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Alternative Funds 2021

British Virgin Islands: Law and Practice
Eric Flaye
Conyers

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BRITISH VIRGIN ISLANDS

Law and Practice

Contributed by:

Eric Flaye

Conyers see p.15



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1. GENERAL

1.1 General Overview of Jurisdiction

The British Virgin Islands (BVI) is a leading international finance centre and one of the most popular offshore domiciles for alternative investment funds and managers. Sponsors are attracted to the cost and time efficiencies of launching and operating a fund or manager in the BVI, as well as the quality and sophistication of the BVI's regulatory framework and broader funds industry. As of the end of Q1 2021, the BVI was home to approximately 1,700 regulated funds and 670 regulated managers.

Funds activity has comprised a significant part of the BVI's finance industry over the past 25 or so years, developing with it a substantial network of sophisticated local infrastructure in terms of legal, administrative and other professional service providers.

BVI's key value proposition has always lay in its compelling combination of ease, speed and cost-effectiveness of formation, and significant flexibility in terms of structuring and governance, as supported by a regulatory regime which is robust but appropriate for private fundraising globally. In recent years, the BVI industry has focussed its efforts in carving out a reputation as the natural home for mid-sized and emerging managers across both the hedge fund and PE/VC funds space.

Particular strengths of the BVI as a premier offshore domicile for investment funds include the following.

- Attractive suite of fund products and structures – the BVI offers a diverse set of offshore fund products and structures, suitable for the full gamut of sponsors from emerging start-ups all the way up to institutional managers with established track records and significant assets under management.
- Cost and time efficient – the BVI is a very efficient jurisdiction in which to structure, launch and maintain an offshore fund or manager.
- Appealing regulatory environment – the BVI offers robust but proportionate levels of industry regulation (with sound but commercially sensible levels of regulatory oversight and ongoing compliance requirements). No particular investment restrictions or limitations apply to BVI funds. Also, the industry's regulator, the BVI Financial Services Commission (BVI FSC), is very responsive and constructive in its approach, and is generally willing to consider novel proposals and structures on their merits.
- Limited local substance requirements – regulated investment funds generally fall outside of local economic substance requirements. There is no mandatory requirement for BVI-resident directors.
- Foreign service providers permitted – a BVI fund is generally free to engage its preferred service providers based outside of the BVI (provided they are located in a “recognised jurisdiction” and meet the BVI FSC's “fit and proper” criteria). To the extent an audit is required, a foreign (non-BVI-based) audit firm may be engaged (and a local audit sign-off by a BVI-based auditor is not required). For BVI limited partnerships, an entity formed outside of the BVI may act as the general partner (GP) (without any local registration requirements for the foreign GP in the BVI).
- Global recognition and familiarity – BVI funds are recognised by and familiar to sophisticated investors, lenders and securities regulators worldwide.
- Best in class company and partnership law – the BVI has progressive, flexible and business-friendly company and partnership law legislation, often considered an anglicised version of Delaware law and supported by

English common law precedent and analysis. In particular, there is a high degree of flexibility to tailor bespoke governance and capital arrangements.

- Tax neutrality – no direct taxes are assessable in the BVI on a BVI company or partnership or its investors.
- International compliance – the BVI adheres to all applicable international compliance standards. It is listed on the OECD’s “white list” and is a member of the International Organization of Securities Commissions (IOSCO). The BVI was amongst those jurisdictions moved to the EU’s list of fully co-operative tax jurisdictions on 18 February 2020.
- Sophisticated and reliable judicial system – the BVI legal system is tried and tested. The BVI has a dedicated and experienced Commercial Court, with ultimate appeal to the Privy Council of the United Kingdom, as well as a highly-regarded International Arbitration Centre.

2. FUNDS

2.1 Types of Alternative Funds

Although all types of alternative funds are established in the BVI, its sweet spot is currently with small-to-mid sized hedge funds and private equity and venture capital funds (including, in recent times, cryptocurrency and other digital assets funds).

2.2 Fund Structures

The BVI offers a diverse set of offshore fund products and structures, suitable for the full gamut of sponsors from emerging start-ups all the way up to institutional managers with established track records and significant assets under management.

The most common fund structures in BVI are:

- limited partnerships;
- business companies (corporations); and
- segregated portfolio companies (which are potentially suitable for multi-strategy or umbrella fund structures).

As a broad generalisation, BVI private equity and venture capital funds tend to be structured as limited partnerships whereas BVI hedge funds tend to be structured as companies.

