

# Establishing a Closed-Ended Fund in the BVI

Are you thinking of setting up a closed-ended investment fund in the BVI? This document provides an overview of the closed-ended funds industry in the BVI and why the BVI is such an attractive jurisdiction for private equity, venture capital and other closed-ended fund managers. We explain the regulatory regime in the BVI, the fund structures available and how we can support you from the initial structuring and planning conversations, all the way through to the launch and ongoing support.

Closed-ended funds in the BVI are regulated by the Financial Services Commission (the **Commission**). The primary legislation which governs the industry is the Securities and Investment Business Act 2010, as amended (**SIBA**), and the Private Investment Funds Regulations 2019 (the **PIF Regulations**).

This guide focuses on the closed-ended fund industry, but it should be highlighted that the BVI does have a separate regulatory regime for hedge funds and other open-ended funds – these are discussed in a separate legal guide. Do let us know if you would like further details.

## What factors determine whether a closed-ended fund must be regulated in the BVI?

Generally, an entity will be considered to be a closed-ended fund and will be subject to regulation as a Private Investment Fund (or **PIF**) if it falls within the following definition of a “**private investment fund**”:

- It collects and pools investor funds for the purpose of collective investment and diversification of portfolio risk, and
- The equity interests that it issues entitle the holder to receive an amount calculated by reference to the value of a proportionate interest in the whole or a part of the net assets of the fund

## The BVI Private Investment Fund Regime

BVI closed-ended funds falling within the definition of a “**private investment fund**” are generally required to be regulated by the Commission as a PIF. However certain entities, including but not limited to single investor funds, single asset funds, joint venture companies and special purpose acquisition companies do not require regulation as a PIF. The PIF is a flexible, cost-effective and lightly-regulated fund product which is suited for everyone from the start-up manager to established institutional private equity houses with billions under management. The characteristics of the PIF are set out below.

### Private investment fund

Interests in a PIF may be distributed on either a ‘private’ or a ‘professional’ basis. There is no minimum investment amount for a PIF distributed on a private basis. If distributing on a ‘private’ basis the PIF is restricted to either:

- Having no more than 50 investors, or
- Making an invitation to subscribe for or purchase fund interests on a private basis only

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If the PIF interests are being distributed on a 'professional' basis it they may only be made available to "professional investors" and the minimum initial investment by each professional investor must not be less than US\$100,000 (or other currency equivalent), unless the investor is an "exempted investor" in which case there is no minimum initial investment.

A "professional investor" is 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, whether individually or jointly with their spouse, has a net worth in excess of US\$1,000,000 (or other currency equivalent) which does include the primary residence

An "exempted investor" means:

- The manager, administrator, promoter or underwriter of the fund, or
- Any employee of the manager of the fund

A PIF is required to issue an offering document or term sheet (although in certain circumstances the Commission can provide an exemption from this requirement).

A PIF is required to maintain a clear and comprehensive policy for the valuation of its assets (**Fund Property**) with procedures that are sufficient to ensure that the valuation policy is effectively implemented. The valuation policy shall:

- Be appropriate for the nature, size, complexity, structure and diversity of the fund and Fund Property
- Be consistent with the provisions concerning valuation in its constitutional documents and term sheet/offering document
- 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

A PIF is also required to provide information to the Commission on its arrangements for safekeeping of the Fund Property.

A PIF may carry on its business or manage or administer its affairs for a period of up to 21 days without being recognised under SIBA.

## What fund structure should I use?

The majority of BVI PIFs are established as limited partnerships under the BVI Limited Partnership Act 2017 and we would generally recommend using this structure. Companies limited by shares under the BVI Business Companies Act 2004 (**BCA**) are also quite common. Although permitted, we rarely see unit trusts used for closed-ended fund structures, but we would of course be happy to discuss them with you.

### Limited partnerships

A BVI limited partnership is formed by a general partner and at least one limited partner executing a limited partnership agreement (or adopting a statutory model form agreement) and the registered agent submitting a registration statement and registered agent consent to act to the BVI Registrar of Limited Partnerships. The partnership agreement forms the internal governing document of the limited partnership, dealing with issues such as partnership contributions, distribution waterfalls and the day-to-day running of the limited partnership and does not have to be filed with the BVI Registrar.

