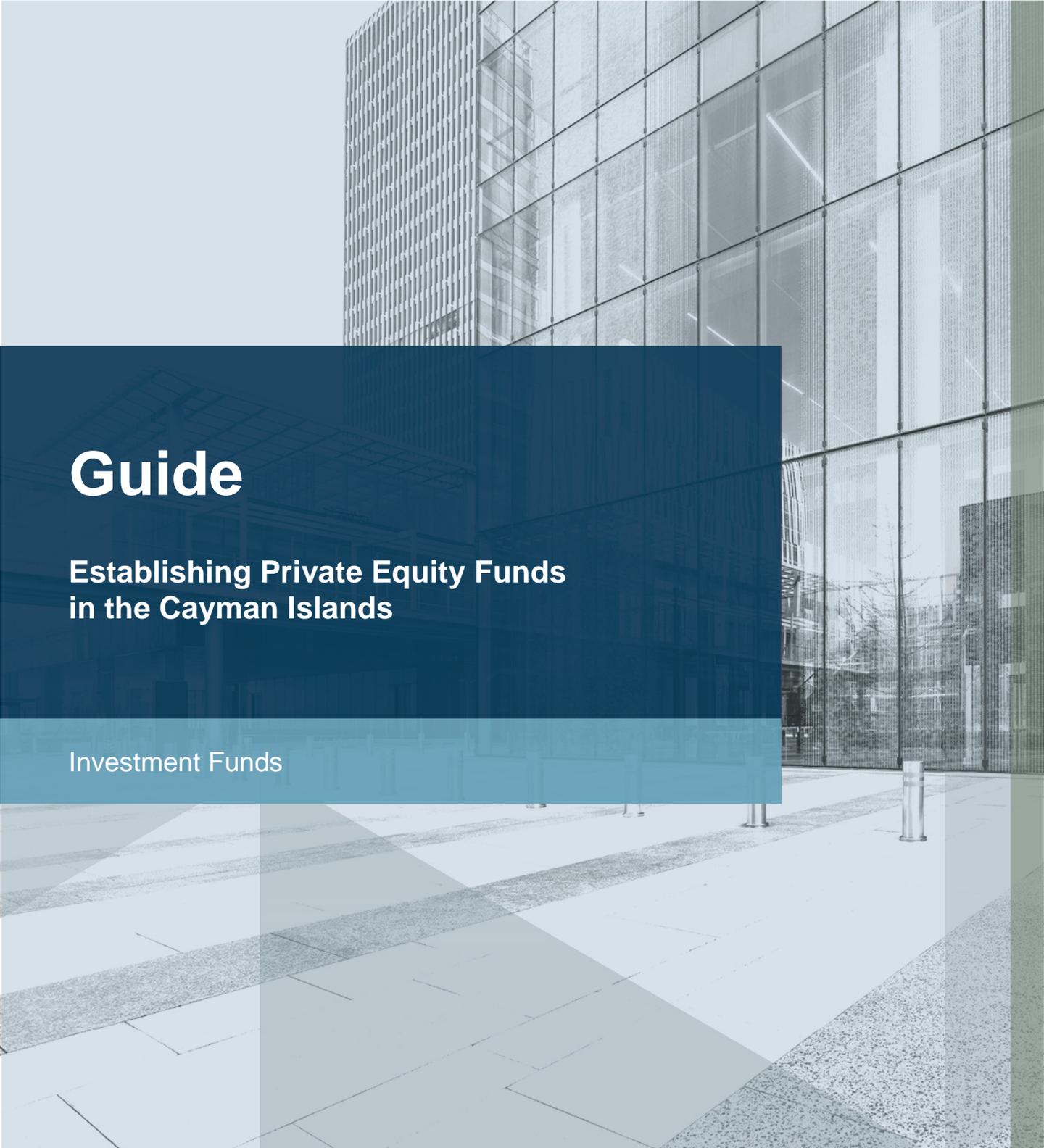


CONYERS



Guide

Establishing Private Equity Funds in the Cayman Islands

Investment Funds

Foreword



Having provided advice to hundreds of investment funds in Asia and around the world, I have prepared this guide.....

Best,

Piers Alexander

Partner

Conyers Dill & Pearman

There's a reason that the Cayman Islands is one of the world's biggest and most attractive hubs for offshore financial businesses. Not only does it provide a stable, tax-neutral platform but also offers a sound legislative and judicial system, confidentiality, one of the world's most active banking sectors and legal and financial professional and support services.

As issues of high taxation, complex financial laws and economic and political instability continue to affect the onshore world, the attractiveness of the Cayman Islands as a location for establishing private equity funds increases.

To help fund managers decide whether the Cayman Islands is the right home for their fund, we've outlined some important factors to consider when setting up a private equity fund, as well as provided an overview of necessary documentation and relevant regulations.

Key Considerations

1. What Fund Structure Should You Use?

While an open-ended fund permits periodic redemptions by the investors and is a good choice for funds with liquid investment strategies (such as hedge funds), a closed-ended structure is suitable for those that require more time for their investments to mature.

In a closed-ended fund, an investor cannot redeem or exit from the fund until it is wound up. A closed-ended fund also only accepts investors for a set period, such that the number of investors is fixed at the closing of the subscription deadline. Because investors want to know how long their capital will be tied up, a closed-ended fund usually has a finite lifespan.

