

Comparison of Regulatory Regimes for Closed-Ended Private Investment Funds: Cayman Islands and BVI

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The Cayman Islands and the British Virgin Islands (**BVI**), two of the most popular jurisdictions for private equity, venture capital, real estate and credit funds, have each recently introduced a new regulatory regime for closed ended private investment funds.

This client advisory discusses the similarities and differences between the new private investment funds law regimes as well as practical implications for fund managers.

Regulatory framework

Cayman Islands

The Private Funds Act, 2020 (**Cayman PF Act**), enacted on 7 February 2020, as amended by the Private Funds (Amendment) Act, 2020 (**Cayman PF Act Amendment**), provides for the registration and regulation of "private funds" with the Cayman Islands Monetary Authority (**CIMA**). For a more detailed discussion of the Cayman PF Act, please refer to our briefings:

[New registration requirements for unregulated investment funds and Cayman Islands Private Funds Act - Expanded Scope.](#)

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The Securities and Investment Business Act, 2010 (**SIBA**) was amended by the enactment of the Securities and Investment Business (Amendment) Act, 2019 (**SIBA Amendment Act**) and Private Investment Funds Regulations, 2019 (**BVI PIF Regulations**), which came into force on 31 December 2019. Under the SIBA Amendment Act and BVI PIF Regulations, all "private investment funds" are now subject to registration and regulation by the BVI Financial Services Commission (**FSC**). For a more detailed discussion of the SIBA Amendment Act and the BVI PIF Regulations, please refer to our briefing:

Which entities are in scope?

Cayman Islands

The definition of "**private fund**" captures any company, unit trust or partnership that offers or issues or has issued its non-redeemable investment interests, the purpose or effect of which is the pooling of investor funds with the aim of enabling investors to receive profits or gains from such entity's acquisition, holding, management or disposal of investments, where:

(a) the holders of investment interests do not have day-to-day control over the acquisition, holding, management or disposal of the investments; and

(b) the investments are managed as a whole by or on behalf of the operator of the private fund directly or indirectly,

but does not include (among other things) any non-fund arrangements.

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A "**private investment fund**" is defined as a company, a partnership, a unit trust or any other body that is incorporated, registered, formed or organised, whether under the laws of the BVI 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.

The definitions of a "private fund" (under the Cayman PF Act) and a "private investment fund" (under the SIBA Amendment Act in the BVI) are similar in that:

(a) companies, unit trusts and partnerships are captured under both definitions; and

(b) they both exclude single investor vehicles set up for the purpose of a single investor only by requiring there to be pooling of investor funds. However, a point of distinction is that in the Cayman Islands, CIMA has released an FAQ noting that single investor funds are exempt where the constitutive documents of the private fund, or any other provision or arrangement of binding legal effect, expressly states that the fund only has and is only intended to ever have a single investor of record. Whereas in the BVI, the FSC has indicated that they would expect single investor funds to provide for similar restrictions in their

constitutive documents; however, they have not gone as far as to formally require it.

Whilst the Cayman Islands definition of a "private fund" and BVI definition of a "private investment fund" are substantially similar, there are some nuances which should be noted, namely:

(a) the Cayman definition specifically contemplates that investors do not have day-to-day control over the fund's investment activities, whilst no similar distinction is made in the BVI definition;

(b) it should be possible to interpret BVI single investment structures as out of scope under the SIBA Amendment Act by relying on the interpretation that there is no "diversification of portfolio risk" (however, a case by case analysis will need to be conducted). For the Cayman regime, further to the Cayman PF Act Amendment, there is no longer a similar concept in the Cayman definition which potentially brings Cayman single investment structures into scope where the other components of the Cayman definition are satisfied. As a consequence, whilst single investment funds may be caught within the definition of a "private fund" in the Cayman Islands and so required to register with CIMA, they will likely be outside the definition of a "private investment fund" in BVI and so not required to be regulated by the FSC;

(c) the definition of "investor" in the Cayman PF Act expressly excludes a promoter, operator or proprietary investor (each of these terms is defined under the Cayman PF Act), whilst such term is not defined under the SIBA Amendment Act and so such term would bear its ordinary plain English meaning; and

(d) the Cayman definition specifically exempts "non-fund arrangements", which term includes (among others) securitisation special purpose vehicles, structured finance vehicles, debt issues and debt issuing vehicles, preferred equity financing vehicles, sovereign wealth funds and single family offices, joint ventures, proprietary vehicles, holding vehicles, officer, manager or employee incentive, participation or compensation schemes, and programmes or schemes to similar effect, individual investment management arrangements, arrangements not operated by way of business, and funds whose investment interests are listed on a stock exchange specified by CIMA. Whilst there are no equivalent exemptions from the definition in the BVI, the FSC has given industry guidance that structures such as family office vehicles, joint venture arrangements and carried interest vehicles are not intended to be caught by the BVI PIF Regulations.

