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## Investment Business in Bermuda

## Foreword

This memorandum has been prepared for the assistance of those who require information about the Investment Business Act 2003. It deals in broad terms with the requirements of Bermuda law and it is not intended to be exhaustive but merely to provide information which we hope will be of use to our clients. We recommend that our clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

Copies of the Investment Business Act 2003 and any other legislation referred to herein are available upon request.

This memorandum has been prepared on the basis of the law and practice as at the date set out below.

**Conyers Dill & Pearman**

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## 1. PRELIMINARY

The Investment Business Act 2003 (the “IBA”) came into operation on 30th January 2004 and replaced the Investment Business Act 1998 (the “IBA 1998”) to effect a new but similar financial services regime in Bermuda, and brought Bermuda’s regime more in line with international standards. The IBA is administered by the Bermuda Monetary Authority (the “BMA”).

## 2. TRANSITIONAL

Licenses under the IBA 1998 were issued a licence under the IBA without need to reapply. Persons relying on certain exemptions under the IBA 1998 had to file new exemption notifications with the BMA under the IBA.

## 3. LICENCE REQUIREMENT

Any persons carrying on investment business in or from Bermuda must hold a licence issued by the BMA, unless they qualify for exemption from this requirement. A person carries on investment business in or from Bermuda only if that person carries on such business from a place of business maintained by him in Bermuda or if he engages in an activity deemed to be carrying on investment business in or from Bermuda pursuant to an Order made by the Minister of Finance (no such Orders have yet been made). The following types of service providers carrying on investment business from a place of business in Bermuda should expect to be required to apply for a licence (unless qualifying for exemptions from the requirement), although this list is not exhaustive:

- investment managers
- investment advisers
- market makers
- broker/dealers
- market intermediaries

#### 4. MEANING OF “INVESTMENT BUSINESS”

The IBA contains a wide definition of “investment business” which includes carrying on any of the following activities by way of business-

- dealing in investments – buying, selling, subscribing for, or underwriting, investments, or offering or agreeing to do so, either as principal or agent. However, a person will be “dealing” with respect to a particular transaction only if he continuously holds himself out as carrying on that business or the transaction is a result of him continuously soliciting members of the public (eg persons other than licensed or exempted persons).

-‘dealing’ also does not include:

- (i) dealing by a company, in its own shares, by a unit trust in its own units, or by a partnership in its own partnership interests; or
  - (ii) accepting or transferring an instrument acknowledging or creating indebtedness in respect of any loan, etc, by a person in respect of an instrument which he has made.
- arranging deals in investments – making or offering, or agreeing to make: (a) arrangements with a view to another person buying, selling, subscribing for, or underwriting a particular investment, being arrangements which bring about or would bring about the transaction in question; or (b) arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments.

-‘arranging’ does not include:

- (i) arrangements made by a person with a view to a transaction to which he himself will be a party as principal or agent;
- (ii) arrangements the purpose of which is to provide finance to enable a person to buy, sell, subscribe for or underwrite investments;

- (iii) arrangements for the introduction of persons to licensed or exempted persons, or persons not unlawfully carrying an investment business in Bermuda, where such introduction is made with a view to the provision of independent advice or independent exercise of discretion in relation to investments; or
  - (iv) arrangements with a view to a person accepting or transferring an instrument creating or acknowledging indebtedness in respect of any loan, etc., which he has made.
- managing investments – managing or offering, or agreeing to manage, assets belonging to another person where those assets consist of or include investments.
  - investment advice – giving or offering, or agreeing to give, to persons in their capacity as clients or potential clients, advice on the merits of their purchasing, selling, subscribing for or underwriting an investment, or exercising any right conferred by an investment to acquire, dispose of, underwrite or convert an investment.
  - safeguarding and administering investments – safeguarding and administering, or arranging for the safeguarding and administration, or offering or agreeing to safeguard and administer, or to arrange for the safeguarding and administration of certain assets which may consist of or include investments where such arrangements have been held out as being arrangements under which investments would be safeguarded and administered.