A BVI limited partnership can have a foreign (non-BVI) entity as its GP (and local registration requirements generally do not apply to foreign GPs of BVI limited partnerships).

Segregated Portfolio Companies

Segregated portfolio companies are a niche product but can be utilised effectively as either private equity/venture capital funds or hedge funds.

A BVI segregated portfolio company (SPC) is a company limited by shares which is permitted to create one or more “segregated portfolios” (or “cells”) linked to a particular class or classes of shares in order to segregate the assets and liabilities held in or on behalf of a segregated portfolio (and such related classes) from the assets and liabilities of the SPC: (i) held in or on behalf of any other segregated portfolio (and related classes) of the SPC; and (ii) which are not held within or on behalf of any segregated portfolio of the SPC (“general assets”). A BVI SPC is one discrete legal entity. Assets linked to a particular segregated portfolio (and related class) are held by the company as a separate fund. Such assets are not available to meet the company’s general liabilities and cannot (unless otherwise agreed) be made available to satisfy liabilities linked to other classes and corresponding accounts of the company. These unique aspects make SPCs potentially suitable and attractive for multi-strategy or umbrella

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fund structures. An SPC allows multiple different fund strategies to be operated as distinct portfolios (or “cells”) under the umbrella of one single segregated portfolio company with common management and functionaries/service providers, if desired, and with the unique benefit of statutory segregation. Significant costs savings (relative to forming and operating multiple distinct fund structures) can potentially be realised, provided there is sufficient scale. However, SPCs are a somewhat complicated and bespoke product and are generally only suitable for use by sophisticated sponsors with strong internal control mechanisms in place (in order to ensure compliance with the special operational rules which apply to SPCs under BVI company law) as well as sufficient scale to justify the upfront formation costs.

2.3 Regulatory Regime

The BVI offers robust but proportionate levels of industry regulation (with sound but commercially sensible levels of regulatory oversight and ongoing compliance requirements). The regulatory application process is relatively time and cost efficient.

The principal legislation pertaining to hedge funds and other open-ended funds in the BVI is the Securities and Investment Business Act, 2010 (SIBA) and regulations thereto. The principal legislation pertaining to private equity, venture capital and other closed-ended funds is SIBA and the Private Investment Funds Regulations, 2019 issued under SIBA. This legislation sets out the requirements for the approval, recognition and registration of funds incorporated or formed under the laws of the BVI or otherwise carrying on business in or from within the BVI.

The principal regulator of the BVI funds industry is the BVI Financial Services Commission.

BVI funds can generally be categorised, for local regulatory purposes, as one of the following.

- Open-ended funds (which provide investors the right to withdraw capital at periodic intervals by reference to the net asset value of the fund) – these are subject to regulation as “mutual funds”. Most hedge funds would fall into this category.
- Closed-ended funds (which do not provide periodic redemption/withdrawal rights to investors, with distributions at the discretion of the operator of the fund instead) – these are subject to regulation as “private investment funds”. Most private equity and venture capital funds would fall into this category, subject to certain limited exceptions.

BVI “Mutual Funds”

These are divided into sub-categories and can be structured and regulated as follows.

Professional funds

These are suitable for a full-fledged hedge fund structure. No limits apply on assets under management or the maximum number of investors. However, they may only be offered to “professional investors” with a minimum initial investment of USD100,000 (other than for “exempted investors”).

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 or she, whether individually or jointly with his or her spouse, has net worth in excess of USD1 million and that he or she consents to being treated as a professional investor.

“Exempted investors” is narrowly defined and includes employees of the manager or promoter of the fund and fund functionaries.

Professional funds currently comprise approximately 58% of all BVI regulated mutual funds.

Private funds

These are suitable for a full-fledged hedge fund structure or a significant “friends and family” type offering. No cap applies on assets under management, there are no investor qualification requirements, and no minimum initial investment per investor applies. However, they may only be offered to a maximum of 50 investors (or potentially more than 50, provided the offer is made on a “private basis” only).

An invitation made on a “private basis” includes an invitation which is made (i) to specified persons and is not calculated to result in fund interests becoming available to other persons or to a large number of persons; or (ii) by reason of a private or business connection between the person making the invitation and the investor.

Private funds currently comprise approximately 18% of all BVI regulated mutual funds.

