

# BVI closed-ended funds

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## Introduction

The Securities and Investment Business Act, Revised Edition 2020 (as amended, the **Act**) provides for the supervisory regime for private investment funds (**PIFs**) in the British Virgin Islands (**BVI**), requiring closed-ended<sup>1</sup> BVI fund vehicles to apply for 'recognition' by the Financial Services Commission (**FSC**) prior to their promotion or operation.

The Private Investment Funds Regulations, 2019 (the **Regulations**) supplement the Act by setting out the application procedures for recognition of a PIF and requirements relating to valuation, financial statements and audit.

## What is a private investment fund?

The Act defines a **PIF** as a company, partnership, unit trust or any other body incorporated, registered, formed or organised in the BVI or any other country, which:

- collects and pools investor funds for the purpose of collective investment and diversification of portfolio risk; and
- 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 Private Investment Funds Regime Guidelines<sup>2</sup> published by the FSC provide additional clarification on the requirements for recognition as, and the ongoing obligations of, a PIF.

PIFs can be structured as BVI business companies, limited partnerships or unit trusts of which BVI business companies and limited partnerships are the most commonly used vehicles. This guide focuses on BVI business companies. Please contact us if you require more information in relation to limited partnership or unit trust structures.

## Directors, authorised representative and appointed persons<sup>3</sup>

A PIF, if a company, must have at least two directors, one of whom must be an individual.<sup>4</sup> A PIF must also have:

- an authorised representative<sup>5</sup> in the BVI to liaise with the FSC on behalf of the fund; and
- appointed persons responsible for undertaking the management, valuation and safe-keeping (including segregation) of fund property<sup>6</sup>, respectively.

Each appointed person may be an individual or a company having relevant expertise and experience for performing the specified function. An appointed person may be a person licensed by the FSC (or other regulatory authority), an independent third party, or a director, partner or trustee of the PIF assuming the relevant responsibility.

Ideally the appointed person responsible for undertaking the management of the fund's assets should be independent from the appointed person responsible for the valuation process. However, where this is not possible, the PIF must:

- identify, manage and monitor any potential conflicts of interest that may arise; and

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<sup>1</sup> Funds in which investors do not have the right to redeem or withdraw their fund interests on demand in accordance with the fund documents.

<sup>2</sup> [https://www.bvifsc.vg/sites/default/files/private\\_investment\\_funds\\_regime\\_guidelines\\_2019\\_0.pdf](https://www.bvifsc.vg/sites/default/files/private_investment_funds_regime_guidelines_2019_0.pdf).

<sup>3</sup> The Act defines **appointed person** in respect of a PIF as meaning the person responsible for undertaking:

- (a) the management of the PIF's assets;
  - (b) the valuation of the PIF's assets;
  - (c) the safekeeping of the PIF's assets; or
- such other function as may be specified in the Regulations.

<sup>4</sup> Under the Private Investment Funds Regime Guidelines issued on 31 December 2019, where a private investment fund is not a company, it must provide certain prescribed details of its general partner (where it is a limited partnership) or trustee (where it is a unit trust).

<sup>5</sup> The authorised representative (amongst other things) acts as the main intermediary between a PIF and the FSC, and must be a BVI business company, a BVI partnership or an individual who is ordinarily resident in the BVI.

<sup>6</sup> **Fund property** means, where the fund is a company or a partnership, the assets of the fund, and where the fund is a unit trust, the assets subject to the trust deed that constitutes the fund (regulation 2, Regulations).

- disclose to investors that the same person is appointed as being responsible for the fund's management and valuation functions, along with details of how any potential conflicts will be managed.

