



September 2010

A New Regulatory Regime in BVI: SIBA 2010

The Securities and Investment Business Act, 2010 (SIBA) was brought into force in the British Virgin Islands (BVI) on May 17, 2010, with the exception of Part II of SIBA which contains new rules relating to the public issue of securities. This note contains a brief overview of SIBA and highlights some of the key changes which are introduced by the new legislation.

SIBA augments the BVI's regulatory regime to ensure it complies with international best practice and implements standards laid down by the International Monetary Fund (IMF) and the International Organisation of Securities Commissions (IOSCO). More specifically, SIBA establishes four broad pillars of regulation, namely the regulation of:

1. investment business;
2. the public issues of securities;
3. market abuse; and
4. mutual funds.

The first three pillars of regulation are almost entirely new in the BVI. The fourth pillar – the regulation of mutual funds – is already well established in the BVI and, in this regard, SIBA only brings about limited changes. These changes are described in a separate note entitled Hedge Funds and the Securities and Investment Business Act, which is also published on our website.

1. The Regulation of Investment Business

The most significant change implemented by SIBA is that it requires any person carrying out "investment business" in or from within the BVI to obtain a licence from the Financial Services Commission (the FSC).

Territorial scope

Importantly, a company incorporated in the BVI is deemed to carry on investment business in the BVI for the purposes of SIBA even if it carries on all its investment business activities outside of the BVI. As such, any BVI business company which carries on “investment business”, and which does not have the benefit of an exemption (described below), must obtain a licence.

Any other person or company who (a) occupies a premises in the BVI for the purposes of carrying on investment business; or (b) solicits a person in the BVI for the purpose of offering investment business services will also require a licence. In the case of a foreign company soliciting a BVI company to provide investment business services to that BVI company, care must be taken to ensure that the solicitation takes place outside of the BVI.

Definition of investment business

“Investment business” is widely defined by SIBA and includes engaging in the following “investment activities” by way of business: dealing in investments, arranging deals in investments, managing investments, providing investment advice, providing custodial or administration services with respect to investments or the operating of an investment exchange. “Investments” in turn is widely defined and includes shares, interests in a partnership or fund, debentures, bonds, other debt instruments and derivatives, contracts for difference and other interests relating to such investments.

As a result, in very broad terms (and this list is not exhaustive), BVI companies carrying on business as investment managers, investment advisers, administrators, custodians, market makers, brokers, dealers and market intermediaries are required to apply for a licence from the FSC. It is also worth specifically noting that the functionaries of a closed-ended fund are likely to carry on “investment business” and therefore, in contrast to the pre-SIBA position, require a licence.

As stated above, the position of mutual (hedge) funds and their functionaries are dealt with in a separate publication entitled *Hedge Funds and the Securities and Investment Business Act*.

Exemptions

SIBA contains some exemptions from the licensing requirement, all of which are relatively limited. First, there is a list of “excluded activities” which are carved out from the definition of investment business. These excluded activities are unlikely to have a great deal of significance for the majority of BVI companies carrying on investment

business. For example, they include matters related to employee share schemes, dealing as bare trustee where no remuneration is received and investment business which is incidental to the sale of goods or the supply of services.

Second, there is a list of “excluded persons”. In this regard, there are two key exemptions from the licensing requirement for persons who (only) carry on the following activities:

- soliciting or making an offer to provide an investment business service to or through certain qualified persons; and
- providing investment business services to a company of which a person is a director, a company in the same group, a joint venture or another partner in a partnership, provided that in each case no remuneration or commission is paid in respect of the relevant investment business (excluding normal remuneration received while acting in such a capacity).

Deadline for obtaining a licence

SIBA distinguishes between those people who are already carrying on investment business immediately prior to May 17, 2010 and those that are not. If a person was already carrying on investment business prior to May 17, 2010, a licence to carry out investment business will not be required until the later of:

- December 30, 2010 (the “application deadline”); or
- if an application for a licence is made before the application deadline, the date the application for a licence is determined (including as a result of any appeal).

If a person was not already carrying on investment business prior to May 17, 2010, a licence will be required prior to carrying on investment business.