A BVI limited partnership can elect whether to have a separate legal personality distinct from its partners. The general partner of a BVI limited partnership is ultimately liable for the debts and obligations relating to the limited partnership. As a matter of BVI law, a limited partner BVI limited partnership is not liable for the debts and obligations of the limited partnership (save for the amount contributed and any unpaid commitment).

The general partner of a BVI limited partnership is typically a company or LLC and does not need to be a BVI entity. There is no requirement for the general partner to appoint a BVI resident director or for the directors to register with the Commission.

### BVI Business Companies

A BVI Business Company is a separate legal entity from its investing shareholders (whose liability is limited by statute). The shareholders of a BVI Business Company have no direct legal or beneficial interest in any of the assets of the company which are instead legally and beneficially owned by the company itself.

The BCA is very flexible for structuring funds. For example, there is no concept of “authorised capital” or “share capital” under BVI law, and shares do not need to have any par value or capital attributed to them. The directors may also designate different series of shares within each class of shares without the need to amend the constitutional documents of the fund. There is no requirement for a PIF to appoint a BVI resident director or for the directors to register with the Commission.

## What service providers or appointed persons will I need to get started?

PIFS are not required to appoint a manager, administrator or custodian. However PIFs are required to work with “appointed persons” who will take responsibility for the following functions:

- Management of Fund Property
- Valuation of Fund Property
- Safekeeping of Fund Property

The PIF Regulations provide that an “appointed person” may be a person licensed by the Commission or a regulatory authority in a recognised jurisdiction, an independent third party with experience in performing the specified functions or a director, partner or trustee of the PIF. An “appointed person” can be a corporate entity and does not need to be a natural person, or a BVI resident.

The PIF Regulations also provide that the appointed person with responsibility for the fund’s management function must be independent from the appointed person with responsibility for the valuation process. If the PIF determines that these must be the same person, the PIF is required to identify, manage and monitor any potential conflicts of interest that arise.

A PIF is also required to appoint the following:

- An auditor (which need not be located in BVI), although there are exemptions available depending on the circumstances of the fund
- An authorised representative in the BVI to liaise between the fund and the Commission. This is a service offered by our associated services business, Craigmuir Authorised Representative Limited

While a PIF is not required to appoint an administrator many choose to do so, particularly to avail of an administrator’s expertise in verifying the identity of investors, complying with relevant anti-money laundering regulations and assisting with registration and reporting obligations under FATCA and CRS.

## I have existing relationships with some service providers but they are not based in the BVI. Can I appoint them to my BVI fund?

It is very likely that you will be able to use the providers you are already familiar with. The Commission requires (in accordance with SIBA and policy guidelines) that a functionary of a PIF (ie any manager, investment advisor, administrator or custodian) must satisfy the Commission’s fit and proper criteria. But to fast-track this process, the Commission will generally automatically accept a functionary that is located and appropriately regulated in a “**Recognised Jurisdiction**”.

The following countries have been designated by the Commission as Recognised Jurisdictions:

Argentina, Australia, Bahamas, Bermuda, Belgium, Brazil, Canada, Cayman Islands, Chile, China, Curacao, Denmark, Finland, France, Germany, Gibraltar, Greece, Guernsey, Hong Kong, Ireland, Isle of Man, Italy, Japan, Jersey, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Panama, Portugal, Singapore, Spain, South Africa, Sweden, Switzerland, United Kingdom, and the United States of America.

Accordingly, an application for recognition of a PIF whose functionaries are domiciled in a Recognised Jurisdiction and hold the appropriate regulatory status in that jurisdiction will generally be processed without further assessment of the fit and proper status of such functionaries.

The Commission may also accept a functionary domiciled in another jurisdiction if the applicant can satisfy the Commission that the jurisdiction has a system for the effective regulation of investment business, including funds business.

## I am also going to need to set up a new investment management vehicle to manage my BVI fund. Can you assist with that?