### Eligibility criteria for FSC recognition

The FSC may recognise a PIF if it is satisfied that:

- the fund is lawfully incorporated, registered, formed or organised under the laws of the BVI or a country outside the BVI;
- the constitutional documents of the fund specify that:
  - the fund is not authorised to have more than 50 investors;
  - an invitation to subscribe for, or purchase, fund interests shall be made on a private basis only; or
  - the fund interests shall be issued only to professional investors<sup>7</sup> with a minimum initial investment for each investor (other than an 'exempted investor'<sup>8</sup>) of US\$100,000 (or its equivalent in any other currency),
 (the **Investor Criteria**);
- the fund meets such other criteria as may be specified in the Regulations, and, on recognition, the fund will be compliant with the Act, the Regulations and any applicable practice directions; and
- recognising the fund is not against the public interest.

### Restrictions under the Act

As a general rule, if a PIF is not recognised by the FSC under the Act, it is prohibited from:

- carrying on business as a PIF in or from within the BVI (including operating the fund from within the BVI);
- soliciting an individual within the BVI to subscribe for, or purchase, any of the fund interests; or
- promoting the fund in or from within the BVI, including by the communication of an invitation or inducement to any other person, or by advising or procuring any other person to become an investor in the fund.

A PIF from outside the BVI will not be considered to be soliciting subscriptions from an individual within the BVI where the subscription has been made as the result of an unsolicited approach by such individual.

In addition, no person is to act as an appointed person, or otherwise be concerned with the management or valuation of a PIF carrying on business in or from within the BVI, unless the fund is recognised as a PIF.

### Application process

The Act provides for a 21 day grace period from the commencement of carrying on business for making the application to the FSC. However, PIFs relying on this grace period must submit their applications within 14 days of commencement of business.

The initial application fee for recognition as a PIF by the FSC is US\$850. The application will need to include:

- the address of the fund's place of business in the BVI;
- if the fund is a company, the name and address of each of the fund's directors;
- if the fund is a unit trust, the name and address of the trustee;
- if the fund is a limited partnership, the name and address of the general partners;
- the name and address of the fund's authorised representative;

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<sup>7</sup> The Act defines a **professional investor** as meaning a person:

- 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
- who has signed a declaration that the person, whether individually or jointly with the person's spouse, has net worth in excess of \$1,000,000 (or its equivalent in another currency) and that the person consents to being treated as a professional investor.

<sup>8</sup> The Act defines an **exempted investor** as meaning the investment manager, administrator, promoter or underwriter of a fund, any employee of the investment manager or promoter, or such other person as the FSC may specify from time to time.

- the name and address of each appointed person;
- the address of any place(s) of business that the fund may have outside the BVI;
- copies of:
  - the fund's register of directors and résumé or biography of each director (if the fund is a company);
  - the fund's constitutional documents;
  - the fund's certificate of incorporation, formation, registration or equivalent document;
  - the fund's valuation policy;
  - the offering document or term sheet, or the proposed offering document or term sheet, if applicable; and
- such other information as may be required.

Once the FSC has approved the application for recognition, it will add the PIF to the Register of Private Investment Funds and issue a certificate of recognition upon receipt of a fee of US\$1,200.

### **Offering document or term sheet**

Where a PIF intends to make an offer or invitation to an investor or potential investor, the invitations must be contained in an offering document or term sheet. The offering document or term sheet should also serve to inform investors or potential investors of relevant information that relates to making an investment in the fund. Where a PIF does not intend to issue an offering document or term sheet, the fund must indicate in the application:

- the reason the fund does not intend to issue an offering document or term sheet; and
- how relevant information concerning the fund and any invitation or offer will be provided to investors or potential investors.

An offering document or term sheet must indicate:

- the applicable limb of the Investor Criteria;
- the investment objective of the fund;
- a written statement that investors do not have the right to redeem or withdraw their fund interests on demand;
- the names and addresses of the appointed persons responsible for the management, valuation and safekeeping (including segregation) of fund property; and
- any fees to be paid by the fund.

### **Valuation policy and safekeeping of fund property**

PIFs must maintain a clear and comprehensive policy for the valuation of fund property with procedures that are sufficient to ensure the effective implementation of the valuation policy. The appointed person responsible for the valuation of fund property must value the fund's assets in accordance with the valuation policy.

