

BVI Investment Business Companies

July 2010

I. Introduction

A new 'investment business' licensing regime has been introduced in the British Virgin Islands (BVI) requiring providers of investment services *in or from within* the BVI to hold a license. The new regime is intended to regulate, inter alia, investment advisors, broker-dealers, market makers, custodians and operators of investment exchanges and is applicable to existing, as well as, new companies and/or persons engaging in activities which constitute 'investment business'.

II. General

The Securities and Investment Business Act, 2010 ("SIBA") has been introduced in the BVI following an industry consultation. It is thought that SIBA constitutes a landmark legislation as it has introduced, inter alia, a licensing regime for those carrying on 'investment business' in or from within the BVI.

SIBA allows for a transition period, in that persons already carrying on 'investment business' as at 17 May 2010 (the "enactment date") are required to obtain a license from the BVI Financial Services Commission ("FSC") within six months of the enactment date, whilst persons not already carrying on 'investment business' would be required to obtain a license in order to commence 'investment business'.

SIBA provides that no person may carry on 'investment business' of any kind in or from within the BVI unless they are licensed by the FSC to carry on such 'investment business'. Conducting investment business in the BVI without holding a license is an indictable offense carrying a maximum fine of USD75,000 and may also lead to the unenforceability of any consequential transactions entered into.

III. Investment Business

Investment business is defined by reference to certain 'investment activities' in relation to 'investments'. The definitions of both terms are set out in great detail in **Schedules 1 and 2** of SIBA.

The types of **investment activities** are broadly defined in **Schedule 2** of SIBA as follows:

- Dealing in investments
- Arranging deals in investments
- Managing investments
- Providing investment advice
- Providing custodial services with respect to investments
- Providing administration services with respect to investments
- Operating an investment exchange

Schedule 2 also provides for a wide range of excluded activities for which the provisions of SIBA do

not apply and for exemption of certain types of persons conducting investment business from the requirement to hold a license under SIBA.

The investment activities referred to above must be in relation to **investments** which are broadly defined in **Schedule 1** to include:

- Shares, interests in a partnership or fund interests
- Debentures
- Instruments giving entitlement to shares, interests or debentures
- Certificates representing investments
- Options
- Futures
- Contracts for difference
- Long-term insurance contracts
- Rights and interests in investments

Cash and real estate property are not investments under SIBA.

IV. Scope of Application

SIBA determines that a BVI business company that carries on or holds itself as carrying on investment business outside the BVI, is deemed to carry on or hold itself out as carrying on investment business from within the BVI. This means that even if the investment business is carried outside of the BVI by business companies, or other BVI persons, then such business will be deemed to occur in the BVI and a license will be required.

In addition, a person will be deemed to carry on investment business in or within the BVI if he/she solicits a person in the BVI for the purpose of offering to provide a service that constitutes investment business.

As already mentioned, SIBA provides a list of excluded activities and excluded persons, so clients are advised to seek professional advice if they have any doubt as to whether their proposed activity falls within the scope of SIBA or whether they would benefit from an exception.

V. Obtaining the License

The FSC may take into account a number of facts and circumstances before it issues a license. In general SIBA provides that the FSC will grant the license if it is satisfied that:

- the applicant intends, if issued with a license, to carry on the relevant investment business
- the applicant satisfies the requirements of applicable legislation with respect to the application
- the applicant will, on the issuance of the license, have capital resources equal to those prescribed by law
- the applicant will otherwise be in compliance with all applicable legislations, regulatory codes and practice directions

- its directors, senior officers and shareholders satisfy and fit the proper criteria
- the organisation, management and financial resources of the applicant are, or on the issuance of the license will be, adequate for the carrying on of the relevant investment business; and
- issuing the license is not against the public interest

Once licensed, a licensee will be entered on the Register of Investment Business Licensees in the BVI. The license may be subject to such conditions as may be imposed by FSC.

VI. Professional Indemnity and Other Insurance

SIBA provides that a licensee under the Act must obtain and at all times maintain such professional indemnity and other insurance as may be prescribed.

VII. Bearer Shares

BVI Investment Business Companies licensed under SIBA are not allowed to issue bearer shares.

VIII. Approved Auditors

Licensees under SIBA are required to appoint and at all times have an auditor for the purposes of auditing its financial statements. An auditor must be an "approved auditor". This means that the auditor's appointment must be approved in advance by FSC.

IX. Authorised Representative

Under SIBA, all licensees must have an authorised representative in the BVI, unless such licensee has a significant management presence in the BVI. The authorised representative's functions are as follows:

- acting as the main intermediary between the licensee and the FSC
- accepting service of notices and other documents on behalf of the licensee;
- keeping such records, or copies of such records, as may be prescribed by applicable regulations
- submitting documents to the FSC (unless otherwise provided by applicable regulations)
- paying fees to FSC on behalf of the licensee (unless otherwise provided by applicable regulations)

Where an authorised representative resigns or his appointment is terminated or become vacant for any reason, a licensee may appoint another authorised representative within 21 days from the date of the previous authorised representative ceased to act.

NOTES:

The above is intended to provide a brief guide only. It is essential that appropriate professional advice is obtained. Totalserve Management Ltd will be glad to assist you in this respect. Please do not hesitate to contact us.