

# Legal Briefings

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## Key Features and Requirements of BVI Private Investment Funds

June 2024

In December 2019, the British Virgin Islands (“**BVI**”) introduced a new regulatory regime for closed-ended funds in the BVI by requiring closed-ended funds (e.g., funds investing in private equity, venture capital, real estate, and infrastructure projects) which qualify as “private investment funds”, to apply to the Financial Services Commission of the BVI (“**FSC**”) to be recognized and regulated by the FSC.

On the same date, the FSC also published (i) the Private Investment Funds Regime Guidelines, which sets out the requirements for recognition of a private investment fund by the FSC, and (ii) Fund Safekeeping Arrangements Guidelines, which sets out the type of arrangements considered by the FSC to be appropriate for private investment funds (and other regulated fund types in the BVI), based on the particular asset class invested in.

### What is a Private Investment Fund?

A Private Investment Fund is defined as a company, a partnership, unit trust, or any other body which (i) collects and pools investor funds for the purpose of collective investment and diversification of portfolio risk, and (ii) 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 or unit trust or other body.

An entity which meets the definition of a Private Investment Fund cannot legally carry on business or hold itself out as carrying on business as a Private Investment Fund, unless it is recognized by the FSC as a Private Investment Fund. Single investor funds fall outside the scope of a Private Investment Fund, given that they do not involve a “pooling” of investor funds. Similarly, single project funds will not fall within the definition of a Private Investment Fund, due to the lack of diversification of portfolio risk.

### What are the key requirements of a Private Investment Fund?

1. A Private Investment Fund needs to be lawfully incorporated or registered under the laws of the BVI or a country outside the BVI.
2. A Private Investment Fund that is a company (or the general partner in the case of a limited partnership or the trustee in the case of a unit trust) must have at least two directors, one of whom must be an individual.
3. The constitutional documents of the Private Investment Fund must clearly state that:
  - (i) the Private Investment Fund is not authorised to have more than 50 investors; or
  - (ii) any invitation to subscribe for or purchase, fund interests issued by the Private Investment Fund must be made on a private basis only; or

- (iii) fund interests shall be issued only to professional investors, with an initial investment of each professional investor, other than an exempted investor, not being less than US\$100,000. “Professional Investor” is a person (X) 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 Private Investment Fund, or (Y) who has signed a declaration that he/she (whether individually or jointly with his/her spouse), has net worth in excess of US\$1,000,000.
4. Investors do not have the right to redeem or withdraw fund interests on demand.
  5. A Private Investment Fund must have an authorised representative.
  6. A Private Investment Fund must appoint a suitable MLRO and have a suitable AML Policies and Procedures which are compliant with BVI law.
  7. Recognition of the fund as a Private Investment Fund must not be against the public interest.
  8. A Private Investment Fund must at all times have a person appointed who is responsible for (each an “**Appointed Person**”):
    - (i) the management of fund property;
    - (ii) the valuation of fund property; and
    - (iii) the safekeeping of fund property, including the segregation of fund property.

An Appointed Person can be (i) a director or the general partner of the Private Investment Fund, (ii) an independent third party with experience in performing the specified function, or (iii) a person licensed in BVI or a recognized jurisdiction to carry out such functions.

The Private Investment Fund must give due consideration to the Fund Safekeeping Arrangements Guidelines, when making a decision on the Appointed Person to be responsible for the safekeeping of the Private Investment Fund’s property. There is no statutory requirement for a Private Investment Fund to appoint a fund manager, fund administrator or custodian. Where an application for recognition as a Private Investment Fund has been approved by the FSC, the Fund will be issued with a Certificate of Recognition as a Private Investment Fund.

#### **What documents are required to be submitted to the FSC for a Private Investment Fund application?**

An application form must be submitted to the FSC, along with a copy of the Private Investment Fund’s (i) constitutional documents, (ii) certificate of incorporation or registration, (iii) Register of Directors for a company, (iv) term sheet or offering document, (v) valuation policies and procedures, and (vi) a CV for each director.

#### **What are the requirements for valuation of a Private Investment Fund?**

A Private Investment Fund must have a valuation policy, which shall be used to value the Private Investment Fund’s assets. The valuation policy must be appropriate for the nature, size, complexity and assets under management of the Private Investment Fund. A valuation of the Private Investment Fund’s assets must be undertaken at least once per year. If the same person is the Appointed Person in respect of the management of fund property and valuation of fund property for the Private Investment Fund, the Fund must clearly disclose to investors and monitor any potential conflicts of interest.

### What are the audit requirements for a Private Investment Fund?

A Private Investment Fund is required to prepare audited financial statements that comply with IFRS, GAAP or other internationally recognized and generally accepted accounting standards. There is no requirement for a local BVI auditor or local BVI auditor sign-off for a Private Investment Fund.

### What are the ongoing obligations of a Private Investment Fund?

1. The Private Investment Fund must maintain financial records to explain its transactions, which must be retained for at least 5 years after completion of the transaction to which they relate.
2. The audited financial statements of a Private Investment Fund must be filed with the FSC within 6 months of the Fund's financial year end. The FSC may allow an extension for filing of up to 9 months upon payment of the requisite fee.
3. The Private Investment Fund (or the appointed third party) must attend to all CRS/ FATCA related reporting for the Fund.

### What event-driven notifications must a Private Investment Fund make to the FSC?

A Private Investment Fund must notify the FSC (via its authorised representative) upon the occurrence of certain events, including:

1. If it does not have two directors (or the general partner in the case of a limited partnership or trustee in the case of a unit trust) within 7 days.
2. The appointment of an Appointed Person at least 7 days' prior to the appointment.
3. The resignation of an Appointed Person within 7 days, including a statement of the reason for such Appointed Person ceasing to act.
4. Any amendment to the offering document, term sheet of valuation policy within 14 days.

### What are the consequences of breach of the laws relating to Private Investment Funds?

Schedule 7 of the Securities and Investment Business Act (Revised), as amended, sets out the monetary penalties for offences in relation to a Private Investment Fund, including (i) for an entity carrying on as a Private Investment Fund without being recognized by the FSC as a Private Investment Fund, and (ii) for a Private Investment Fund not maintaining financial records.

### Further Assistance

This publication is not intended to be a substitute for specific legal advice or a legal opinion. If you require further advice relating to the matters discussed in this Briefing, please contact us. We would be delighted to assist.

E: [gary.smith@loebsmith.com](mailto:gary.smith@loebsmith.com)

E: [robert.farrell@loebsmith.com](mailto:robert.farrell@loebsmith.com)

E: [ivy.wong@loebsmith.com](mailto:ivy.wong@loebsmith.com)

E: [elizabeth.kenny@loebsmith.com](mailto:elizabeth.kenny@loebsmith.com)

E: [cesare.bandini@loebsmith.com](mailto:cesare.bandini@loebsmith.com)

E: [vivian.huang@loebsmith.com](mailto:vivian.huang@loebsmith.com)

E: [faye.huang@loebsmith.com](mailto:faye.huang@loebsmith.com)

E: [yun.sheng@loebsmith.com](mailto:yun.sheng@loebsmith.com)

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