Registration requirements

Timing

Cayman Islands

The Cayman PF Act provides that a private fund must submit an application for registration to CIMA within 21 days of its acceptance of capital commitments from investors for the purpose of investments, and in any event shall not accept capital contributions from investors in respect of investments until it is registered by CIMA.

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The SIBA Amendment Act provides that a private investment fund must submit an application to the FSC for recognition within 14 days of commencing business, and prior to receiving its certificate of recognition, it may carry on business for a period not exceeding 21 days.

It is worth noting that in the Cayman Islands, according to CIMA's policy, the registration date of a private fund will be the date on which a complete application has been received by CIMA – ie, the submission date when the private fund has submitted all documents, fees and information as required pursuant to the Cayman PF Act.

Documents required

An application for registration with CIMA as a "private fund" (in the Cayman Islands) or recognition with FSC as a "private investment fund" (in the BVI) must be accompanied by the following:

- a completed prescribed application form;
- a copy of the fund's certificate of incorporation/formation/registration;
- a copy of the fund's constitutional documents (memorandum and articles of association/trust deed/limited partnership agreement) (in Cayman, these will not be required to be submitted where the offering documents/summary of terms or marketing materials contain the relevant information on the terms of the offer);
- a copy of the offering document/term sheet (as further explained below); and
- an application fee:
 - Cayman Islands – an initial application fee of US\$366 plus an annual fee of US\$4,269 (waived for year 2020 if registered on or before 7 August 2020).
 - BVI – an initial application fee of US\$700, plus a fee of US\$1,000 (for recognition on or before 30 June in each year) or US\$500 (for recognition after 30 June in each year). Thereafter, the annual fee is US\$1,000.

In addition, an application for registration as a Cayman private fund with CIMA shall be accompanied by:

- (a) the administrator's letter of consent (if applicable),

(b) a structure chart, and

(c) the auditor's letter of consent.

In BVI, the only additional items for an application for recognition as a BVI private investment fund are:

(a) the register of directors (if a company);

(b) a resume/biography for each director; general partner, trustee or underlying individual where the director; general partner or trustee is a corporate entity; and

(c) the fund's valuation policy (as further explained below).

Operating requirements

Cayman Islands - Cayman Conflicts Rule

As further discussed below, the functions of valuation, title verification and cash monitoring can be performed (where not performed by a custodian, administrator or independent third party, as applicable) by the manager (or a person who has a control relationship with the manager) or the operator (e.g. general partner) of the private fund, provided that:

(a) such function is independent from the portfolio management function, or

(b) potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors (together, the **Cayman Conflicts Rule**).

BVI - Appointed Persons

In the BVI, a not dissimilar approach is adopted, in that a private investment fund shall at all times have an appointed person responsible for undertaking each of the following:

(a) management;

(b) valuation; and

(c) safekeeping of fund property (**Appointed Person**).

An Appointed Person may be a person licensed by the FSC or a regulatory authority in a recognised jurisdiction to perform the specified functions; an independent third party with the experience in performing the specified functions; or a director, partner or trustee of the private investment fund. Similar to the position in relation to the Cayman Conflicts Rule, where the Appointed Person for the fund's management function is the same person responsible for the valuation of fund property, the fund shall identify, manage and monitor any potential conflicts

of interest that may arise; and disclose to investors that the Appointed Person responsible for the fund's management function is also the Appointed Person responsible for the valuation of fund property; and details of how any potential conflicts of interest will be managed.

A minor point of distinction is that in the BVI, where it is intended that the function of valuation or safekeeping of fund property for a private investment fund will be undertaken internally, the Appointed Person must be a director, partner or trustee of the fund. Whilst under the Cayman regime, there is no equivalent concept of an Appointed Person and the relevant functions can be performed by the manager or operator (subject to compliance of the Cayman Conflicts Rule as explained above).

Number of directors ("four eyes principle")

Cayman Islands

Although not specified in the Cayman PF Act, CIMA has separately confirmed that it will require all private funds to have at least two natural persons acting as, or for, the operator (e.g. on the board of directors of the general partner) of the private fund. Directors appointed to private funds are not required to be registered pursuant to the Director Registration and Licensing Act, 2014.

