

# BVI open-ended funds

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## Introduction

The British Virgin Islands (**BVI**) is one of the most popular offshore jurisdictions for investment funds for the following reasons:

- modern, flexible company law - the BVI Business Companies Act, 2004 (as amended) is widely regarded as one of the most modern and progressive company law regimes in the world;
- familiarity to international investors - BVI 'business companies' are the most commonly used offshore vehicles in the world and are very familiar to international investors;
- well regulated - the BVI is internationally recognised as a well-regulated jurisdiction with a robust legal system that actively engages and cooperates with foreign governments and supra national bodies to ensure that its regulation meets international standards;
- tax neutral - an investment fund incorporated in the BVI is not subject to any income, withholding or capital gains taxes in the BVI;
- operative ease - there are no requirements for directors, officers, managers, administrators or custodians to be based in the BVI. There are no restrictions on commercial matters, such as investment objectives, trading strategies, or leverage, trading or diversification limits;
- experience and skill - the BVI hosts a highly skilled workforce of lawyers, accountants, corporate administrators and insolvency experts; and
- cost effective - compared with other jurisdictions, the BVI is extremely cost effective for incorporating, launching and maintaining investment funds.

## Structure

BVI investment funds can be structured as BVI business companies, limited partnerships or unit trusts of which BVI business companies are the most commonly used vehicle. Similar to other jurisdictions, BVI law also provides for 'segregated portfolio companies'. A segregated portfolio company is a single legal entity with different portfolios of assets and liabilities, each of which may be legally segregated from the assets and liabilities of the other segregated portfolios.

This guide focuses on BVI business companies. Please contact us if you require more information in relation to limited partnership or unit trust structures.

## Regulation

The BVI Financial Services Commission (the **FSC**) is the local regulator.

The Securities and Investment Business Act, 2010 (as amended) and the Mutual Funds Regulations, 2010 (as amended) (together, **SIBA**) are the main pieces of legislation that govern the business of investment funds in the BVI and contain provisions relating to registration and licensing.

Open-ended investment funds (ie funds in which investors have the right to redeem their fund interests on demand in accordance with the fund documents) generally fall under SIBA and must be recognised or registered with the FSC.

## Types of open-ended investment funds

### Professional funds

A professional fund is the most popular BVI investment funds product. It is aimed at high net worth, professional investors and the minimum initial investment by each investor (other than an 'exempted investor') is US\$100,000 or its equivalent in another currency.

A **professional investor** is defined under SIBA as being 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 US\$1,000,000 (or its equivalent in another currency) and that the person consents to being treated as a professional investor.

An **exempted investor** is 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.

A professional fund may carry on business for up to 21 days prior to obtaining FSC recognition provided the application for recognition is lodged with the FSC within 14 days of launch. This means it is possible for professional funds to come to market very quickly in the BVI.

### Private funds

A private fund is a fund whose constitutional documents specify that:

- the fund is not authorised to have more than 50 investors; or
- any invitation to investors to subscribe for fund interests is to be made on a private basis.

**Private basis** is defined under SIBA as including an invitation which is made to certain specified persons or by reason of a private or business connection between the person making the invitation and the investor.

Unlike a professional fund, a private fund must obtain its FSC recognition prior to launch. However, in our experience, this is usually a fairly quick process which takes a couple of weeks.

### Public funds

A public fund is a fund which is not a professional or private fund. The product is generally utilised by managers looking to make retail offerings and is therefore subject to more stringent regulation and scrutiny, requiring the publication of a prospectus that is registered by the FSC. A public fund is not subject to any BVI restrictions on the categories or number of investors that may invest in the fund.

### Foreign funds

In certain circumstances, it is possible for an existing fund which is incorporated in another jurisdiction to apply to be recognised as a foreign fund. Reasons for doing so include if the existing fund wishes to carry on business 'in or from within' the BVI or market the fund to BVI resident individuals.

### Incubator funds<sup>1</sup>

An incubator fund is a fund that is designed for start-up managers who may be looking to set-up quickly and create a track record.

The key features of an incubator fund are:

- it can have a maximum of 20 investors, who must be 'sophisticated private investors';<sup>2</sup>
- the minimum investment for each investor is US\$20,000; and
- the net assets must not exceed US\$20,000,000 (or its equivalent in another currency).

An incubator fund can operate for a period of two years, which may be extended to three years on application to the FSC. At the end of this time period, or if the incubator fund has more than the permitted number of investors or net assets, it must:

- convert to a private fund, professional fund or an approved fund; or
- liquidate; or
- cease to be a fund (by amending its constitutional documents to remove any reference to being a fund).

Where an incubator fund either liquidates or ceases to be a fund, it should give investors adequate notice of the change and the opportunity to redeem their fund interests.

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<sup>1</sup> Incubator funds were introduced by the Securities and Investment Business (Incubator and Approved Funds) Regulations, 2015.

<sup>2</sup> **Sophisticated private investors** are defined under BVI law as being a person who has been invited to invest in an incubator fund and the amount of that person's initial investment is not less than US\$20,000.

An incubator fund is not required to have a manager, administrator, custodian or auditor. An incubator fund may just have a term sheet rather than a fuller offering document, which must include certain risk warnings.

### Approved funds<sup>3</sup>

An approved fund is a fund that is aimed at smaller, private offerings or friends and family funds. Unlike the incubator fund, there are no eligibility requirements, no required minimum level of investment and no set time limit on the life of an approved fund (assuming it has all the key features set out below).

