

BRITISH VIRGIN ISLANDS SECURITIES & BANKING GUIDE

Robert Briant & Anton Goldstein – April 2009

On December 31, 2001, the Financial Services Commission (“FSC”) was created pursuant to the Financial Services Commission Act, 2001. The FSC is an independent regulatory body responsible for all financial services business that operates within the British Virgin Islands. The FSC replaced the Financial Services Department, which was a department of the British Virgin Islands government. The FSC is now an independent regulator that reports only to its board of commissioners (which is appointed by the cabinet of government ministers). The FSC is divided into four principal regulatory divisions — banking and fiduciary services, insolvency services, insurance and investment business. In addition, the Registrar of Corporate Affairs reports to the corporate services division of the FSC.

Banking and fiduciary services

The Banks and Trust Companies Act, 1990 is the principal statute regulating banking and fiduciary services in the British Virgin Islands. A person or company may not carry on banking business or trust business from within the British Virgin Islands without obtaining a licence under such act.

Banking

Unlike other offshore jurisdictions, the British Virgin Islands is not considered a banking jurisdiction. Only nine banks have licences to carry on banking business under the Banks and Trust Companies Act, 1990, most of which are retail banks with a general licence. A bank may obtain either a general banking licence, a Class I banking licence or a Class II banking licence. A general banking licence allows the bank to carry on business without any restrictions. Amongst other things, a Class I banking licence prohibits the bank from taking deposits from persons resident in the British Virgin Islands other than licence holders or companies incorporated under the BVI Business Companies Act, 2004. A Class II banking licence has the same restrictions as a Class 1 banking licence and also prohibits the bank from receiving or soliciting funds from persons other than those listed on the licence. Generally, an entity will not be able to obtain a banking licence in the British Virgin Islands unless it is an extremely large, well known, international bank, and even then it may be required to establish a retail presence in the British Virgin Islands.

Fiduciary services

A person that carries on trust business must be licensed under the Banks and Trust Companies Act, 1990. Trust business refers to the business of acting as a professional trustee, protector or administrator of a trust or settlement, managing or administering any trust or settlement, or providing directors, officers or nominee shareholder services. The FSC will license a person to provide fiduciary services if they have a presence in the British Virgin Islands and are fit and proper for licensing.

Insolvency services

The Insolvency Act, 2003 is the principal legislation relating to the insolvency of companies, partnerships and individuals. Under the Insolvency Act, 2003, only insolvency practitioners licensed under such act are eligible to accept an appointment as an administrator, administrator receiver, interim supervisor, supervisor, provisional liquidator, liquidator or bankruptcy trustee of a British Virgin Islands person. There are provisions in the Insolvency Act, 2003, however, that enable overseas insolvency practitioners to be appointed jointly with the British Virgin Islands licensed insolvency practitioner. The insolvency services division of the FSC is responsible for the licensing and regulation of insolvency practitioners in the British Virgin Islands.

Under the Insolvency Act, 2003, the FSC is required to appoint a suitably qualified and experienced person to act as official receiver. The official receiver is an employee of the FSC and an officer of the court. The official receiver has a responsibility to investigate malpractice. Where appropriate, it is the official receiver's responsibility to apply to the court for director disqualification orders. The official receiver has a number of other functions, which are generally intended to assist with the smooth operation of the Insolvency Act, 2003. Solvent liquidation procedures are not dealt with under the Insolvency Act, 2003, but rather under the BVI Business Companies Act, 2004.

Investment business

The Mutual Funds Act, 1996 regulates any company, partnership or unit trust formed in or under the laws of the British Virgin Islands (or which carries on business form within the British Virgin Islands) which offers shares or units that are redeemable at the option of the holder for an amount calculated by reference to the net asset value of the company. Any person that provides management or administration services to a fund which is incorporated or carrying on business in the British Virgin Islands is required to be licensed under the Mutual Funds Act, 1996 (or otherwise be a recognised and qualified functionary in another jurisdiction). The investment services division of the FSC is responsible for the regulation and supervision of all funds as well as the licensing of British Virgin Islands managers and administrators.

The FSC has adopted "differentiated regulation", a system of regulation which offers investors the protection they need through a flexible, self-regulatory environment. There are three categories of funds in the British Virgin Islands: public, private and professional funds. A professional fund may only be offered to professional investors and minimum investment thresholds must be met. A private fund may normally only have 50 shareholders. A public fund is any fund which is not a private or professional fund and is regulated to a significantly higher level than a professional or private fund. These distinctions have allowed for a differentiated approach to regulation wherein a relevant level of regulation is applied to the different categories of funds. As a result, the FSC has been able to achieve efficiency in regulation which facilitates the commercial reality of having a fund up and running in a timely manner.