Approved funds

These are a low-cost product suitable for start-up/emerging managers looking to prove their investment strategy and establish a track record in the most cost-efficient manner (and are also popular for “friends and family” type private offerings and managed account structures). The only mandatory service provider is a fund administrator. No investor qualification requirements or minimum initial investment per investor applies. However, assets under management cannot exceed USD100 million, and the number of investors cannot exceed 20. Approved funds currently comprise approximately 14% of all BVI regulated mutual funds.

Incubator funds

These are a low-cost product suitable for start-up/emerging managers looking to prove their investment strategy and establish a track record in the most cost-efficient manner. There are no mandatory service providers. However, assets under management cannot exceed USD20 million, and the number of investors cannot exceed 20. They may only be offered to “sophisticated private investors” with a minimum initial investment of USD20,000. They also have a finite lifespan: an incubator fund has a maximum term of two years (with an extension of up to 12 months available with permission from the BVI FSC), upon expiry of which the fund must be converted into a professional fund, private fund or approved fund or otherwise be wound up. Incubator funds currently comprise approximately 7% of all BVI regulated mutual funds.

Public funds

These are, in essence, retail funds, and are subject to correspondingly high regulatory burdens. No limits apply on assets under management or the maximum number of investors, and no investor qualification requirements or minimum initial investment per investor applies. Public funds currently comprise approximately a mere 2% of all BVI regulated mutual funds.

Foreign funds

These are funds which are formed and already operating in another jurisdiction which apply to the BVI FSC for recognition as a foreign fund in the BVI. The only reason a foreign fund would apply for recognition in the BVI would be if it intends to offer its fund interests to investors in the BVI or otherwise intends to carry out its business in or from within the BVI. Foreign funds currently comprise less than 1% of all BVI regulated mutual funds.

The remainder of this chapter shall not focus on or detail the requirements of BVI public funds or

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foreign funds (given their relative scarcity), save as otherwise indicated.

BVI “Private Investment Funds

For closed-ended funds which are regulated as “private investment funds” in the BVI, no limits apply on assets under management. However, a private investment fund’s constitutional documents must specify that one of the following three criteria applies:

- it will have no more than 50 investors;
- an invitation to subscribe for or purchase fund interests issued by the fund is to be made on a “private basis” only; or
- fund interests are made available only to “professional investors” with an initial investment per investor (other than “exempted investors”) of not less than USD100,000. Exemptions from regulation may potentially apply for closed-ended funds which only hold one single investment holding, and for single family office funds.

Investment Limitations

Save as mentioned above regarding caps on assets under management, no particular investment or borrowing restrictions or limitations apply to BVI funds (whether structured as “mutual funds” or “private investment funds”).

2.4 Loan Origination

BVI funds can originate loans without any limitations or restrictions; no special rules apply. However, careful analysis should be undertaken with respect to credit funds to assess whether they might carry on the “relevant activity” of a “finance and leasing business” for the purposes of the BVI economic substance regime.

2.5 Non-traditional Assets

No particular investment restrictions or limitations apply to BVI funds (whether structured as “mutual funds” or “private investment funds”).

As a result, BVI funds have proven adaptable and very popular for investments in non-traditional assets, such as cryptocurrencies and other digital assets, as well as other non-traditional assets such as artworks, fine wines, etc.

In recent times, the BVI FSC has adopted a cautiously supportive but measured approach to fund structures involving cryptocurrencies and other digital assets, and has issued specific industry guidance in that regard. A key focus of the BVI FSC when assessing applications for crypto and other digital assets funds is adequate arrangements for the safekeeping/custody of investments.

BVI’s popularity for crypto funds goes hand-in-hand with its market position as one of the largest cryptocurrency exchange markets in the world and as a leading domicile for token/coin issuer vehicles.

Cannabis funds are not currently permitted in the BVI.

2.6 Regulatory Approval Process

The BVI is a very time efficient jurisdiction in which to launch a new fund. The regulatory approval timeframes can vary by type or category of fund but suffice to say that formal approval can often be obtained within one to five business days (with a well-drafted and complete set of application materials).

A professional fund or private investment fund may actually carry on business in advance of regulatory approval, for an interim grace period not exceeding 21 days pending regulatory recognition by the BVI FSC, provided it satisfies the criteria for a professional fund or private investment fund, as the case may be, and complies with all applicable laws.

In contrast, a private fund cannot commence business until recognised by the BVI FSC.

An approved fund or incubator fund may commence business within two business days of lodging a completed application for approval with the BVI FSC.

