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# Securities Investment Business in the Cayman Islands

## Foreword

This memorandum has been prepared for the assistance of those who require information about the Securities Investment Business Law (Revised). It deals in broad terms with the requirements of Cayman 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 the Cayman Islands on their specific proposals before taking steps to implement them.

Copies of the Securities Investment Business Law (Revised) and any other legislation referred to herein are available from this Firm 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**

27 April 2011

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## 1. PRELIMINARY

The Securities Investment Business Law (“SIBL”) provides an appropriate structure for the regulation of persons carrying on securities investment business in or from the Cayman Islands, and is administered by the Cayman Islands Monetary Authority (“CIMA”). The stated objective of the SIBL is to define licensable activity and through CIMA’s supervision to ensure that such activity is undertaken by fit and proper persons in accordance with accepted supervisory standards of conduct for securities investment business.

## 2. LICENCE REQUIREMENT

Any person, company or partnership (whether general, limited or exempted) which is incorporated or registered in the Cayman Islands (or which is incorporated or registered outside the Cayman Islands but has an established place of business in the Cayman Islands) and is carrying on securities investment business must hold a licence issued by CIMA unless they qualify for an exemption from this requirement. In certain cases, reliance on an exemption also involves a registration process. The following examples of service providers carrying on securities investment business from a place of business in the Cayman Islands, should expect to be required to apply for a licence (unless qualifying for an exemption):

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

The SIBL provides an exhaustive list of activities which constitute the carrying on of securities investment business (see section 3, “Meaning of Securities Investment Business” below).

A licence is not required where either: (a) the business being conducted is an “excluded activity”; or (b) the entity conducting the securities investment business is an “excluded person” (subject to registration with CIMA in certain cases) (see section 4, “Exemptions from Licensing” below).

### **3. MEANING OF “SECURITIES INVESTMENT BUSINESS”**

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

- (a) dealing in securities – buying, selling, subscribing for, or underwriting securities, or offering or agreeing to do so, either as principal or agent. 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 (e.g. persons other than licensed or exempted persons);
- (b) arranging deals in securities – making arrangements with a view to: (i) another person (whether as a principal or an agent) buying, selling, subscribing for, or underwriting; or (ii) a person who participates in the arrangements of buying, selling, subscribing for or underwriting investments;
- (c) managing securities – managing securities belonging to another person in circumstances involving the exercise of discretion;
- (d) investment advice – giving or offering, or agreeing to give, to persons in their capacity as an investor or potential investor, advice on the merits of their buying, selling, subscribing for or underwriting a security, or exercising any right conferred by a security to buy, sell, subscribe for or underwrite a security.

The SIBL defines “securities” in quite broad terms. In addition to items such as shares, bonds and warrants, the definition also includes such things as units in a unit

trust, limited partnership interests, debt instruments, options, futures and contracts for differences.

#### 4. EXEMPTIONS FROM LICENSING

There are two principal types of exemption.

The first set of exemptions lists activities which are not considered to fall within the definition of securities investment business. These exemptions take the person carrying on such activities outside the scope of the SIBL entirely. These “excluded activities” include:

- (a) issuing, redeeming or repurchasing your own securities or making arrangements in relation to such activities or dealing in securities by applying proprietary assets other than as an underwriter;
- (b) dealing in securities evidencing indebtedness where the person dealing, provided the financial accommodation which created that indebtedness;
- (c) dealing in securities for risk management purposes in connection with a non-securities investment business;
- (d) dealing in securities or giving legal, accounting or other advice as a necessary or incidental part of carrying on a non-securities investment business;
- (e) the provision of finance to enable a person to deal in securities.

The second set of exemptions relates to “excluded persons” and includes persons:

- (a) carrying on securities investment business exclusively for one or more companies within the same group;

- (b) carrying on securities investment business by a person established in the Cayman Islands who is regulated by a recognised overseas regulatory authority where the securities investment business is being carried on in that country;
- (c) carrying on securities investment business exclusively for a sophisticated person<sup>1</sup>, a high net worth person<sup>2</sup> or a company, partnership or trust of which the shareholders, unit holders or limited partners are all sophisticated persons or high net worth persons.
- (d) carrying on securities investment business only in the course of acting in any of the following capacities:
  - (i) director,
  - (ii) partner (limited and general),
  - (iii) liquidator,
  - (iv) trustee in bankruptcy,
  - (v) receiver,
  - (vi) executor or administrator of an estate,

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1 A “sophisticated person” is someone regulated by CIMA or an overseas regulatory authority recognised by CIMA or whose securities are listed on a recognised securities exchange or who by virtue of knowledge and experience in financial and business matters is reasonably to be regarded as capable of evaluating the merits of a proposed transaction and participates in each transaction with a value or in monetary amounts of at least CI\$80,000 (approximately US\$100,000).

2 A high net worth person is an individual whose net worth is at least CI\$800,000 (approximately US\$1,000,000) or any person that has total assets of not less than CI\$4,000,000 (approximately US\$5,000,000)

- (vii) trustee,
- (e) in each case, provided that the person does not hold himself out as carrying on securities investment business other than as necessary or incidental to their role and they are not separately remunerated for such securities investment business activities.
- (f) carrying on securities investment business in connection with a joint enterprise.

A person who satisfies one of the second set of exemptions may still be subject to certain provisions of the SIBL. In the cases of (a), (b) and (c), exempted persons will nevertheless be required to file an annual declaration with the CIMA confirming that they are entitled to rely on the relevant exemption and pay an annual fee (available on request).