The valuation policy and procedures must:

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

PIFs must ensure that the appointed person responsible for the safekeeping of the fund's assets has adequate arrangements in place for the segregation of the fund's assets from its or any other assets it may have or hold. The types of arrangements that the FSC consider appropriate will depend on the particular asset type of the fund. Where a PIF invests in financial instruments, the appointed person may, for example, be a traditional custodian or prime broker. For other types of assets, the appointed person may be an appropriate independent third party or a director of the PIF having sufficient expertise and resources to carry out the function.

## Financial and reporting requirements

PIFs must file audited financial statements (prepared in accordance with international standards accepted by the FSC and the requirements under the Regulations) with the FSC within 6 months of the end of each financial year. It is possible, in certain circumstances, for a PIF to apply to the FSC for an extension and/or exemption for a particular financial year. The auditor of a PIF need not be based in the BVI. PIFs do not need to submit an annual return each year to the FSC.

## Anti-money laundering/countering terrorism and proliferation financing

PIFs must comply with relevant anti-money laundering legislation, including the requirement to appoint a money laundering reporting officer (**MLRO**) and to notify the FSC and the BVI Financial Investigation Agency (**FIA**) of the MLRO's appointment within 14 days of the appointment. The MLRO need not be an employee of the fund or resident in the BVI but should meet the requirements of the BVI Anti-money Laundering Regulations, Revised Edition 2020 (as amended, the **AML Regulations**) to perform the functions of a MLRO..

PIFs must also maintain appropriate policies and procedures for preventing money laundering, terrorism financing, proliferation financing and relating to sanctions (**AML Procedures**). In practice, funds will usually outsource necessary client identification procedures to their administrator.

## Automatic exchange of information (AEOI)

Most BVI closed-ended funds are likely to qualify as a foreign financial institution for the purposes of US FATCA<sup>9</sup> by virtue of being an investment entity<sup>10</sup>. This means that (among other things) they must:

- register with the BVI International Tax Authority (**ITA**) for online reporting and report on an annual basis;
- identify and report certain reportable US accounts under US FATCA;
- report information on holders of reportable accounts tax resident in CRS<sup>11</sup> reportable jurisdictions;
- produce written AEOI policies and procedures and implement them; and
- appoint individuals to AEOI roles including a US FATCA responsible officer (where applicable) and a principal point of contact to liaise with the ITA.

All financial institutions with US FATCA obligations must include US Tax Identification Number information<sup>12</sup> for all reportable accounts in their US FATCA reports, which should be reported through the BVI Financial Account Reporting System (**BVIFARS**) portal<sup>13</sup>. For US FATCA, the annual enrolment deadline is 1 April and reporting submission deadline is 31 May. For CRS, the annual enrolment deadline is 30 April and reporting submission deadline is 31 May.

In practice, most BVI funds will usually outsource their AEOI obligations to their administrator or another appropriate service provider.

## Data protection

PIFs may have access to 'personal data' (as defined in the Data Protection Act, 2021 (**DPA**)) of their directors and investors and may be a data controller for the purposes of the DPA. For further information relating to the DPA and practical considerations for funds, please see our update: [BVI data protection: A practical update for funds](#).

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<sup>9</sup> The Foreign Account Tax Compliance Act of 2010.

<sup>10</sup> Generally, an entity that conducts (or is managed by an entity that conducts) trading or portfolio and investment management activities as a business on behalf of a customer or otherwise invests, administers or manages funds or money on behalf of other persons.

<sup>11</sup> The Common Reporting Standard approved by the Organisation for Economic Co-operation and Development (**OECD**) Council on 15 July 2014.

<sup>12</sup> The mandatory US Tax Identification Number information applies for the 2020 reporting period onwards.

<sup>13</sup> <https://bviita.vg/bvifars/>.