BVI

The BVI PIF Regulations provide that a private investment fund structured as a company shall have at least two directors, at least one of whom shall be an individual. Applying the FSC's four eyes principle, where one director is an individual and the other director is a corporate entity, it will be necessary to demonstrate that the individual director is functionally independent of the corporate director. For private investment funds structured as a limited partnership, the FSC have confirmed that they do not require the general partner to have at least two directors (or equivalent officers) which position can be distinguished from the position in Cayman which does expect the board of directors of the general partner to comprise two directors.

Audit

Cayman Islands

The Cayman PF Act requires a private fund to have its accounts audited annually by a Cayman Islands auditor and its audited accounts to be sent to CIMA within 6 months of the end of each financial year (subject to such extension as CIMA may allow).

BVI

Whilst private investment funds are similarly required to be audited in the BVI, a differing approach on audit is followed in the BVI, in that the financial statements of a private investment

fund will not need to be audited by a local BVI auditor, such that the only requirement is that the financial statements be prepared in accordance with an approved accounting standard (IFRS, UK GAAP, US GAAP, Canadian GAAP or such other accounting standard as is equivalent to these accounting standard). Similar to the Cayman Islands, a copy of the fund's financial statements shall be provided to the FSC within 6 months after each financial year end (subject to such extension as FSC may allow). An exemption from the requirement to audit is available and the FSC has issued guidance in relation to the circumstances in which it would consider an application for an exemption.

Valuation

Cayman Islands

The Cayman PF Act provides that a private fund shall have appropriate and consistent procedures for the purposes of proper valuations of its assets and valuations shall be carried out at a frequency that is appropriate to the assets held by the private fund and, in any case, at least on an annual basis.

Valuations may be performed by an appropriately qualified independent third party or an administrator and otherwise, may be performed by the manager (or a person who has a control relationship with the manager) or operator of the private fund subject to the Cayman Conflicts Rule.

CIMA's rules on the calculation of asset values (**NAV**) for registered private funds (**Cayman NAV Rules**) require private funds to establish, implement and maintain a "NAV Calculation Policy" (i.e, the pricing and valuation practices, policies, and procedures to calculate a private fund's NAV that are established and maintained in accordance with the requirements of the Cayman PF Act and the Cayman NAV Rules) that ensures a Fund's net asset value is fair, complete, neutral and free from material error and is verifiable. Such NAV Calculation Policy shall be based on International Financial Reporting Standards or US, Japanese or Swiss GAAP or GAAP of a non-high risk jurisdiction and must be written and disclosed in the fund's offering document.

BVI

In the BVI, a private investment fund is similarly required to maintain a clear and comprehensive policy for the valuation of fund property with procedures that are sufficient to ensure that valuation policy is effectively implemented. However, unlike the position in the Cayman Islands, specific rules applicable to such valuation policies and procedures (including matters to be covered therein) are expressly provided for within the BVI PIF Regulations. A copy of the fund's valuation policy is also required to be submitted to the FSC at the time of the private investment fund's application for recognition and the fund shall provide written notice to the FSC of any amendment thereto within 14 days.

The BVI PIF Regulations further provide that the Appointed Person responsible for a private investment fund's management function shall be independent from the Appointed Person responsible for the valuation process, except that where the private investment fund determines that the management and valuation functions "must be" performed by the same Appointed Person, in which case, as noted above, the fund shall identify, manage and monitor any potential conflicts of interest and disclose to the investors details of how such potential conflicts will be managed. This is somewhat similar to the position under the Cayman Conflicts Rule except that the Cayman Conflicts Rule does not impose a requirement on the fund to determine that the valuation function "must be" performed by the manager or operator.

Safekeeping of fund assets/property

Cayman Islands

The Cayman PF Act provides that a private fund shall appoint a custodian to perform two duties, namely:

- (a) custody: to hold in custody, in segregated accounts opened in the name, or for the account, of the private fund, the custodial fund assets (i.e. the assets of a private fund that are capable of being physically delivered or capable of registration in an account opened in a custodian's books in the name, or for the account, of the private fund); and
- (b) title verification: to verify, based on information provided by the private fund and available external information, that the private fund holds title to any other fund assets (assets that are not custodial fund assets) and maintain a record of those other fund assets.