2.7 Requirement for Local Investment Managers

There is no requirement for a local BVI investment manager to be appointed to a BVI fund – a sponsor may appoint an investment manager located in any “recognised jurisdiction” provided it meets the BVI FSC’s “fit and proper” criteria.

2.8 Other Local Requirements

Regulated investment funds generally fall outside of BVI economic substance requirements (and therefore local business premises and employees are generally not required). However, careful analysis should be undertaken with respect to credit funds to assess whether they might carry on the “relevant activity” of a “finance and leasing business” for the purposes of the BVI economic substance regime (in which case significant economic substance requirements may apply in BVI).

There is no mandatory requirement for BVI-resident directors, and no director registration or licensing requirements apply.

A BVI limited partnership can have a foreign (non-BVI) entity as its GP (and local registration requirements generally do not apply to foreign GPs of BVI limited partnerships).

The key mandatory local requirements are a BVI registered agent and office, and a BVI “authorised representative” (to act as an intermediary point of contact for dealings between the fund and the BVI FSC). The corporate services agent

which incorporates the fund entity would normally provide such local services.

2.9 Rules Concerning Other Service Providers

A BVI fund is generally free to engage its preferred service providers based outside of the BVI, provided they are located in a “recognised jurisdiction” and meet the BVI FSC’s “fit and proper” criteria. Compliance officers can also be based outside of the BVI.

The list of “recognised jurisdictions” is extensive and includes all major financial centres and many other developed nations. Service providers other than from “recognised jurisdictions” may potentially be acceptable subject to application to and approval by the BVI FSC.

2.10 Requirements for Non-local Service Providers

Non-local service providers are generally not subject to any regulation/registration requirements in the BVI, provided they do not carry on business in or from within the BVI.

2.11 Tax Regime

The BVI benefits from a tax-neutral environment. No income, capital gains, inheritance or other direct taxes are assessable in the BVI on a BVI company or partnership (provided it does not own any interest in land in the BVI or have any employees in the BVI) or on its investors. Except for the US withholding tax that could potentially be imposed pursuant to FATCA (see **4.8 FATCA/CRS Compliance Regime**), there are currently no withholding taxes in the BVI applicable to a BVI fund or its investors.

2.12 Double-Tax Treaties

The BVI’s tax-neutral environment (see **2.11 Tax Regime**) does not rely on any double-tax treaties.

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The BVI has entered into a number of double-tax treaties but they are of limited or no direct relevance to investment funds business.

2.13 Use of Subsidiaries for Investment Purposes

It is quite common for BVI funds to use subsidiaries for investment purposes; for example, in order to:

- segregate (ring-fence) potential liabilities of a particular investment holding from the broader fund;
- act as a corporate “blocker” for onshore tax purposes; or
- facilitate efficient financing or disposal/exit of an investment of the fund.

2.14 Origin of Promoters/Sponsors of Alternative Funds

The BVI is popular with promoters/sponsors from around the world, in particular the USA, Latin America, the UK, the Middle East, and Asia.

2.15 Origin of Investors in Alternative Funds

Investors in BVI funds come from all manner of jurisdictions (often concentrated around the “home jurisdiction(s)” of the promoters/sponsors).

2.16 Key Trends

Over the years the BVI has proven remarkably resilient and flexible in quickly adapting to – and, in some instances, trailblazing – industry changes.

A few of the key recent trends for alternative funds established in the BVI include the following.

- Regulatory changes – the scope and pace of regulatory change has been incredible in the past two years or so. Key changes include:

- the new regulatory regime for private investment funds enacted under SIBA and the Private Investment Funds Regulations, 2019, which have brought BVI private equity, venture capital and other closed-ended funds within the regulatory net for the first time;
- the BVI economic substance regime enacted under the Economic Substance (Companies and Limited Partnerships) Act, 2018;
- new rules for BVI alternative funds regarding valuations and the safekeeping and custody of fund assets;
- enhanced focus by the BVI FSC on AML/CFT compliance, and by the BVI International Tax Authority (BVI ITA) on CRS policies and procedures; and
- the recently enacted BVI Data Protection Act, 2021, which introduced the BVI’s first data protection regime.

Such regulatory changes have been rapid and, in many instances, necessitated hurried amendments to pre-existing BVI fund structures (to the frustration of many a sponsor). That said, on balance the developments have been welcomed as a boon in further enhancing the robustness, sophistication and international credibility of the BVI regulatory regime.

