment managers investing into relatively illiquid asset classes (for example, managers to private equity funds, venture funds, real estate funds and other analogous funds) in structuring their fund vehicles through British Virgin Islands entities, the fund vehicle utilised will almost certainly fall within the statutory definition of a **private investment fund** under the British Virgin Islands' Securities and Investment Business Act, 2010 (as amended). The implication of this being that the fund vehicle then needs to be regulated as a private investment fund by the Financial Services Commission.

A fund will come within the statutory definition of a private investment fund where the following two-part test is satisfied, namely where it:

- collects and pools investor funds for the purpose of collective investment and diversification of portfolio risk
- 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

What the above statutory definition means is that a fund established in the British Virgin Islands (**BVI**) for the purposes of (i) collective investment by two or more investors; and (ii) diversification of portfolio risk (which would effectively apply if the fund will make two or more investments), which entitle its investors upon exit to a return calculated by reference to the investment performance of their investment (as opposed to a fixed return), will fall within the definition of a private investment fund and so required to be regulated by the Financial Services Commission (the **FSC**).

Falling outside this definition, therefore, will be both funds established for a single investor and so do not have as a purpose **collective investment** and funds established to make a single investment and so do not have as a purpose **diversification of portfolio risk** – this will enable both single investor funds and single investment funds to fall outside the parameters of the private investment fund regime. See our briefing on [What you need to know about BVI single](#)

Eligibility criteria

To be eligible to become licensed as a private investment fund, the following eligibility criteria must be satisfied:

- the fund must be lawfully incorporated, registered, formed or organised (whether in the BVI or elsewhere)
- the fund's constitutional documents must specify that either:
 - the fund is not authorised to have more than 50 investors or
 - an invitation to subscribe for or purchase, fund interests issued by the fund must be made on a private basis only or
 - fund interests shall be issued only to professional investors, with an initial investment of each professional investor, other than an exempted investor, not being less than US\$100,000

For these purposes, an invitation made on a **private basis** includes an invitation which is made to specified persons and is not calculated to result in shares or fund interests becoming available to other persons or to a large number of persons; or by reason of a private or business connection between the person making the invitation and the investor. A **professional investor** is defined as 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 US\$1,000,000 (or its equivalent in another currency) and consents to being treated as a professional investor.

- the fund must satisfy the other criteria specified for recognition of a private investment fund in the Private Investment Funds Regulations, 2019 (the **PIF Regulations**)
- the fund will, on being recognised, be in compliance with the Securities and Investment Business Act, 2010 (as amended) (**SIBA**), the PIF Regulations and any practice directions applicable to the fund
- recognising the fund as a private investment fund is not against the public interest

Licensing process

The licensing process for private investment funds is reasonably straight forward and typically dealt with within a couple of weeks of filing the licence application.

Importantly, an applicant for recognition as a private investment fund is required to submit its licence application within 14 days of commencing business (ie launching). Prior to receiving their certificate of recognition, an applicant may still operate as a private investment fund for a period not exceeding 21 days and during this intervening 21-day period, will be deemed to have been recognised as a private investment fund. This therefore facilitates a quick time to market for investment managers.

Notwithstanding the above, our recommendation to clients is generally not to commence business until the licence application has been submitted, thereby enabling the fund to avail itself to the full 21-day period during which it can operate without having a licence.

How does a private investment fund offer its fund interests?

A private investment fund will usually offer its fund interests pursuant to either an offering document or a shorter form term sheet and there are certain mandatory BVI disclosures which need to be contained within this document.

However, it is possible for a private investment fund to opt not to issue an offering document or a term sheet, subject to providing to the FSC the reason for doing so, including an explanation as to how relevant information concerning the fund and any invitation or offer will otherwise be provided to investors or potential investors. For instance, in more limited offerings these disclosures might be alternatively adequately provided to investors via the fund's limited partnership agreement and subscription documents.

