



*This bulletin provides an overview of the financial services industry and recent developments in the British Virgin Islands (“BVI”), including legal and regulatory amendments, important judgments and significant transactions.*

## **The Securities and Investment Business Act, 2010 (“SIBA”)**

On May 17, 2010, SIBA was brought into force in the BVI, introducing regulatory reform to investment business, the public issue of securities, market abuse and hedge funds.

### **Investment Business**

SIBA requires any person carrying on “investment business” in or from the BVI to obtain a licence from the BVI Financial Services Commission (“FSC”), including:

- BVI companies which carry on investment business, even if the relevant company’s business activities occur entirely outside of the BVI; and
- Non-BVI persons who solicit individuals or companies in the BVI for the purpose of offering investment business services. Provided no solicitation occurs in the BVI itself, the licensing requirement will generally not apply to non-BVI persons who provide investment business services to BVI companies outside of the BVI.

“Investment business” is very widely defined by SIBA and will catch investment managers, investment advisors, administrators, custodians, market makers, brokers, dealers, market intermediaries and operators of investment exchanges.

### **Public Issue of Securities**

BVI companies will be able to offer securities outside the BVI without restriction, and securities can be offered to BVI companies without restriction, provided such an offer is not sent into, or received in, the BVI. The applicable provisions of SIBA are not yet in force, pending the drafting of a public issuers code.

### **Market Abuse**

SIBA introduces new criminal offences relating to insider dealing, misleading statements and market manipulation. Broadly, the territorial scope of all of these offences is limited to conduct which occurs in the BVI.

### **Hedge Funds**

SIBA replaces existing legislation regulating hedge funds, however many of the “new” requirements introduced by SIBA are already required in practice by the FSC. The key new requirements are that funds appoint an auditor and submit audited financial statements to the FSC, have an authorised representative in the BVI to liaise with the FSC, and include a prescribed investment warning in their offering memoranda.

## Conclusion

The key change introduced by SIBA is the licensing and supervisory regime for investment business, bringing the BVI into line with other financial centres. Judging from experience with other financial services licensees in the BVI, there is every reason to think the FSC will administer the new regime efficiently and without undue interference with the day-to-day business activities of licensees.

## Richard Evans Promoted to Partner in Conyers' BVI Litigation Department

Richard has over fifteen years' experience in commercial litigation and all contentious aspects of commercial and insolvency law. Since joining Conyers, Richard has appeared in a number of the leading decisions in BVI concerning the interpretation and operation of the Insolvency Act 2003. He is equally at home in Court, acting as Counsel before the Commercial Court or the Court of Appeal of the Eastern Caribbean Supreme Court, as he is in giving timely strategic advice. He has recently appeared as lead Counsel in a number of the leading decisions in the Commercial Court concerning disputed debt/distressed funds matters.

## Trust & Private Client Practice Launched in BVI

The new practice launched in April 2010 and is headed by Raymond Davern, who advises on all aspects of BVI trust law to BVI licensed trustees and clients including HNW individuals and corporate and commercial trusts. The new practice extends our BVI practice into a full service law firm advising on corporate, litigation and trust & private client law. Raymond has more than 10 years' experience of Chancery litigation and advisory work, and another 10 as Lecturer in Law at King's College in London (where he worked closely with Professor David Hayton) specializing in the law of trusts.

## London Circle of Business Leaders Meets to Discuss BVI Outlook

Martin Lane and Edward Stone from Conyers' London office, and Raymond Davern from the firm's BVI office formed part of the BVI London Circle of Business Leaders which met last month with Kedrick Malone, Director of the BVI Government's London Office, to discuss avenues for growth in the BVI financial services industry. The meeting focused on political developments in the UK and Europe, possible impacts of the EU Funds directive and the BVI's Tax Information Exchange Agreements programme. Conyers has been involved in promoting the BVI in London for over 10 years. In addition to its membership in the London Circle of Business Leaders, Conyers hosted its 2nd Annual London Trust Forum last month, showcasing Conyers' new trust practice in the BVI.

## New Insurance Regime in BVI

On 1 February 2010, the Insurance Act, 2008, with attendant Insurance Regulations, 2009 (together, the "Insurance Act and Regulations") came into force, pursuant to the Financial Services Commission Act (the "FSC Act").

The revised legislation structure provides a robust regulatory framework with a high degree of flexibility, based on the utilisation of the 2009 Regulatory Code ("the code").

### Key Changes:

- A license, once granted, continues until it is cancelled, where previously insurance licenses were required to be renewed annually;
- Insurance companies are no longer allowed to hold both General and Long-Term licenses simultaneously, but must apply to the FSC for a license either to conduct one or more classes of General business, or to carry on one or more classes of Long-Term business;
- The redomiciliation of an insurance company and the creation of segregated portfolio insurance companies are now regulated by the BVI Business Companies Act, 2004;

- FSC regulators are now able to fine-tune the code without recourse to the full legislative amendment process.

The Insurance Division of the FSC is responsible for the regulation, supervision and inspection of all insurance companies, insurance managers and other intermediaries operating within the BVI to ensure compliance with the provisions of the Insurance Act and Regulations.