- Growth – client demand for BVI fund structures remains strong and has been growing year on year.
- Digitalisation and technology enhancements – there has been a notable trend towards digitalisation and technological enhancements of operations. For example, recent amendments to the BVI’s AML rules now permit digital ID verification and the receipt of electronic copies of documents.
- ESG – in keeping with many other leading funds jurisdictions, environmental, social and governance (ESG) considerations now feature prominently in many new fund launches.

- Complicated fund structures – there has been increased client demand for:
 - (a) multi-class funds (which can be described as funds with a mandate that allows them to pursue two or more different strategies (or to acquire two or more different investments or buckets of investments) within a single fund vehicle that are to be treated as distinct and separate from one another, such that investors in a given strategy only participate economically in that particular strategy and not any other strategies (or investment holdings) of the fund); and
 - (b) hybrid funds (these are funds which hold a mix of both liquid and illiquid investments and seek to combine elements of fund terms customary for both hedge funds (for liquid investments) and private equity funds (for illiquid investments) within a single fund vehicle) – such alternative strategies can present certain unique issues and challenges from a structuring perspective but the BVI fund industry is very well adapted to cater for this given the jurisdiction’s flexible legal regime and unique set of well-regarded, innovative and cost-competitive fund products.
- Digital assets – the BVI has made a concerted effort to embrace the digital asset revolution and continues to lead the way with innovative and flexible structures for cryptocurrency and other digital assets funds.
- Larger funds – historically, BVI fund products and structures have been especially appealing for small to mid-cap managers although in more recent times the BVI has been proving increasingly attractive to larger and more established fund managers as well.

2.17 Disclosure/Reporting Requirements

The BVI does not have a prescriptive regime for mandatory content disclosure requirements or

reporting to investors, save for required “investment warnings” and certain other limited mandatory disclosures pertaining to the BVI regulatory status and treatment of a BVI fund.

Offering documents and investor reports are not publicly available in the BVI.

2.18 Anticipated Changes

Any anticipated changes are referred to in sections **2.1 Types of Alternative Funds** to **2.17 Disclosure/Reporting Requirements**.

3. MANAGERS

3.1 Legal Structures Used by Fund Managers

A BVI management vehicle may be structured as a BVI business company (corporation) or, less commonly, a BVI limited partnership.

3.2 Regulatory Regime

In broad general terms, any BVI entity which provides investment management or advisory services will be subject to regulation in the BVI.

The principal legislation pertaining to alternative fund managers/advisers in the BVI is the Securities and Investment Business Act, 2010 and regulations thereunder. The principal regulator of the BVI fund management industry is the BVI Financial Services Commission.

The two key options available for regulation in the BVI include:

- approval as an Approved Investment Manager under the Investment Business (Approved Managers) Regulations, 2012 issued under SIBA (an “Approved Manager”); and
- a Category 3 (Investment Management) or Category 4 (Investment Advice) licence under Schedule 3 of SIBA (a “Full SIBA Licence”).

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Approved Managers

The BVI is recognised as a well-established and innovative fund domicile, ideally suited to attract new or start-up investment fund managers. A key initiative on this front, implemented by the BVI FSC, was to introduce the Approved Manager regime back in 2012, which has made it easier, quicker and more cost-effective for small and medium-sized fund sponsor groups to establish a regulated manager or adviser in the BVI. Previously, any manager or adviser formed in the BVI would require a Full SIBA Licence, which is a much more complex and costly process. Under the “lighter touch” Approved Manager regime there is a cap on assets under management of USD400 million for managers of hedge funds or USD1 billion for managers of private equity or venture capital funds, and the funds managed must be BVI investment funds or foreign investment funds domiciled in a “recognised jurisdiction” with equivalent characteristics to a BVI private fund or professional fund. Management or advisory services to managed account structures may also potentially be acceptable, subject to application to and approval of the BVI FSC. An Approved Manager is exempt from holding a SIBA investment business licence and the obligations that go along with it, and is not required to appoint an auditor or a compliance officer or maintain a compliance manual.

A streamlined application process applies and a BVI Approved Manager can be formed very quickly. Unless the BVI FSC otherwise objects, the applicant may commence business seven days after submission of the completed application for an interim grace period not exceeding 30 days. That said, in practice, formal approval can often be obtained within about two to five business days (with a well-drafted and complete set of application materials).