[Due to the restrictions on withdrawals, investors may be granted some rights and powers so that they have a say in determining certain key matters affecting the fund. These rights and powers may, for example, include approving the winding-up of the fund, nominating representatives to an advisory board and approval of significant expenditures.]

2. The Limited Partnerships

The most popular vehicle for Asian private equity funds is an exempted limited partnership. In the Cayman Islands, the Exempted Limited Partnership Law (ELPL) governs the formation of these kinds of partnerships. To be registered under the ELPL, such partnerships must have a general partner and at least one limited partner. An exempted limited partnership does not have a separate legal personality and the general partner is responsible for the management of the partnership business. Contracts and other documents with third parties will therefore be entered into by the general partner on behalf of the partnership.

Under the ELPL, there are a number of specific requirements applicable to the exempted limited partnership structure. These include that at least one general partner must have a presence in the Cayman Islands (which can take various forms) and that on the insolvency of the partnership, the general partner is liable for all the partnership's debts and obligations.

It's worth noting that, under the ELPL, a limited partner's role is very different than that of a general partner. A limited partner is a passive investor and must not take part in the conduct of the business of the partnership or it will too risk being liable for the partnership's debts and obligations. The ELPL's "safe harbour" provisions, however, enable a limited partner to undertake certain roles or to perform certain actions with respect to the partnership without risking its limited liability status. For example, a limited partner may approve amendments to the partnership agreement serve on, or nominate members to, a board or committee of the general partner, the partnership or the partners or consult with or advise a general partner.

3. Exempted Companies/Segregated Portfolio Companies

An alternative, though less commonly used, structure for Asian private equity funds is an exempted company or a segregated portfolio company (SPC). Under the Cayman legislation for SPCs, assets and liabilities are separated into distinct pools. SPCs are attractive because they can achieve such separation within one vehicle and so avoid the expense of incorporating separate companies in order to obtain the same effect. SPCs can be used to establish a number of single investor portfolios designed to meet an investor's specific needs and without having to disclose the details of such portfolios to other investors in the SPC.

In terms of subscriptions, similar to a limited partnership, the SPC could accept subscriptions during a set period. Capital commitments would be drawn down by the directors of the SPC when needed to make investments or to pay fees and expenses and an appropriate number of shares reflecting the value of the capital contributions would then be issued to investors.

4. Limited Liability Company

A third option is to set up a private equity fund as a limited liability company (LLC); a LLC combines many of the features of a company with the flexibility of a partnership. Unlike a partnership, a LLC may be formed by a single member. Members receive one LLC interest, representing, for example, a share of profits and losses, voting rights and the right to receive dividends.

5. Preferred Fund Structure

In general for Asian private equity funds, a closed-ended Cayman Islands exempted limited partnership is the preferred vehicle, with a Cayman Islands exempted company incorporated as its general partner. Below is a short overview of some of the key applicable regulations and documentation.

Regulations

As a closed-ended fund, it will not be a mutual fund under the Mutual Funds Law of the Cayman Islands and so will not be regulated by the Cayman Islands Monetary Authority.

While the general partner will be exempt from licensing under the Securities Investment Law of the Cayman Islands (SIBL), it must not carry on securities investment business unless as a necessary or incidental part of its role as general partner. The partnership and the general partner must have a registered office in the Cayman Islands, which Conyers Client Services will provide.

Incorporation

Conyers Client Services will oversee the incorporation of the general partner as a Cayman Islands exempted company and establishment and registration of the fund as an exempted limited partnership. This can usually be done within 48 hours of submission of each application to the Cayman Registrar. However, copies of the certificate of incorporation and memorandum and articles of association of the general partner and the certificate of registration of the partnership, may take up to 7-10 working days to be issued by the Cayman Registrar unless the expedited service is used.

To streamline the set-up process, the fund will be established with a Conyers Client Services standard limited partnership agreement, entered into by the general partner and someone who will act as the initial limited partner (and who will usually withdraw from the partnership once the investor limited partners are admitted).

Fund Documentation

In general, the following documents may be required for the fund.

- Limited Partnership Agreement

The limited partnership agreement establishes the fund and provides for its overall operation. The standard Conyers Client Services limited partnership agreement will be amended to cover the withdrawal of the initial limited partner and to reflect other commercial and operational terms for the admission of the investor limited partners.

- Subscription Agreement

The subscription agreement contain details relating to subscriptions for limited partnership interests in the fund, including capital commitments and bank accounts.

- Section 9 Statement

The section 9 statement contains the details required by the ELPL (such as the names and registered offices of the general partner and the Partnership, and the duration of the partnership) and will be filed with the Cayman Registrar.

- Private Placement Memorandum

If issued, this document contains commercial and operational information relevant to the terms and structure of the fund, including applicable risk factors, prospective deals and management experience.

- Memorandum and Articles

These will be Conyers Client Services' standard memorandum and articles of association for an exempted company incorporated with limited liability in the Cayman Islands.

- Launch Resolutions

The resolutions are passed by the directors of the general partner and cover the review and approval of the amended and restated limited partnership agreement and the subscription agreement, for example.

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This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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