-‘safeguarding and administering’ does not include: safeguarding and administering investments, or agreeing or offering to do so, by a person under arrangements where another person permitted under the IBA to provide such a service is responsible for and operates such arrangements in the course of carrying on such activities in Bermuda.

The IBA also defines “investments” in quite broad terms. In addition to items such as shares, bonds and warrants, the definition also includes such things as options to acquire or dispose of any investment, rights under any contract the purpose of which is to secure a profit by reference to fluctuations in the value or price of property and rights under any contract constituting long-term insurance business (as defined in the IBA).

However, certain activities are expressly excluded from the definition of investment business. Among these excluded activities are:

- certain activities carried on between members of the same group, firm or joint enterprise;
- certain activities carried on for the purposes of, or in connection with, the sale of goods or the supply of services;
- operating employee share or savings schemes;
- a sale of a body corporate involving the disposal and acquisition of at least fifty per cent of the voting rights, or where the object of the transaction is to acquire day-to-day control of the affairs of the body corporate;
- certain activities carried on by a trustee or personal representative, provided additional remuneration is not received for doing so;
- general advice given in a periodical publication or broadcast.

## **5. MEANING OF “IN OR FROM BERMUDA”**

For the purposes of the IBA, a person carries on investment business ‘in or from Bermuda’ only if that person (a) carries on investment business from a place of business maintained by such person in Bermuda; or (b) engages in an investment activity deemed to be carrying on investment business in or from Bermuda pursuant to an Order made by the Minister of Finance.

A person 'maintains a place of business' (a) in the case of a sole trader, if that individual carries on investment business from premises that he occupies for that purpose; or (b) in any other case, if that person carries on investment business from premises it occupies for that purpose, at which it employs staff and pays salaries and other expenses in connection with that business.

At present, no Orders have been made by the Minister of Finance deeming the engaging in an investment activity to be carrying on investment business in or from Bermuda.

## 6. EXEMPTIONS FROM LICENSING

Persons carrying on investment business will be exempted from the requirement to hold a licence under the IBA if their activities are limited as described below. Such exempted persons may still apply to be licensed if they wish.

The following persons are exempt from the requirement to hold a licence under the IBA:

- (1) Persons, other than market intermediaries, who provide investment services exclusively to one or more of the following classes of undertakings:
  - (a) high income private investors;
  - (b) high net worth private investors;
  - (c) sophisticated private investors;
  - (d) investment funds approved by the Authority under the Investment Funds Act 2006;
  - (e) bodies corporate, each of which has total assets of not less than five million dollars, where such assets are held solely by the body corporate or held partly by the body corporate and partly by one or more members of a group of which it is a member;
  - (f) unincorporated associations, partnerships or trusts, each of which has total assets of not less than five million dollars, where such assets are

held solely by such association, partnership or trust or held partly by it and partly by one or more members of a group of which it is a member;  
(g) bodies corporate, partnerships and trusts all of whose shareholders, members or beneficiaries fall within one or more of the subparagraphs above, except subparagraph (d).

- (2) investment funds;
- (3) persons who provide investment services to not more than twenty persons at any time, as long as such services are not provided to, and investment business is not solicited from, the public;
- (4) persons who are registered under the Insurance Act 1978 to carry on insurance business, but only in connection with investment services provided in connection with the insurance business for which those persons are registered under that Act;
- (5) persons registered under the Insurance Act 1978 as insurance managers, brokers, agents, salesmen, or members of an association of underwriters, but only in connection with investment services in connection with the business for which they are registered under that Act; and
- (6) the Government of Bermuda, the Bermuda Monetary Authority or other Public Authorities established in Bermuda.

Where a person seeks to rely on the exemptions one or three described above, that person must submit a declaration to the BMA confirming this.

## **7. UNSOLICITED CALLS**

In addition to prohibiting the carrying on of investment business in or from Bermuda without being licensed (or exempted from the requirement to be licensed), the IBA also establishes an unsolicited calls regime and regulations specifying this regime are due to be made by the Minister of Finance. This regime under the IBA will prohibit persons from entering into an investment agreement with an individual in the course of or in consequence of an unsolicited call made on that individual. It is expected that licensed persons will be permitted to make unsolicited calls pursuant to the regulations.