Licensing requirements

In order for a licence to be granted to an applicant, the FSC must (among other things) be satisfied that:

- the applicant, its directors and senior officers and any persons having a significant interest in the applicant satisfy the FSC’s “fit and proper” criteria. The FSC has issued detailed guidance on this criteria, which, broadly, require the FSC to be

- satisfied of the honesty, integrity, reputation, competence, capability and financial soundness of the relevant persons;
- the organization, management and financial resources of the applicant are adequate for the carrying on of the relevant investment business; and
- issuing the licence is not against the public interest.

If you would like any further information on the application process, including copies of the form to be used to apply for a licence, please do not hesitate to contact us.

Activities covered by licence

It is important to note that a licence granted under SIBA will only authorise the licensee to carry on the type of investment business specified in the licence. If the licensee wishes to carry on other types of investment business not authorised by that licence, an additional licence will be required. As such, it is important that the initial application for an investment business licence cover all of the activities that are or will be carried out by the applicant.

Consequences of being licensed

Once a person has been licensed, SIBA imposes a number of continuing obligations on licensees. It is also expected that the BVI Regulatory Code will be amended before the end of the year so as to apply to licensees, which will impose a host of further obligations on licensees. The key obligations imposed on licensees under SIBA are as follows:

- **Financial condition:** licensees are obliged to maintain their business so as to be in a position to meet liabilities as they fall due and must notify the Commission if they form the opinion they do not comply with this obligation.
- **Capital resources:** licensees will be required to maintain minimum capital resources (expected to be specified in the Regulatory Code in due course). Licensees are also restricted from issuing shares for consideration other than cash.
- **Approval for corporate actions:** The prior approval of the FSC is required for a number of corporate actions of a licensee, including the appointment of a director or senior officer (who must satisfy the FSC's "fit and proper" criteria, as to which see above), the establishment of a branch or representative office outside of the BVI or the formation or acquisition of a subsidiary and, in the case of licensees other

than fund managers and administrators, a change to the corporate name or the name under which the licensee carries on business.

- **Change of control restrictions:** the FSC's prior consent is required in respect of any acquisition or disposal of a "significant interest" in a licensee – broadly, 10% of the voting or economic rights or the right to appoint a director.
- **Client assets:** there are a number of requirements in respect of dealing with client assets, including ensuring they are appropriately segregated, accounted for and protected.
- **Conduct of business:** there are also restrictions imposed on licensees in respect of misleading advertisements and statements. The Regulatory Code may also require licensees to maintain specified professional indemnity and other insurance.
- **Authorised representatives:** unless the licensee has a significant management presence in the BVI, it will be required to appoint a local "authorised representative", which will be a BVI entity or individual certified by the FSC for this purpose. The authorised representative acts as the liaison between the FSC and the licensee, and is required to maintain certain records. We fully expect that Codan, the affiliated registered agent to Conyers Dill & Pearman, will be granted a licence to act as an authorised representative and will therefore be able to provide this service (in addition to the existing registered agent and secretarial services) to our clients.
- **Audited financial statements:** we also expect that the Regulatory Code will introduce the requirement for licensees to appoint an auditor which has been approved by the FSC and to submit audited financial statements, prepared in accordance with particular accounting standards, to the FSC annually.

The FSC is given significant powers under SIBA to investigate and ensure compliance with the new rules.



2. The Regulation of the Public Issue of Securities

When Part II of SIBA is brought into force, SIBA will also regulate the offering of securities to the public in the BVI. It is not expected that these new rules will have widespread application. The new rules do not regulate the offering of securities by BVI companies outside the BVI. Similarly, securities can be offered to BVI companies without restriction, provided such an offer is not sent into, or received in, the BVI.

To the extent the new regime does apply, a prospectus in respect of the public offering must be prepared and registered with the FSC (unless an exemption applies). It is also expected that a “Public Issuers Code” will be enacted in due course containing detailed rules relating to the offering of securities to the public in the BVI.

3. The Regulation of Market Abuse

SIBA also introduces new criminal offences relating to insider dealing, misleading statements and market manipulation. In respect of these new offences, it is important to note that:

- an offence will generally only be committed if one or more of the persons involved was actually in the BVI at the time of the relevant conduct or the relevant conduct actually occurred in the BVI; and
- the insider dealing offence only applies to individuals and cannot be committed by a company itself. However, the offences relating to misleading statements and market manipulation can be committed by a company or other entity.



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