Absolutely, although it should be pointed out again that the investment management vehicle can be based in any of the Recognised Jurisdictions listed above if required.

But if you would like to establish an investment manager in the BVI (and our clients commonly do), the two basic regulatory options are (i) the full investment management license under Part I of SIBA; or (ii) the approved manager regime.

The application for a SIBA licence is substantial and involves the submission of a wide variety of documents to the Commission. Whilst a number of our clients do hold the full SIBA license, the approved manager product has proved hugely attractive as it provides eligible fund managers and advisers with a less onerous regulatory regime. Those eligible for approved manager status may submit a simple application to the Commission and commence business seven days later without waiting for formal approval.

The key restriction for an approved manager is that aggregate capital commitments of all closed-end funds under management cannot exceed US\$1 billion, and for open ended funds under the management of the approved manager assets under management cannot exceed US\$400 million.

Please contact us if you would like further information on either of these options.

### Regulatory considerations

A PIF must also comply with the following regulatory obligations under BVI law:

- Appoint a money laundering reporting officer (in accordance with the fund's obligations under the BVI Anti-Money Laundering Regulations 2008 and the BVI Anti-Money Laundering and Terrorist Financing Code of Practice 2008 (as amended)). This person is often one of the directors or a representative of the administrator who is conducting the onboarding of investors on behalf of the fund
- Put in place procedures for investor on-boarding which address typical investor identification requirements and the reporting of suspicious activities to the BVI Financial Investigations Agency, and documenting how the fund complies with BVI anti-money laundering procedures (if an administrator is not appointed given they would naturally perform this function)
- Register and report with the BVI International Tax Authority (*ITA*) to meet the fund's automatic exchange of information obligations under the United States Foreign Account Tax Compliance Act (*FATCA*) and the OECD Common Reporting Standard (*CRS*) as implemented in the BVI

Harneys would be pleased to advise on compliance with the above obligations.

### What fees are payable to the Commission?

Fees payable by a PIF to the Commission are competitive and lower than in most other offshore and onshore jurisdictions. Fees are payable on application and annually and are set out in the table below.

Application Fee (US\$)	Initial Recognition Fee (US\$)*	Annual Fee (US\$)
US\$850	US\$1,200	US\$1,200

\*This one-off fee is halved where an application is made after 30 June.

## How long will it take to set up my fund?

The time taken to set up your PIF will depend largely on how long it takes to agree terms with any service providers and finalise your strategy and offering documents. However, a rough guide is set out below.

Formation/Incorporation of Partnership/Company	Time to Prepare Documentation	Time for Recognition
Same day* (allow 3 days for documents to be returned from the registry)	Generally 2-4 weeks (but can be quicker)	7 days for a complete application

\* We must obtain “know your client” information and a retainer before we can submit the formation/incorporation request to the registry.

In assisting you with the formation of a new PIF, our services are likely to include the following, although we will always tailor our provision to meet your specific needs:

- Advising on the structure of the fund
- Preparing constitutional and organisational documents, including a bespoke limited partnership agreement for a limited partnership or articles of association for a BVI business company limited by shares
- Drafting or reviewing from a BVI perspective the private placement memorandum and subscription agreement for the fund
- Drafting or reviewing from a BVI perspective the investment management agreement between the fund and the manager (if applicable)
- Reviewing and commenting, from a BVI perspective, on the administration agreement (if applicable)
- Reviewing the fund’s valuation policy
- Advising on the fund’s safekeeping arrangements
- Preparing general partner/directors’ resolutions for the launch of the fund
- Advising on the regulatory requirements in the BVI and preparing and making an application for recognition of the fund with the Commission
- Making all necessary filings in respect of the fund
- Liaising with Harneys Corporate Services Limited and Craigmuir Authorised Representative Limited in relation to the provision of registered office/registered agent/authorised representative and related corporate services for the fund
- Providing you with a summary of the continuing obligations of your fund

In addition, we have excellent relationships and work closely with a variety of other service providers including administrators, custodians, brokers, auditors and independent directors and would be very happy to make introductions to you should you wish to engage external service providers.



For more information and key contacts please visit [harneys.com](https://www.harneys.com)