## **8. REGULATION OF UNLICENSED PERSONS**

Under the IBA, the BMA has several methods of regulating unlicensed persons, including powers of investigation and the ability to seek various types of court order.

If the BMA has reasonable grounds for suspecting that a person is carrying on investment business in contravention of the requirement to be licensed, the BMA may, by written notice, require that or any other person to provide such information, and/or produce documents which may reasonably be required for the purpose of investigating the suspected contravention. In such circumstances, the BMA may also require that or any other person to attend an interview and answer questions relevant for determining whether such contravention has occurred. Officers, servants or agents of the BMA may, with a warrant, also enter premises for the purposes of seeking information or documents, asking questions or making copies of documents.

Under the IBA, the BMA may seek court orders to wind up a company or dissolve a partnership which has carried on investment business in contravention of the IBA. The BMA may also seek orders to restrain or remedy such contraventions, or to restrain the disposal of assets or to require the restitution of profits to persons which have, for example, suffered loss as a result of the contravention.

## **9. ENFORCEABILITY OF AGREEMENTS MADE IN CONTRAVENTION OF IBA**

The IBA expressly provides that an agreement entered into by a person in the course of carrying on investment business in contravention of the requirement to obtain a licence under the IBA shall be enforceable by all parties to that agreement.

## 10. LICENCE APPLICATION

An application for a licence to carry on investment business must be made in a prescribed form. In addition, at or prior to the time the application is made, the applicant must advertise his intention to apply for a licence in a local newspaper. Among other things, the application for a licence must include a business plan setting out the nature and scale of the business intended to be carried on by the applicant and particulars of the proposed arrangements for its operation. The BMA may not grant a licence unless an applicant meets (or will meet by the time of licensing) the minimum criteria described in the Second Schedule of the IBA.

In considering an application the BMA must take account of the minimum criteria specified in the Second Schedule of the IBA. The minimum criteria include the following requirements:

- that 'controllers' and 'officers' of applicants be 'fit and proper' persons;
- that, if the applicant is a company, a firm, a partnership or an unincorporated association, its business be directed by at least two individuals;
- that, if the applicant is a company, it have sufficient non-executive directors as the BMA considers appropriate in the circumstances;
- that the business of the applicant will be conducted in a prudent manner, including but not limited to its net and liquid assets and its record keeping, and its ability to comply with the provisions of the IBA, any other provisions of law and any code of practice;
- that the applicant's position in the structure of any group to which it belongs is not such as to obstruct the conduct of effective consolidated supervision; and
- that the business of the applicant will be carried on with appropriate integrity and professional skill.

After considering an application, the BMA can either reject the application or grant a licence subject to limitations on its scope. An application may be withdrawn at any time before it is rejected or a licence is granted, but the application fee is not refundable.

## 11. THE LICENCE

The holder of a licence is referred to in the IBA as an “investment provider”.

Once a licence is granted, it will remain in force until revoked. It is possible for the limitations on a licence to be varied and for a licence to be restricted or revoked. The IBA establishes a right to appeal a decision of the BMA to vary, restrict or revoke a licence to an appeals tribunal appointed by the Minister of Finance.

The licence must be displayed in Bermuda at the applicant’s principal place of business or registered office. The BMA maintains a register of licences available for public inspection. A fee is payable on the grant of a licence and an annual fee is payable thereafter.

## 12. REGULATION AND SUPERVISION OF LICENSEES

Each investment provider is required to maintain adequate records and systems of control. They are also required to maintain accounts in respect of all investment business transactions and balances and to maintain separate accounts for client assets. Each investment provider must submit to the BMA within four months from the end of its financial year a certificate confirming whether that investment provider has complied with the minimum criteria or indicating any failure to comply, and whether the investment provider has observed limitations on its licence, if any. At such time, an investment provider must also submit a copy of its financial statements for that financial year along with the auditor’s report on such statements (if such statements have been audited). The BMA also requests that it be provided with balance sheets and profit and loss information of investment providers on a quarterly basis.