As mentioned above, the functionaries of a mutual fund — the manager, investment adviser, administrator and custodian — need not be domiciled in the British Virgin Islands provided they are domiciled in a recognised jurisdiction. A functionary that is not domiciled in a recognised jurisdiction may also be acceptable to the FSC, provided the jurisdiction is regarded as having a prudent system of regulation and supervision of mutual funds business. If this is not the case, the FSC may in certain circumstances issue a certificate of recognition or registration for the fund with certain terms, conditions, limitations or restrictions which recognise the lack of a proper functionary.

The following jurisdictions are recognised for the purposes of the Mutual Funds Act: Australia, the Bahamas, Belgium, Bermuda, Canada, the Cayman Islands, France, Germany, Gibraltar, Guernsey, Hong Kong, the Isle of Man, Ireland, Italy, Japan, Jersey, Luxembourg, Malta, the Netherlands, Singapore, Spain, Sweden, Switzerland, the UK and the US.

Insurance

The insurance division of the FSC regulates, supervises and inspects all insurance companies, insurance managers and other intermediaries that operate within the British Virgin Islands to ensure compliance with the Insurance Act, 1994 and its supporting regulations.

The Insurance Act, 1994 applies to any person that carries on insurance business within the British Virgin Islands. "Insurance business" is defined as the undertaking by one person to indemnify another person against loss or liability for loss in respect of certain risk or peril to which the object of insurance might be exposed, or to provide a service or pay a sum of money or other thing of value on the happening of a certain event. Reinsurance falls within the definition of "insurance business" and is regulated under the Insurance Act, 1994. Insurance managers, agents, adjusters and brokers are required to obtain a certificate of authority under the Insurance Act.

The Insurance Act, 1994 distinguishes between long-term business and general business. Long-term business consists of life, annuity or accident and disability contracts. Everything else falls under the general business heading. A further distinction is made between domestic and non-domestic business; domestic business is all contracts that insure a person domiciled or resident in the British Virgin Islands, or the subject matter of which is property of any kind within the British Virgin Islands or in transit to or from the British Virgin Islands. Generally, there is no difference in the regulation of insurance and reinsurance business.

Corporate service

The Registrar of Corporate Affairs reports to the corporate services division of the FSC. The Registrar of Corporate Affairs is responsible for the administration of the BVI Business Companies Act, 2004. It has more of a supervisory role than a regulatory role, although the Registrar of Corporate Affairs ensures the smooth functioning of the BVI Business Companies Act, 2004.

The BVI Business Companies Act, 2004 came into effect on January 1, 2005 and replaced the International Business Companies Act. All British Virgin Islands companies are now incorporated under this act. As of January 1, 2007, any existing companies that were not already re-registered under the BVI Business Companies Act, 2004 were automatically re-registered.

The BVI Business Companies Act, 2004 regulates the incorporation and operation of all types of British Virgin Islands companies, which include those limited by shares, those limited by guarantee, unlimited liability companies, restricted purposes companies (also known as special purpose companies) and segregated portfolio companies, whether their business is local or international in scope.

The memorandum and the articles of association of a business company together form its constitution. Both documents are a matter of public record and are available for inspection at the offices of the Registrar of Corporate Affairs in the British Virgin Islands. A business company can have one or more directors. None of the directors need to be residents of the British Virgin Islands. Every business company, however, must have at all times a registered agent in the British Virgin Islands. Registered agents must be licensed under either the Company Management Act, 1990 or the Banks and Trust Companies Act, 1990. The Registrar of Corporate Affairs maintains a register of licensed registered agents in the British Virgin Islands.

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This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

Notes to Editors

Conyers Dill & Pearman has pioneered the field of offshore law since its establishment in 1928. It is the first law firm to have established an office outside of its home jurisdiction, setting up shop in Guernsey in 1982 as a base for servicing European clients (superceded by the London office in 1998). It is also the first to have expanded into Asia, with the opening of its Hong Kong office in 1988, and the first to establish a presence in Singapore in 2001. It is also the first to have an office in Russia with the launch of its Moscow office in 2008. Conyers has continued in this vein in 2009, becoming the first offshore firm to have a Brazil office, with the formation of its São Paulo partnership in March.

With a current complement in excess of 550 staff, with over 150 lawyers, Conyers Dill & Pearman advises on the laws of Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Mauritius from those islands and from Dubai, Hong Kong, London, Moscow, and Singapore. The firm has earned clients' trust, loyalty and respect by consistently providing responsive, timely and thorough advice on all aspects of offshore corporate, company and commercial law, commercial litigation and private client matters.

Affiliated companies (Codan) provide registered agent, registered office, corporate director and secretarial services, as well as specialised company management services. An affiliated global network of licensed trust companies undertakes a broad range of trust establishment and administration services. These services range from the administration of family trusts for private clients to the structuring of highly complex and innovative corporate ventures including special purpose trusts for ownership of securitization structures.

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