Full SIBA Licences

In light of the more recent Approved Manager regime, a Full SIBA Licence is really only attractive for those managers or advisers who expect to exceed the caps on assets under management applicable to an Approved Manager (USD400 million for managers of hedge funds or USD1 billion for managers of private equity or venture capital funds).

The application process is much more involved, and also requires approval of the auditor and those persons involved in the management and ownership of the applicant. Ongoing compliance requirements are also significant (including a mandatory compliance manual and compliance officer, and mandatory annual audits). The BVI economic substance requirements for Full SIBA Licensees are also extensive (see **3.7 Local Substance Requirements**). A typical timeframe for approval would exceed four weeks.

3.3 Tax Regime

The BVI benefits from a tax-neutral environment. No income, capital gains, inheritance or other direct taxes are assessable in the BVI on a BVI company or partnership (provided it does not own any interest in land in the BVI or have any employees in the BVI) or on its investors/owners.

3.4 Rules Concerning “Permanent Establishments”

The BVI benefits from a tax-neutral environment (see **3.3 Tax Regime**). A foreign fund would not become liable to taxation in the BVI solely by virtue of engaging a BVI entity as its manager or adviser.

3.5 Taxation of Carried Interest

The BVI benefits from a tax-neutral environment (see **3.3 Tax Regime**). A BVI manager and its owners will not be liable to taxation in the BVI with respect to carried interest.

3.6 Outsourcing of Investment Functions/Business Operations

The BVI FSC requires details of any proposed delegation or outsourcing of investment functions or business operations.

A Full SIBA Licensee may not outsource (i) the compliance function or a core management function; or (ii) an activity if the outsourcing of that activity would either impair the BVI FSC's ability to supervise the licensee or affect the rights of a customer against the licensee, including the right to obtain legal redress. Core management functions include:

- the setting and approval of the licensee's risk management and other strategies;
- the oversight of the licensee's policies, systems and controls; and
- the responsibility for the delivery of services to the licensee's customers.

The board of a Full SIBA Licensee remains ultimately responsible for the performance of all functions that have been delegated.

A Full SIBA Licensee must maintain a comprehensive outsourcing policy, and requirements also apply regarding due diligence on the service provider and potential risks associated with outsourcing and contingency planning. In addition, any outsourced activity must be governed by a written contract with the service provider.

3.7 Local Substance Requirements

The BVI economic substance requirements applicable to BVI managers depend in part on the regulatory status of the manager.

A Full SIBA Licensee will be subject to significant BVI economic substance requirements, including the following:

- the management activities must be directed and managed in the BVI;
- the manager must have an adequate number of suitably qualified employees physically present in the BVI; incur adequate expenditure in the BVI; and have physical offices or premises as may be appropriate for the core income-generating activities in the BVI; and
- the manager must conduct core income-generating activities in the BVI (and not outsource those functions outside the BVI).

For this purpose, "core income-generating activities" include:

- taking decisions on the holding and selling of investments;
- calculating risks and reserves;
- taking decisions on currency or interest fluctuations and hedging positions; and
- preparing relevant regulatory or other reports for government authorities and investors.

A BVI Approved Manager may be subject to less onerous requirements, depending on the exact nature of its particular business activities.

3.8 Local Regulatory Requirements for Non-local Managers

Foreign managers appointed to BVI funds are generally not subject to any local regulatory requirements in the BVI (provided they do not carry on business in or from within the BVI).

4. INVESTORS

4.1 Types of Investor in Alternative Funds

BVI funds have proven popular with all manner of investors, including sophisticated professional investors, high net worth individuals, family offices, sovereign wealth funds, and the full range of institutional investors.

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4.2 Marketing of Alternative Funds

A number of the BVI's fund products may only be offered to "professional investors" or "sophisticated private investors" or on a "private basis" only (see **2.3 Regulatory Regime**).

4.3 Rules Concerning Marketing of Alternative Funds

Foreign (non-BVI) funds which wish to undertake marketing to individuals physically present in the BVI would need to apply for recognition by the BVI FSC in accordance with SIBA (an exception applies for reverse solicitation).

A foreign fund can generally market to a BVI entity without restriction provided the marketing takes place entirely outside of the BVI.

Otherwise, SIBA provides that no security may be offered to the public in the BVI for purchase or subscription unless:

- the offer is contained in a prospectus that complies with SIBA and is registered with the BVI FSC; and
- the offer complies with the (still to be published) requirements of the Public Issuer's Code; or
- an exemption is available.

