

Alert

The New BVI Private Investment Funds Regime

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The British Virgin Islands (BVI) has introduced a new regulatory regime for the recognition of private investment funds. Under the new regime, closed-ended funds, including private equity and venture capital funds, which were previously not regulated in the BVI, will have to be recognised by the Financial Services Commission (FSC) as private investment funds prior to carrying on business, subject to a transition period for existing funds (see below).

Background

Closed-ended funds were historically not regulated in the BVI as they fell outside the definition of “fund” for the purposes of the BVI Securities and Investment Business Act, 2010 (“SIBA”). However, by an amendment to SIBA pursuant to the Securities and Investment Business (Amendment) Act, 2019 (the “Amending Act”), such funds will now be required to apply to the FSC for recognition as private investment funds. The Amending Act and accompanying Private Investment Funds Regulations, 2019 (the “Regulations”) were introduced in order to bring the BVI into conformity with European Union requirements to regulate closed-ended investment funds.

Definition of Private Investment Fund

A private investment fund is defined to include a company, partnership or unit trust which collects and pools investor funds for the purposes of collective investment and diversification of portfolio risk, and which issues fund interests that entitle the holder to receive an amount computed by reference to the value of a proportionate interest in the net assets of the fund. Most closed-ended and private equity funds will be considered private investment funds under the new regime.

Requirements of a Private Investment Fund

In order to be recognised by the FSC, a private investment fund’s constitutional documents will need to specify that (i) it will have no more than 50 investors, (ii) an invitation to subscribe for or purchase shares or fund interests issued by the fund is to be made on a private basis only or (iii) shares or fund interests are made available only to professional investors and the initial investment of each investor in the fund (other than certain “exempted investors”) is not less than US\$100,000 or its equivalent in another currency.

An invitation made on a “private basis” includes an invitation which is made (a) 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 (b) by reason of a private or business connection between the person making the invitation and the investor. “Exempted investors” is currently not defined but is expected to comprise a narrow category which includes employees of the manager or promoter of the fund.

A “professional investor” is defined as a person (i) 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 (ii) 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 that he consents to being treated as a professional investor.

Regulation of a Private Investment Fund

A private investment fund is subject to the following:

- A private investment fund that is a company (or the general partner in the case of a limited partnership or the trustee in the case of a unit trust) must have two directors, one of whom must be an individual. As well, the fund will need an authorised representative in the BVI (which is part of the registered agent services provided by Conyers Corporate Services).
- A private investment fund must at all times have an appointed person or persons who is or are responsible for undertaking (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 application for recognition must include the name and address of each appointed person. An appointed person may be (i) a person licensed by the FSC or a regulatory authority in a recognised jurisdiction to perform the specified functions, (ii) an independent third party with experience in performing the specified functions or (iii) a director, partner or trustee of the private investment fund. The same appointed person may carry out more than one of the functions of managing, valuing and safekeeping of fund property except that the appointed person responsible for the fund's management function must be independent from the appointed person responsible for the valuation process.
- An offer or invitation to an investor or a potential investor to purchase or subscribe for fund interests in a private investment fund must be made within an offering document or a term sheet. The offering document or term sheet must clearly indicate that the fund is recognised by the FSC as a private investment fund and contain (a) an indication as to whether (i) the fund is suitable for private investors only and is limited to 50 investors, or any invitation to subscribe for fund interests may be made on a private basis only, or (ii) the fund is only suitable for professional investors and a minimum investment of US\$100,000 (or such larger sum as may apply with respect to the fund) is required, (b) the investment objective of the fund, (c) a written statement that investors do not have the right to redeem or withdraw fund interests on demand, (d) the names and addresses of the appointed persons for the fund and (e) any fees to be paid by the fund. The fund may choose not to issue an offering document or term sheet subject to providing to the FSC the reason for not doing so and explaining how relevant information concerning the fund and any invitation or offer will otherwise be provided to investors or potential investors.
- A private investment fund is required to prepare financial statements complying with the International Financial Reporting Standards promulgated by the International Accounting Standards Board, UK GAAP, US GAAP, Canadian GAAP or internationally recognised and generally accepted accounting standards equivalent to any of the foregoing. Each private investment fund is required to provide a copy of its audited financial statements to the FSC within six months after its financial year end. Application may be made to the FSC for (a) an exemption from the requirement to prepare and submit financial statements or (b) an extension of time to prepare and submit financial statements, in each case under certain limited circumstances. There is no requirement for a local BVI auditor or local BVI auditor sign-off.

Changes to a Private Investment Fund

The FSC is required to be notified of (i) any change to the directors, appointed persons, authorised representative or auditor of a private investment fund, (ii) any change in the address of the fund's place of business, (iii) any material change in the nature and scope of the fund's business, in the case of a fund incorporated, constituted, formed or organised under the laws of a country outside the BVI, (iv) any amendment to the constitutional documents of the fund, (v) the issue of an offering document or a term sheet that was not previously provided to the FSC, (vi) the amendment of any offering document or term sheet previously provided to the FSC and (vii) any amendment to the fund's valuation policy.

Application Process

The application process under the Regulations is straightforward. A simple application form must be completed and submitted to the FSC together with the relevant application fee and basic supporting documentation in respect of the fund, including a copy of the (i) certificate of incorporation or formation, (ii) constitutional documents, (iii) register of directors (if a company), (iv) a curriculum vitae for each director, or director of the general partner or trustee; (v) the offering document or term sheet and (vi) the fund valuation policy. A new fund may carry on business for a period of 21 days prior to submitting an application provided that such application is made within 14 days of commencing business.

Fees

The application fee payable to the FSC is US\$750 and the annual fee payable to the FSC is US\$1,000. The fund will also incur a fee payable to the Registrar in the amount of US\$450 or US\$1,200 per annum in the case of a company and US\$750 in the case of a

limited partnership. Consideration also needs to be given to the registered agent fee and legal fees, but generally there are no other fees, such as director registration fees or local auditor sign off fees, payable by the fund in the BVI.

Transition Period

A fund which was carrying on business as a private investment fund before 31 December 2019 may continue to operate, but will have to apply for recognition on or before 1 July 2020 in order to continue operating after such date.

Other Regulatory Changes

The following changes also came into force on 31 December 2019:

- Both mutual funds and private investment funds are now 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 policy must, among other things, be appropriate for the nature, size and complexity of the fund and fund property and require valuations to be undertaken at least on an annual basis.
- From 1 July 2020, a licensed fund manager and a licensed private investment fund manager must notify the FSC within 21 days of commencing to act as an investment manager of a mutual fund or a private investment fund, or a fund with equivalent characteristics to a mutual fund or a private investment fund.

Conclusion

Despite the additional regulation, which also affects most other comparable jurisdictions, when coupled with the light-touch Approved Manager regime for managers and advisers ([click here](#) for more information), the flexibility of BVI's corporate and limited partnership laws, the strength of BVI's commercial court and BVI's competitive fees, BVI remains a highly attractive domicile for private equity and venture capital firms.

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