





CORPORATE FLEXIBILITY AND EASE OF NAVIGATION CAN EXPLAIN THE INCREASING POPULARITY OF THE BRITISH VIRGIN ISLANDS (BVI) AMONG ASIAN FUND MANAGERS, VIRTUAL ASSET BUSINESSES, AND SPECIAL PURPOSE ACQUISITION COMPANIES

OFFSHORE SOLUTIONS IN BVI

Guide to BVI closed-ended investment funds

While the Cayman Islands has forged a deserved reputation as the leading off-shore jurisdiction for investment funds, in recent years the British Virgin Islands (BVI) has gained increasing popularity in the closed-ended sector of the industry. This article discusses the most commonly sought structure for BVI closed-ended funds, and certain legal and regulatory considerations for global fund managers associated with the use of the jurisdiction.

BVI LIMITED PARTNERSHIPS

The renaissance of BVI investment fund activity has been driven in no small part by the wholesale rewrite of the jurisdiction's partnership legislation in 2017, and the introduction of the Limited Partnership Act (LP Act, as revised). The LP Act replaced the longstanding and under-utilised international limited partnership regime, and offers managers a highly flexible and modern structuring tool for closed-ended investment funds.

Drawing heavily on the continued refinements made to the limited partnership product in other competing jurisdictions, BVI limited partnerships now share many of the features of those other offerings, including broad freedom to contract, operational responsibilities being vested in the general partner, and limited partners enjoying limited liability in exchange for no involvement in day-to-day management.

General partners of BVI limited partnerships are also subject to substantially the same unlimited liability for limited partnership debts and liabilities, and statutory duties to at all times act in good faith and (subject to any express provisions to the contrary in the limited partnership agreement) in the interests of the limited partnership.

There are notable differences between the Cayman Islands and BVI regimes. For example, while both jurisdictions permit the use of non-domestic entities as general

partners, unlike in the Cayman Islands, a non-BVI entity does not need to first register as a foreign company in the BVI to be eligible to act as general partner of a BVI limited partnership.

Unlike Cayman Islands exempted limited partnerships, BVI limited partnerships may be formed with separate legal personality. While this does not constitute them as separate bodies corporate in the same way as, for instance, a BVI business company, it does permit any charge created over an asset of a BVI limited partnership that is registered with the Registrar of Limited Partnerships in the BVI to then have priority over any other charge over the same asset that is either unregistered or registered subsequently.

The registration process for BVI limited partnerships is straightforward and requires only submission to the Registrar of a registration statement (signed by each general partner) containing certain prescribed limited partnership information, a letter of consent from the limited partnership's proposed registered agent in the BVI, and confirmation of whether the limited partnership is to be formed with separate legal personality, together with the payment of the requisite USD750 government registration fee.

Regulations accompanying the LP Act set out a model form of a limited partnership agreement that will be deemed adopted by a limited partnership at registration, unless overridden by the entry into a separate form of a limited partnership agreement for this purpose. Registration will usually take up to four working days to be processed.

INVESTMENT FUND REGULATION

BVI closed-ended investment funds, whether limited partnerships or otherwise, are subject to regulation under the Securities and Investment Business Act (SIBA) if they constitute "private investment funds". A private investment fund is defined under the

SIBA as a company, partnership, unit trust or any other body that:

- Collects and pools investor funds for the purpose of collective investment and diversification of portfolio risk; and
- Issues fund interests that 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.

Accordingly, where there is a lack of collective investment or diversification of portfolio risk, a closed-ended fund will not meet the above-mentioned definition, and will not be subject to regulation under the SIBA. This is a driver behind the increased use of BVI for single investor or single investment funds and "club deals", and for co-investment vehicles set up to hold a single investment for one or more investors within the framework of an existing closed-ended fund structure – particularly where acquisition structures need to be set up and portfolio acquisitions need to be completed with some urgency.

Subject to limited provisos, the SIBA contains a general prohibition on the promotion of private investment funds and their carrying on of business unless and until recognised formally as such by the BVI Financial Services Commission (the FSC).

In order to be eligible for such recognition, the constitutional documents of a private investment fund must: (1) specify that the offer of fund interests to investors must be made on a "private basis" only; (2) restrict the number of shareholders or investors to 50; and (3) restrict the offer to "professional investors" and a minimum initial investment of USD100,000 for each such investor.

The application process for recognition requires the payment of application fees, which can vary depending on when in a calendar year recognition is being sought, and the submission to the FSC of a completed

application form together with a number of supporting documents including the fund's constitutional documents, offering documentation, if any – if none, then an explanation for the lack of must be provided – and valuation policy. The recognition process will typically take between five to seven working days, provided all required documents are submitted to the FSC successfully.

Private investment funds are subject to various ongoing obligations following recognition, including the retention of:

- A suitably qualified person – known as an “appointed person” – to take responsibility for undertaking the management, valuation and safekeeping of fund property;
- An auditor (although this need not be a local auditor based in the BVI), together with the submission to the FSC of annual audited accounts unless exempted under certain limited circumstances; and
- An authorised representative based in the BVI empowered to liaise with the FSC on a fund's behalf.

Any change to the appointed person, auditor or authorised representative must be notified to the FSC within certain prescribed timeframes specified under the SIBA.

OTHER RELEVANT REGULATIONS

The business of being a private investment fund constitutes “relevant business” for the purposes of the BVI Anti-Money Laundering Regulations (as revised), and as a result private investment funds are subject to the BVI anti-money laundering (AML) regime. In addition to the regime's know-your-client (KYC) investor onboarding requirements, a private investment fund must also appoint a suitably qualified money laundering reporting officer.

The officer, who may be internal to the fund or appointed externally, will act as the liaison with the BVI Financial Investigation Agency in relation to AML compliance mat-

ters, and will have responsibility for ensuring compliance by the fund's staff with AML law and regulation, and any internal reporting protocols and compliance procedures the fund may have adopted.

A closed-ended investment fund formed in the BVI that does not meet the private investment fund definition under the SIBA and is not otherwise regulated will not technically be subject to the jurisdiction's AML regime. It is however both recommended and accepted market practice for unregulated funds of this nature to conduct investor onboarding KYC and due diligence as if subject to the regime.

BVI closed-ended investment funds, whether recognised as private investment funds or not, will also constitute “foreign financial institutions” and “financial institutions” under the US Foreign Account Tax Compliance Act and the OECD's Common Reporting Standard, respectively, as both are adopted into local BVI legislation. Accordingly, such investment funds are subject to the regimes' registrations, account due diligence and account reporting requirements.

APPROVED MANAGER REGIME

Alongside investment funds themselves, there has also been increased interest in establishing investment advisers and managers in the BVI under its approved manager regime to service such funds. The regime operates as a regulatory “light” initiative for qualifying BVI managers and advisers, while maintaining appropriate regulatory oversight in line with standards found in other major investment fund jurisdictions.

Involving a simple and non-invasive application process, the regime is suitable for BVI entities looking to act as advisers or managers to closed-ended fund structures with assets under management of USD1 billion or less, or open-ended funds with assets under management of USD400 million or less.



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