## Economic substance

'Investment fund business'<sup>14</sup> is excluded from the nine relevant activities captured by the BVI economic substance regime. Therefore, PIFs that are incorporated or formed as a BVI company or limited partnership do not need to comply with the BVI economic substance regime, unless they also carry out any relevant activity under the economic substance legislation. For further information, please see our guide: [BVI economic substance legislation](#).

## Ongoing obligations

There are a number of ongoing obligations for PIFs, which include:

- paying an annual FSC renewal fee of US\$1,200 by 31 March each year;
- having at all times an authorised representative and, if the fund is a company, at least two directors (one of whom must be an individual);
- operating in accordance with the PIF's constitutional documents;
- maintaining financial records sufficient to explain the PIF's transactions and to enable its financial position to be determined at any time, and keeping such records for at least 5 years after completion of the relevant transaction;
- preparing audited financial statements which comply with the requirements under the Regulations;
- having appointed persons responsible for the management, valuation and safe-keeping (including segregation) of fund property;
- notifying the FSC of any:
  - proposed appointment of an appointed person at least 7 days before the appointment, unless the FSC has agreed to a shorter notice period (or within 7 days after the previous appointed person ceased to act on behalf of the fund);
  - resignation, termination or cessation to act as an appointed person within 7 days of the event, including a statement of the reason for the person ceasing to act;
  - breach of the requirement to have at all times at least two directors (including one individual director) within 7 days of the breach occurring;
  - appointment of a director, authorised representative or auditor or such persons ceasing to hold office, within 14 days after the event;
  - change to the address of a PIF's place of business (inside or outside the BVI), its constitutional documents, offering document or term sheet previously provided to the FSC, or valuation policy within 14 days of the change;
  - issuance of an offering document or term sheet not previously provided to the FSC with the original application within 14 days of the change;
  - material change in the nature and scope of the PIF's business (in the case of a PIF incorporated or formed outside the BVI) within 14 days of the change;
- filing an annual economic substance declaration with the ITA<sup>15</sup> within 6 months of the end of its relevant financial period;
- having a MLRO, maintaining its AML Procedures and complying with the AML Regulations and the Anti-Money Laundering and Terrorist Financing Code of Practice, Revised Edition 2020 (as amended);
- notifying the FSC and the FIA within 14 days after the appointment of a MLRO;
- registering with the ITA for online reporting through BVIFARS each year and submitting, by 31 May each year, its CRS and US FATCA reports for the preceding reporting year; and
- implementing and maintaining written CRS policies and procedures.

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<sup>14</sup> **Investment fund** means an entity whose principal business is the issuing of investment interests to raise funds or pool investor funds with the aim of enabling a holder of such an investment interest to benefit from the profits or gains from the entity's acquisition, holding, management or disposal of investments and includes any entity through which an investment fund directly or indirectly invests or operates (but not an entity that is itself the ultimate investment held), but does not include a person licensed under the Banks and Trust Companies Act, 1990 or the Insurance Act, 2008, or a person registered under the Cooperatives Societies Act 1979 or the Friendly Societies Act.

<sup>15</sup> A PIF's BVI registered agent will submit the declaration through the Beneficial Ownership Secure Search system, provided that the fund has submitted the relevant information to the BVI registered agent and paid its economic substance reporting fee.

## Offences

Carrying on PIF business without being recognised will result in potential fines of US\$40,000 on summary conviction and US\$75,000 on indictment for companies, partnerships or unit trusts. The equivalent fines for individuals of companies are US\$25,000 on summary conviction and US\$40,000 on indictment.

Similar penalty provisions are in place for acting as an appointed person of a PIF that has not been recognised.

Any person operating or promoting a PIF which has not been recognised will face a fine of US\$40,000 on summary conviction and US\$50,000 on indictment (US\$25,000 on summary conviction and US\$30,000 on indictment for individuals).

## Contacts

If you would like more information, a full list of contacts specialising in BVI investment funds can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2023 MOURANT OZANNES ALL RIGHTS RESERVED