Exemptions apply for offers made to:

- the government of the BVI;
- a person having a "close connection" with the issuer – broadly, an affiliate of the issuer, a director or employee of the issuer or a relative of such a director or employee; or
- a "qualified investor".

"Qualified investors" include:

- certain entities which are regulated by the BVI FSC, including banks, insurance companies,

licensees under SIBA and public, professional and private mutual funds;

- a company, any securities of which are listed on a recognised exchange; and
- persons defined as "professional investors" under SIBA.

4.4 Local Investors

Local BVI investors can invest in BVI funds in the same manner as non-BVI based investors.

4.5 Regulatory Regime

As noted in **4.3 Rules Concerning Marketing of Alternative Funds**, foreign (non-BVI) funds which wish to undertake marketing to individuals physically present in the BVI would need to apply for recognition by the BVI FSC in accordance with SIBA (an exception applies for reverse solicitation). A foreign fund can generally market to a BVI entity without restriction provided the marketing takes place entirely outside of the BVI. Therefore, in practice, to the extent foreign funds wish to market to BVI investors, they typically seek to limit such marketing activities to BVI entities (rather than individuals physically present in the BVI) and ensure the marketing takes place entirely outside of the BVI and/or they seek to rely on reverse solicitation to avoid local regulatory filings and other requirements in the BVI.

4.6 Disclosure Requirements

No particular disclosure requirements apply with respect to BVI investors.

4.7 Tax Regime

No income, capital gains, inheritance or other direct taxes are assessable in the BVI against investors in a BVI fund. There is no difference in treatment between corporate investors and individual investors.

4.8 FATCA/CRS Compliance Regime

The BVI has signed a Model 1B (non-reciprocal) inter-governmental agreement with the USA to give effect to the reporting rules under FATCA.

The BVI is also a signatory, along with more than 100 other countries, to the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information which implements the OECD's standard for automatic exchange of financial account information in tax matters (commonly referred to as the "Common Reporting Standard", or the CRS).

The principal legislation in the BVI pertaining to FATCA and CRS is the Mutual Legal Assistance (Tax Matters) Act, 2003, which is enforced by the BVI International Tax Authority.

All BVI "Financial Institutions" are required to comply with the registration, due diligence and reporting requirements of FATCA and CRS, unless they have an exemption that allows them to become a "Non-Reporting Financial Institution". Most BVI funds are not able to avail themselves of any reporting exemption and therefore have to comply with the requirements of the BVI FATCA and CRS regulations, including the following key requirements:

- to appoint a "responsible officer" for the purposes of FATCA;
- to appoint a "Principal Point of Contact" for the purposes of CRS;

- to obtain a Global Intermediary Identification Number (GIIN) from the US Inland Revenue Service, and register the fund with the BVI ITA for FATCA and CRS reporting purposes;
- to conduct due diligence on investor accounts to identify whether any such accounts are "reportable accounts"; and
- to report information on such reportable accounts to the BVI ITA annually by 31 May each year.

The BVI ITA will transmit the information reported to it to the overseas fiscal authority relevant to the reportable account in question (eg, the IRS in the case of a US reportable account) annually on an automatic basis.

A US withholding tax of 30% can potentially apply under FATCA on certain payments made to a recalcitrant account holder or a non-participating Foreign Financial Institution. Provided that a BVI fund complies with its obligations under the US FATCA regime, it will not be subject to the related US withholding tax. Well-drafted fund documents for a BVI fund would typically provide that, in the event that an investor's failure to comply with any FATCA-related reporting requirements results in the said withholding tax, the fund has the right to take steps to ensure that any such withholding tax (and any other related costs, expenses, fines, interest, penalties, etc), arising from such investor's failure to comply, is economically borne by such investor.

Contributed by: Eric Flaye, Conyers

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AUTHOR



Eric Flaye is counsel and head of the London office of Conyers.

He is a leading adviser on all aspects of offshore investment funds, including pre-formation strategy, organisational

structure, regulatory compliance and transactional activities for both private equity funds and hedge funds. Eric is also a key member of Conyers' growing fintech (blockchain and digital assets) practice.

Conyers

PO Box 3140
Wickhams Cay 1
Road Town
Tortola
British Virgin Islands
VG1110

Tel: +1 284 852 1000
Fax: +1 284 852 1001
Email: bvi@conyers.com
Web: www.conyers.com

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