Service providers to private investment funds

A private investment fund is required to have a number of mandatory service providers, being as follows:

i. an **appointed person** responsible for each of the following:

- the management of fund property
- the valuation of fund property
- the safekeeping of fund property

For these purposes, the appointed person must be either be an entity regulated (in the BVI or a recognised jurisdiction) to perform the specified functions; or an independent third party with experience in performing the specified functions; or a director, partner or trustee of the private investment fund.

ii. an auditor. Importantly, there is no requirement for the auditor to be based in BVI (or for there to be a local audit sign-off)

iii. an **authorised representative**

Valuation of fund property?

A private investment fund is required to maintain a clear and comprehensive policy for the valuation of fund property with procedures that are sufficient to ensure that the valuation policy is effectively implemented. The fund's valuation policy is one of the supporting documents required to be filed with the FSC as part of the licence application.

In discharging this requirement, most private investment funds elect to appoint a fund administrator, however, this is not mandatory. Whilst the PIF Regulations provide that a private investment fund should ensure that the person responsible for the fund's management function is independent from the appointed person responsible for the valuation process, the regulations permit the same appointed person could act in both functions, provided that the fund identifies, manages and monitors any potential conflict of interest that may arise as a consequence of this arrangement and discloses the arrangements to its investors, along with details of how any conflicts will be managed.

Ongoing obligations for private investment funds

A fund recognised as a private investment fund owes a number of ongoing obligations, which can be summarised as follows:

- i. to have at all times appointed persons responsible for undertaking each of the management of fund property; the valuation of fund property; and the safekeeping of fund property
- ii. to have at all times an authorised representative in the BVI
- iii. if structured as a company, to have at all times at least two directors
- iv. offering terms which contain the mandatory regulatory disclosure
- v. to maintain a clear and comprehensive policy for the valuation of fund property, which must be followed by the appointed person responsible for the valuation of fund property
- vi. to prepare each year audited financial statements and file a copy of these audited financial statements with the FSC within six months of the financial year to which they relate. The financial statements must be audited in accordance with an approved accounting standard (namely IFRS, GAAP or any other internationally recognised and accepted accounting standards). In certain limited exceptions, it is possible to apply for an exemption from this requirement to audit

- ii. to provide notification to the FSC within 14 days of certain key changes (such as a change of director; material changes to the fund's business; amendments to constitutional or fund offering documents; amendments to the fund's valuation policy and so on). Where an appointed person resigns, or has its appointment terminated or otherwise ceases to act, notice must be given to the FSC within seven days. Any appointment of a new appointed person requires at least seven days prior notice of the appointment to be given to the FSC
- iii. to maintain financial records that: are sufficient to show and explain its transactions, at any time enable its financial position to be determined with reasonable accuracy, and enable it to prepare such financial statements and make such returns as it is required to prepare and make under the SIBA and the PIF Regulations (and such financial records are required to be maintained for a period of at least five years after completion of the transaction to which they relate)
- ix. as a relevant person for the purposes of the BVI's anti-money laundering legislation, appoint a suitably qualified person to act as the MLRO and notify details of the person so appointed to the Financial Investigation Agency
- x. as an investment entity for the purposes of FATCA and CRS, register for a Global Intermediary Identification Number (**GIIN**) with the US Internal Revenue Service and then enrol on the BVI's FATCA/CRS reporting portal, the BVI Financial Account Reporting System (**BVIFARS**). Following which enrolment, to then identify and report annually on BVIFARS in relation to reportable accounts under FATCA and CRS by 31 May each year
- xi. to submit each year, through its registered agent, within six months of the end of the applicable reporting period, a self-certification in relation to whether it is undertaking a relevant activity for the purposes of the BVI's economic substance legislation and, if it is undertaking a relevant activity, to demonstrate its compliance with the economic substance obligations which this would entail. As a private investment fund, significantly the fund will be considered to be undertaking "investment funds business" for the purposes of the BVI's economic substance legislation, which is not a relevant activity for the purposes of the legislation.

Since the introduction of legislation regulating close-ended funds in BVI in 2020, experience has shown the private investment funds regime to be both a user friendly and popular regime amongst investment managers of funds investing in the illiquid assets classes which will be applicable to the regime.

If you would like to discuss structuring your next fund as a private investment fund, please do not hesitate to speak to your usual Ogier contact.

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demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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