## **BVI FSC Publishes Guidance on the BVI Bearer Share Regime**

A new Bearer Share Regime came into force in the BVI at the end of 2009, ruling that bearer shares in companies incorporated in the BVI prior to January 1, 2005 which were not deposited with a custodian, or converted or exchanged into registered shares before January 1, 2010, were “disabled”, losing all of their rights, including the right to vote, the right to receive dividends and the right to share in the assets of the company on liquidation.

On March 5, the FSC published guidance stating that in order to “re-enable” bearer shares disabled on January 1, 2010, it is necessary to first apply to court to obtain an extension of the January 1, 2010 deadline before depositing, converting or exchanging the shares, and subsequently deposit the shares with a custodian or convert or exchange them for registered shares. The implication is that failure to apply to court and “re-enable” bearer shares prior to December 31, 2010 will result in the shares becoming permanently disabled.

The FSC’s guidance is likely to mean that authorised custodians in the BVI will not accept the deposit of disabled bearer shares without evidence of an appropriate court order. Moreover, any attempt to re-enable disabled bearer shares without a court order will not be recognised as valid by the FSC, which has the power to liquidate companies which are not in compliance with the bearer share regime.

Therefore, companies with disabled bearer shares in issue and holders of disabled bearer shares should make an application to court and complete the other formalities to re-enable their shares as soon as possible and, in any event,

prior to the end of the year, to avoid the possibility of these shares becoming permanently disabled (in the FSC’s view).

While we acknowledge the uncertainties in the legislation, there are some question marks about whether the FSC’s interpretation of the legislation is correct. We are of the view that it is not. In particular, the consequence of permanent disablement appears to be in conflict with the operative provision in the legislation which states that “a bearer in a company is disabled *for any period* during which it is held by a person other than a custodian” (emphasis added). Furthermore, the definition of disablement expressly contemplates the ability to deliver shares to a custodian. It is also surprising that the FSC has adopted such a draconian interpretation in the absence of a provision in the legislation expressly contemplating permanent disablement.

The FSC’s interpretation also has the consequence of treating disabled bearer shares in companies incorporated prior to January 1, 2005 differently from those incorporated after that date. In particular, disabled shares in companies incorporated after January 1, 2005 can be re-enabled at any time without applying to court and can never become permanently disabled.

## **British Virgin Islands New Mutual Fund Case:**

### **Western Union International Limited vs. Reserve International Liquidity Fund Ltd.**

The BVI Commercial Court recently delivered a decision in *Western Union International Limited vs. Reserve International Liquidity Fund Ltd.* which is of interest to all hedge fund managers and practitioners. The BVI Court reached four central conclusions which are of particular interest:

1. *Time at which a redeeming shareholder becomes a creditor:* In a ruling that is consistent with authority in the Cayman Islands and elsewhere, the BVI Court confirmed that a redeeming shareholder becomes a creditor for its redemption proceeds on the dealing day in respect of which a redemption request is duly submitted to the fund.
2. *Membership status of a redeemed shareholder:* In the Cayman Islands case of *In re Strategic Turnaround Master*

*Partnership Limited*, the Cayman Court of Appeal viewed redemption as a process with distinct stages and held that a redeeming shareholder cannot properly be regarded as fully redeemed until the shareholder has received the redemption proceeds and the shareholder's name has been removed from its register of shareholders. The BVI Court adopted a different approach and held that a redeeming shareholder ceases to have rights as a shareholder on the dealing day itself. One of the difficulties with the decision in *Strategic Turnaround* is that there is significant uncertainty about precisely what membership rights a shareholder retains until his name is removed from the register of members. In this respect, the certainty provided by the BVI Court's approach is preferable.

3. *Priority of a redeemed shareholder*: Section 197 of the BVI Insolvency Act, 2003 provides that neither a shareholder nor a past shareholder of a company can claim in the liquidation of the company for a sum due to him "in his character as a member, whether by way of dividend profits, redemption proceeds or otherwise" (emphasis added). This section preserves the priority of unsecured creditors over shareholders who may also be owed a debt, for example, as a result of a dividend. Rather surprisingly, the BVI Court held that Western Union's claim to its redemption proceeds was not being made in its "character as a member" and that section 197 therefore did not apply to the payment of the redemption proceeds. The key reason given for this conclusion was that Western Union ceased to be a shareholder of the company on the dealing day when the redemption occurred.

4. *Right to appoint liquidator*: The right of a shareholder or creditor of a BVI company to have a liquidator appointed in the BVI will not be defeated simply because there are foreign proceedings that may offer an alternative remedy. This is despite the fact that a BVI liquidator is unlikely to be able to obtain control of the company's remaining assets because of the difficulties it would have in obtaining recognition in the jurisdiction in which the assets are located.

Conyers advises on the laws of the British Virgin Islands, Cayman Islands, Cyprus, Mauritius and Bermuda. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters. Affiliated companies (Codan) provide a range of trust, corporate secretarial, accounting and management services.

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