

# What to know about BVI's regulatory change for investment structures

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It was unfortunate that such a fundamental change to the regulatory regime of the British Virgin Islands (**BVI**) was largely overshadowed due to the twin challenges of the economic substance regime implementation in 2019/2020 and the COVID 19 pandemic in 2020. Save for structures established for the purposes of a making a single investment, most investment fund structures that fell outside the open-ended fund regime will now be subject to the new regulations and many investment holding structures that may not previously have been considered as 'funds' may warrant some regulatory analysis to ensure that remains the case.

The official registration deadline for any structure caught by the new regulations was 1 July 2020, but it is understood that the BVI's Financial Services Commission may still accept late submissions from affected structures without imposing a financial penalty; however, the window of opportunity to tidy up these structures is fast closing.

As such it is imperative that directors, GPs, Trustees, administrators, CSPs and managers of BVI investment structures undertake a thorough review of their vehicles to determine whether they are in scope and require to be recognised as a private investment fund under the 2020 rules.

## Background

In response to the requirements of the European Union that the BVI should regulate close-ended collective investment schemes as well as open-ended collective investment schemes, the BVI enacted the Securities and Investment Business (Amendment) Act, 2019 (the **SIBA Amendment Act**), the and introduced the accompanying Private Investment Funds Regulations, 2019 (the **PIF Regulations**). This legislation introduced a new regulatory regime for close-ended funds which came into force on 31 December 2019, with a formal transition period of 6 months, ending on 1 July 2020.

## What investment structures are caught by these changes?

The SIBA Amendment Act introduces a new category of fund requiring regulation, being a "private investment fund". An investment structure will come within the new definition of a "private investment fund" where the following two-part test is satisfied, namely where it:

- (i) collects and pools investor funds for the purpose of collective investment and diversification of portfolio risk; and
- (ii) issues shares, LP interests, units or similar, 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 investment structure.

There are three important components to this test, being (i) collective investment (ie having two more investors); (ii) diversification of risk (ie making more than a single investment); and (iii) an entitlement to receive on exit a return computed by reference to the value of the net assets.

## Are there any exemptions?

Not formally. However, the BVI's Financial Services Commission (the **Commission**) has given oral guidance as to certain structures it views as being outside the intended scope of the private investment fund regulations, including structures such as most joint ventures, single investment vehicles and single family/ family office structures. No formal written guidance has been produced to date and so whether a structure is considered 'out of scope' will need to be assessed on a case by case basis.

## What are the requirements if a vehicle falls to be regulated under the private investment fund regime?

There are a number of requirements which must be satisfied in order for the fund to be capable of being recognised as a private investment fund. the following constitutes a summary of these requirements:

1. The fund, if a corporate vehicle, must have at least 2 directors, one of whom must be an individual;
2. The fund must identify to the Commission the persons responsible for:
  - (a) the management of fund property;
  - (b) the valuation of fund property; and
  - (c) the safekeeping of fund property, including the segregation of fund property(the 'appointed persons') who must be suitably licensed or qualified to undertake such

activities or be a director, partner or trustee of the fund. Where the same person is responsible for both the management and valuation of the fund, the fund must identify, manage and monitor any potential conflicts of interest that may arise and disclose to investors in the fund that the appointed person responsible for the fund's management function is also the appointed person responsible for the valuation of fund property and must disclose details of how any potential conflicts of interest will be managed.

3. The fund must make its offer or invitation to invest in an offering document or term sheet (unless otherwise permitted by the Commission) and the offering document or term sheet must state:

(a) That the fund is only suitable (as applicable) for

(i) private investors and

(A) that the fund is limited to 50 investors, or

(B) any invitation to subscribe for fund interests may be made on a private basis only; or

(ii) professional investors (as defined in the Act) and the minimum investment of \$100,000 (or such larger sum as may apply with respect to the fund) is required;

(b) the investment objective of the fund;

(c) that investors do not have the right to redeem or withdraw fund interests on demand;

(d) the names and addresses of the appointed persons responsible for the management, valuation and safekeeping of fund property; and

(e) any fees to be paid by the fund.