## 5. GENERAL PROVISIONS

The following key provisions of the SIBL are of particular interest:

- A contract, transaction or instrument entered into by a person in the course of carrying on securities investment business in contravention of the requirement to obtain a licence under the SIBL shall not be rendered unenforceable by reason of a failure to obtain a licence required by the SIBL;
- Subject to certain exceptions, CIMA approval is required to transfer or dispose of any shares or interests of a company or partnership licensee;
- A licensee shall separately account for the funds and property of each client and for the licensee's own funds and property;
- A licensee must have their accounts audited annually by an approved auditor and filed within six months of the end of a licensee's financial year;
- A licensee requires CIMA approval to open outside the Cayman Islands a subsidiary, branch, agency or representative office or to change its name.

The SIBL also contains provisions relating to enforcement by CIMA including powers to revoke licenses, replace directors/officers, appoint controllers, and to make court applications for injunctions, restitution orders and warrants to enter and to search premises.

## **6. INSIDER DEALING AND MARKET MANIPULATION**

The SIBL created two new offences in the Cayman Islands. They are:

- (a) Creation of false or misleading market – a person is guilty of this offence if he creates or does anything which is calculated to create a false or misleading appearance of active trading in any listed securities<sup>3</sup> or with respect to the market for or price of any such securities; and
- (b) Insider dealing – subject to various defences available under the SIBL, a person is guilty of the offence of insider dealing if he has information as an insider and he deals, or encourages another person to deal in listed securities that are price-affected securities (meaning that the information, if made public, would be likely to have a significant effect on their value) in relation to the information possessed, or he discloses the information other than in the proper performance of his employment, office or profession, to another person.

A person convicted of either of these offences is liable to a fine of up to CI\$10,000 (approximately US\$12,500) and imprisonment for up to 7 years.

## **7. LICENCE APPLICATION**

An application for a licence to carry on securities investment business must be made in the prescribed form (available upon request) together with the prescribed fee and accompanying documentation.

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<sup>3</sup> For these purposes, a “listed security” means any security which is listed on the Cayman Islands Stock Exchange.

In summary, an applicant will need to satisfy CIMA that:

- (a) the applicant will be able to comply with the SIBL and any regulations thereunder;
- (b) the applicant will be able to comply with the Money Laundering Regulations (Revised);
- (c) approval of the application will not be against the public interest including the need to protect investors;
- (d) the applicant has the necessary qualified personnel and facilities having regard to the nature and scale of the applicant's business; and
- (e) the senior officers and managers of the applicant are fit and proper persons.

After considering an application, CIMA can either reject the application or grant a licence subject to limitations on its scope. CIMA will notify the applicant of its decision within 7 days. An application may be withdrawn at any time before it is rejected or a licence is granted, but the application fee is not refundable.

The SIBL makes it a criminal offence to carry on securities investment business without a licence and provides for a fine of CI\$100,000 (approximately US\$125,000) and imprisonment for a term of one year, and in the case of a continuing offence, a fine of CI\$10,000 (approximately US\$12,500) per day during which the offence continues.

The holder of a licence must pay the prescribed annual renewal fees on or before the 15th January of each year. Surcharges of one-twelfth of the fee are payable for every month thereafter. A licensee's licence will lapse in the event that the renewal fee remains unpaid for three full months after the 15th of January. However, the licence may still be renewed if within one month from the lapsing of the licence, the renewal

fee, surcharges and an administration fee of ten per cent of the renewal fee are paid to CIMA.

Any changes to the information disclosed as part of the application process must be notified to CIMA within 7 days.

## **8. POWERS OF REGULATION, SUPERVISION AND INVESTIGATION**

CIMA is responsible for supervision and enforcement in respect of persons to whom the SIBL applies and the investigation of persons who they reasonably believe to be carrying on or purporting to carry on securities investment business without a licence.

CIMA's powers include the ability to obtain regular returns and conduct on-site inspections in order to determine that a licensee is in compliance with the SIBL, the Money Laundering Regulations and is otherwise in a sound financial condition.

If CIMA has reasonable grounds to believe that a licensee will become unable to meet its obligations when they fall due; has failed to comply with a condition of its licence or may be in breach of the requirements set out in sections 7 a) to e) above, it may at the expense of the licensee (where applicable):

- (a) revoke the licence;
- (b) amend, revoke or impose conditions or further conditions upon the licence;
- (c) apply for a Court order to protect the interests of clients or creditors including an injunction or restitution or disgorgement order;
- (d) publish breaches in the Cayman Gazette or other official publication;
- (e) require the licensee to obtain an auditor's report on their anti-money laundering systems and procedures;

- (f) require the substitution of any director or officer or the divestment of ownership or control;
- (g) appoint a third party to advise the licensee on the proper conduct of its affairs and report back to CIMA;
- (h) appoint a person to assume control of the licensee's affairs having the powers of a receiver or manager;
- (i) report breaches of the Money Laundering Regulations to the Attorney-General; or
- (j) require such other action to be taken by the licensee as CIMA reasonably believes necessary.

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

Under the SIBL, CIMA may seek court orders to wind up a company or dissolve a partnership which has carried on securities investment business in contravention of the SIBL. CIMA 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.

*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.

Conyers' sophisticated client base includes FTSE 100 and Fortune 500 companies. Working with leading local and international firms, Conyers advises on highly complex multi-jurisdictional projects.

Affiliated companies (Codan) provide a range of trust, corporate secretarial, accounting and management services.

Founded in 1928, Conyers has 600 staff, including more than 150 lawyers.

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