Where an investment provider’s licence permits it to hold client assets, the business’ accounts must be audited annually by an auditor approved by the BMA. An auditor of an investment provider must also notify the BMA in writing if, for example, he has reasonable cause to believe that any of the minimum criteria is not or has not been

fulfilled, or may not be or may not have been fulfilled, by the investment provider, and the matters are likely to be of material significance to the BMA's functions under the IBA with respect to that investment provider.

The IBA provides the BMA with powers to object to a proposed ten per cent or majority "shareholder controller" (as defined by the IBA). The objection may be on the basis that the person is not 'fit and proper' or for other reasons. Such objections by the BMA are subject to an appeals process, and are enforceable by directives from the BMA and court orders requiring the sale of shares. The BMA may also object to existing "controllers" (as defined by the IBA) of any description (including shareholder controllers, managing directors and chief executives) on the grounds that such controller is no longer 'fit and proper'.

The BMA requires investment providers to maintain levels of liquidity determined by the BMA (having regard to, among other things, their liabilities and the nature and scale of their operations). This currently requires investment providers to maintain liquid capital equivalent to three months' expenditure (or one month's expenditure if they act only as advisors).

The IBA also imposes certain requirements in respect of the systems, records and documentation to be maintained and produced by investment providers. For example, investment providers are generally required to provide confirmation notes within 7 days of carrying out a transaction and must provide clients with portfolio statements on a semi-annual basis. They must also maintain up-to-date accounting records in respect of their business and their clients' affairs and must permit clients to inspect records relating exclusively to them. However, any information which the IBA or the BMA requires an investment provider to maintain can be maintained in electronic form (as long as the information is capable of being inspected and being produced in legible form).

Under the IBA, the BMA has a wide-ranging power to require an investment provider, a member of its group or partnership, or a controller of that investment provider, to provide such information or documents as the BMA may reasonably

require for the performance of its functions under the IBA, including the provision of a report by the investment provider's auditor or other person with relevant professional skill.

Where the BMA believes that it is reasonably required in the interests of an investment provider's clients or potential clients, an inspector can be appointed to investigate and report on the affairs of the investment provider. The BMA has power to require any controller, officer, employee, agent, auditor, accountant or barrister and attorney (subject to legal professional privilege) of an investment provider which is under investigation to produce any document or information in that person's possession, custody or power which the BMA reasonably requires for the purposes of carrying out its investigation. The BMA also has power, in certain circumstances, to enter premises of an investment provider which is under investigation.

Under the IBA, the BMA may publicly censure an investment provider which it considers has contravened a requirement imposed on it by the IBA. However, this power of the BMA is subject to a notice and appeals process prior to publication of the relevant censorious statement. The BMA may also apply to the Bermuda courts for an injunction restraining an investment provider from contravening any relevant requirement. The BMA may also seek a court order to restrain the disposal of assets or require the restitution of profits to persons which have, for example, suffered a loss as a result of a contravention of a relevant requirement.

Most of the requirements of the IBA create offences for non-compliance, conviction of which could result in criminal penalties of heavy fines and/or imprisonment.

The IBA provides for restriction on the disclosure of non-public information by the BMA and other persons receiving information relating to the business or affairs of any other person. One exception to this restriction is the provision for information-sharing gateways between the BMA and regulatory bodies of other jurisdictions.

### 13. CODES OF CONDUCT

The IBA empowers the BMA (after consulting with representatives of the investment business industry as it thinks fit) to issue codes of conduct in respect of a number of areas. It is expected that Codes of Conduct will be issued in respect of (i) general business conduct and practice and (ii) advertising. The BMA may take into account any failure of an investment provider to comply with any codes of conduct issued in determining whether the business of that investment provider is being conducted in a prudent manner as required by the minimum criteria.

*This publication is not a substitute for legal advice nor is it a legal opinion. It deals in broad terms only and is intended merely to provide a brief overview and give general information.*

### **About Conyers Dill & Pearman**

Conyers Dill & Pearman advises on the laws of the Cayman Islands, British Virgin Islands, Bermuda, Mauritius and Cyprus. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters.

The combination of Conyers' structure, culture and expertise enables the highest quality, responsive, timely and thorough legal advice. Conyers' strategic global presence in major international business centres allows a seamless 24 hour service.

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