The key features of an approved fund are:

- it can have a maximum of 20 investors; and
- the net assets must not exceed US\$100,000,000 (or its equivalent in another currency).

An approved fund must have a third-party administrator but it is not required to have a manager, custodian or auditor. Like the incubator fund, an approved fund may just have a term sheet rather than a fuller offering document, which must include certain risk warnings.

### Directors and authorised representative

Any professional, private, incubator or approved fund must have at least two directors, one of whom must be an individual.

A public fund must have an adequate number of individual directors (a minimum of two) who:

- are capable of exercising independent judgment;
- have sufficient knowledge, skills, experience and understanding of the fund's business to ensure that the governing body is able to fulfil its responsibilities; and
- have sufficient time and commitment to undertake their duties diligently.

All categories of funds must have an authorised representative in the BVI to liaise with the FSC on behalf of the fund (unless the fund has a significant management presence in the BVI).

### Functionaries

Any public, professional or private fund that is recognised or registered with the FSC under SIBA must have the following functionaries:

- an investment manager;
- an administrator;
- a custodian; and
- an auditor.

In certain circumstances, it is possible to apply to the FSC for an exemption from the requirement to have a custodian. It is also possible, in limited circumstances, for professional or private funds to apply to the FSC for an exemption from the requirement to have an auditor and/or an investment manager. However, there is no exemption from the requirement to have an administrator, therefore all BVI open-ended funds (other than incubator funds which do not need to have an administrator) may not be 'self-administered' in the BVI.

The FSC does not generally impose any additional regulatory requirements on functionaries who are based in a 'recognised jurisdiction'<sup>4</sup>.

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

BVI funds 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 of the MLRO's appointment within 14 days of the appointment. The MLRO need not

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<sup>3</sup> Approved funds were introduced by the Securities and Investment Business (Incubator and Approved Funds) Regulations, 2015.

<sup>4</sup> A list of recognised jurisdictions is set out in the Securities and Investment Business (Recognised Jurisdictions) Notice, 2010 (as amended) (the **Notice**). Please [click here](#) for a link to the Notice.

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) to perform the functions of a MLRO..

BVI funds must also maintain appropriate policies and procedures for preventing money laundering, terrorism financing, proliferation financing and relating to sanctions. In practice, funds will usually outsource necessary client identification procedures to their administrator or, in the case of incubator funds which do not need to have an administrator, an appropriately qualified person.

### **Automatic exchange of information (AEOI)**

Most BVI funds are likely to qualify as a foreign financial institution for the purposes of US FATCA<sup>5</sup> by virtue of being an investment entity<sup>6</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>7</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>8</sup> for all reportable accounts in their US FATCA reports, which should be reported through the BVI Financial Account Reporting System (BVIFARS) portal<sup>9</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, funds will usually outsource their AEOI obligations to their administrator or another appropriate service provider.

### **Data protection**

BVI funds 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](#).

### **Economic substance**

'Investment fund business'<sup>10</sup> is excluded from the nine relevant activities captured by the BVI economic substance regime. Therefore, investment funds 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](#).

### **Financial and reporting requirements**

BVI public, professional and private funds are required to have an auditor and file audited accounts with the FSC no later than six months after the end of each financial year (unless the FSC grants an extension and/or the fund has obtained an exemption from the requirement to have an auditor, where applicable,

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<sup>5</sup> The Foreign Account Tax Compliance Act of 2010.

<sup>6</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>7</sup> The Common Reporting Standard approved by the Organisation for Economic Co-operation and Development (OECD) Council on 15 July 2014.

<sup>8</sup> The mandatory US Tax Identification Number information applies for the 2020 reporting period onwards.

<sup>9</sup> <https://bviita.vg/bvifars/>.

<sup>10</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.

and/or submit audited financial statements). Annual returns must be filed with the FSC by 30 June each year.

Incubator and approved funds must submit financial statements (which need not be audited) to the FSC no later than six months after the end of each financial year, unless the FSC grants an exemption or an extension. Annual returns/declarations must be filed with the FSC by 31 January each year and, for incubator funds, an additional semi-annual report by 31 July each year.

For funds that are required to submit audited financial statements, there is a list of international standards accepted by the FSC, which allows the manager to select an auditor in the location that best suits the fund.

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

All professional, private, incubator and approved funds 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 fund property must be valued by the fund's administrator (or other person having responsibility for the valuation of fund property) 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 constitutional documents and offering document/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.

All funds must have arrangements in place for the safekeeping, and appropriate segregation, of fund property. Whilst this is usually fulfilled by the appointment of a traditional custodian or prime broker, for incubator and approved funds (which do not need to have either) this would typically be fulfilled by an appropriately qualified person.

Public funds are subject to the Public Funds Code, 2010 and must maintain a valuation policy that is appropriate for the nature, size, complexity, structure and diversity of the fund and fund property. The valuation policy must be reviewed and approved on at least an annual basis and the fund property consistently valued in accordance with the policy. In addition, the prospectus must include prescribed information relating to the valuation of fund property and fund interests.

### **Independence of investment function and valuation process**

For public, professional, private, incubator and approved funds, the manager (where applicable) or other person having responsibility for, or controlling, the fund's investment function must be independent from the fund's administrator or other person having responsibility for, or controlling, the fund's valuation process. Where independence is not possible, generally the fund must identify, manage and monitor any potential conflicts of interest that may arise in order to protect the fund's investors and disclose to the fund's investors how any such conflicts are managed.

### **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](http://mourant.com). © 2023 MOURANT OZANNES ALL RIGHTS RESERVED