CIMA's rules on the segregation of assets for registered private funds (**Cayman Segregation Rules**) require that the portfolio of a private fund must be segregated and accounted for separately from any assets of its manager or operator or custodian (if any), and they shall not use the portfolio to finance their own or any other operations. Operators of a private fund must establish, implement and maintain (or oversee the establishment, implementation and maintenance of) strategies, policies, controls and procedures to ensure compliance with the Cayman Segregation Rules consistent with the private fund's offering document or marketing materials, as the case may be, and appropriate for the size, complexity and nature of the private fund's activities and investors.

A private fund shall not be required to appoint a custodian if it is neither practical nor proportionate to do so, having regard to the nature of the private fund and the type of assets it holds and provided that it has notified CIMA of such fact. In such circumstances, a private fund must appoint a person to carry out the title verification. Such function may be performed by an administrator or another independent third party, and otherwise, may be performed by the manager (or a person who has a control relationship with the manager) or operator of the

private fund subject to the Cayman Conflicts Rule.

BVI

In the BVI as discussed above, a private investment fund must at all times have an Appointed Person responsible for safekeeping of fund property, including the segregation of fund property. Unlike the position in Cayman, in the BVI, the BVI PIF Regulations do not prescribe in detail the duties that apply to the relevant Appointed Person in terms of safekeeping or segregation of fund property. In addition, there is no specific procedure to apply for an exemption from appointing a third-party custodian under the BVI PIF Regulations. However, in circumstances where a fund does not propose to appoint a third-party custodian, the regulatory obligation around safekeeping of fund property will be fulfilled by one of the directors/partners/trustees assuming this responsibility (as the Appointed Person).

Cash monitoring

Cayman Islands

The Cayman PF Act provides that a private fund shall appoint a person to monitor the cash flows of the private fund; ensure that all cash has been booked in cash accounts opened in the name, or for the account, of the private fund; and ensure that all payments made by investors in respect of investment interests have been received. Such function may be performed by an administrator, custodian or another independent third party and otherwise, may be performed by the manager (or a person who has a control relationship with the manager) or operator of the private fund:

(a) subject to the Cayman Conflicts Rule; and

(b) provided that the fund's operator should engage an independent third party, for example the fund's auditor, to provide independent verification that the cash monitoring was done throughout the year.

BVI

No equivalent requirements exist in the BVI.

Identification of securities

Cayman Islands

The Cayman PF Act provides that a private fund that regularly trades securities or holds them on a consistent basis must maintain a record of the identification codes (for example, ISINs) of the securities it trades and holds and shall make this record available to CIMA upon request.

BVI

No equivalent requirements exist in the BVI.

Offering document/term sheet

Cayman Islands

CIMA has confirmed (although not specified in the Cayman PF Act) that an offering memorandum/summary of terms/marketing material (as applicable) would be required in respect of a private fund's application for registration. CIMA has now published rules on the contents of marketing material and private funds will need to ensure that their marketing materials comply with those rules.

BVI

In the BVI, the BVI PIF Regulations contemplate an offer or invitation to purchase or subscribe for fund interests in a private investment fund to be made within either an offering document or term sheet and stipulate the contents that should be contained therein. The BVI PIF Regulations also provide that where an offering document or term sheet is not issued, the fund is required in its application to the FSC to provide the reason for not issuing an offering document/term sheet, including an explanation in relation to how relevant information concerning the fund and any invitation or offer will be provided to investors or potential investors. What this means from a practical perspective is that where a private investment fund opts not to issue an offering document or term sheet, for the FSC to accept this, the required regulatory disclosures will need to be contained elsewhere in the fund's constitutional documents and/or subscription agreement.

Authorised representative

BVI

A private investment fund must have at all times an "authorised representative" in the BVI to act as the main intermediary between the fund and the FSC, to accept services of notices and other documents, to keep such records (or copies thereof) as may be prescribed, and to submit all documents required and pay all fees payable to the FSC. The concept of an authorised representative in the BVI is not a new one and all entities licensed under SIBA are required to have an authorised representative in the absence of their having a substantive presence in the BVI. The authorised representative role is typically performed by a licensed affiliate of the registered agent. Through one of our affiliates which holds an authorised representative licence, Ogier can act as the authorised representative for any of our private investment fund clients.

Cayman Islands

No equivalent requirement exists in Cayman.

Additional requirements applicable to a BVI private investment fund

- A BVI private investment fund's constitutional documents must specify that:
- 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
- the fund interest 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.

There are no equivalent requirements in the Cayman Islands.

If you would like to discuss any of the above or any specific structure with us, please do not hesitate to speak to your usual Ogier contact.

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