4. In addition, the fund's constitutional documents must specify that

(a) the fund is not authorised to have more than 50 investors; or

(b) an invitation to subscribe for, or purchase, fund interests issued by the fund shall be made on a private basis only; or

(c) the fund interests of the fund shall be issued only to professional investors with an initial investment of each professional investor, other than exempted investors, of not less than such sum as may be prescribed in the Private Investment Funds Regulations

5. The fund must 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.

6. The valuation policy and procedures of a private investment fund are required to:

- (a) be appropriate for the nature, size, complexity, structure and diversity of the fund and fund property;
- (b) be consistent with the provisions concerning valuation contained in its constitutional documents and offering document or term sheet;
- (c) require valuations to be undertaken at least on an annual basis;
- (d) include procedures for preparing reports on the valuation of fund property; and
- (e) specify the mechanisms in place for disseminating valuation information and reports to investors.

7. The fund is required to produce financial statements that comply with

- (a) the International Financial Reporting Standards, promulgated by the International Accounting Standards Board;
- (b) UK GAAP;
- (c) US GAAP;
- (d) Canadian GAAP; or
- (e) such other internationally recognised and generally accepted accounting standards equivalent to the accounting standards referred to in sub-paragraphs (a) to (d).

8. The financial statements must be audited by an auditor who prepares his or her report in accordance with prescribed or approved accounting standards and the auditor is required, as part of his or her audit process to assess and certify compliance with the private investment fund regime.

9. The fund must provide a copy of its audited financial statements to the Commission within 6 months after the financial year end to which the financial statements relate unless the period is extended by the Commission in writing.

10. The fund must appoint an authorised representative in the BVI who is responsible for making various ongoing notifications and filings and communicating with the Commission on the fund's behalf.

## Will a private investment fund be subject to the BVI's economic substance requirements?

The business of being an investment fund is not a relevant activity, although as the BVI's economic substance legislation currently stands, investment funds which are also undertaking a relevant activity are required to demonstrate substance for those relevant activities. However, legislation is expected later in the year to expressly exclude investment funds from the BVI's economic substance regime.

## Who is liable if a fund fails to become recognised as a private investment fund?

Where a fund falls within the definition of a 'private investment fund' under the SIBA Amendment Act and is not either recognised as such or specified as not requiring to be recognised by Order issued by the Commission:

- the fund itself commits an offence by virtue of failing to be recognised;
- the fund itself and any other person commits an offence if he or she communicates, or causes to be communicated, an invitation or inducement to any other person, or advises or procures any other person, to become an investor, or to offer to become an investor, in the fund; and any person who acts as an appointed person, or otherwise is concerned with the management or valuation, of the fund commits an offence.

## What are the next steps?

Given that the formal transition period has now expired and all existing structures to which the private investment funds regime apply should be recognised under that regime, service providers should go through their book of BVI companies as a matter of urgency to identify any structures which may need further analysis and, if applicable to it, recognition under the new regime.

We would be happy to assist with this analysis or providing further detail on the requirements for recognition and implications of being a private investment fund.

## About the authors:

**Simon Schilder:** Simon heads Ogier's BVI law in Europe team from the firm's Jersey office – his practice covers investment funds, cross border and multi-jurisdictional mergers & acquisitions, corporate finance, and equity capital markets. Prior to relocating to the firm's Jersey office in 2015, Simon spent 11 years based in the firm's BVI office.

During his time in the BVI, Simon was Chairman of the Investment Funds Association and Chairman of the BVI's Securities, Investment Business and Mutual Funds Advisory Committee, a

committee established by the Financial Services Commission to keep the Securities and Investment Business Act and other enactments relevant to securities, investment business and funds under review (SIBAC).

**Tim Clipstone:** Tim is a Guernsey Advocate and is a partner in our Guernsey based corporate, funds and regulatory team. He advises on all aspects of Guernsey and BVI regulated and unregulated corporate structures, including their formation, regulation, listing, sale and purchase and restructuring and is a committee member of the Guernsey Green Finance Strategy Committee.

Prior to joining the Ogier team in Guernsey, Tim spent a total of 9 years in the BVI and 4 years in Cayman where he was the head of another firm's BVI Funds and Regulatory Team and, before that, headed another firm's Distressed Funds Cayman and BVI Team during the 2008 financial crisis and its aftermath. While in the BVI, Tim was a council member of the Investment Funds Association, Chairman of SIBAC and helped to draft and bring in the Incubator and Approved Funds regime as well as various amendments to the BVIBCA and the revised Limited Partnership Act. He also chaired the BVI FSC's AIFMD Advisory committee and was a committee member of Cayman's AIFMD advisory committee.

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