



PORTCULLIS TRUSTNET

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REGULATION OF INVESTMENT BUSINESS AND OTHER ACTIVITIES UNDER THE BRITISH VIRGIN ISLANDS (“BVI”) SECURITIES AND INVESTMENT BUSINESS ACT 2010

The BVI passed the Securities and Investment Business Act (“SIBA”) recently which takes effect from 17 May 2010. SIBA¹ regulates the carrying on of investment business in the BVI amongst other things. *If any of your BVI entities carry on any form of investment business, whether or not in the BVI, please consult your BVI legal counsel or advisors to verify whether you need to be licensed in the BVI. Under SIBA, the BVI entity has until 16 November 2010 to comply with the new legislation.*

Regulation of “Investment Business”

The most significant change introduced by SIBA is that it requires any person who carries on or holds itself out to be carrying on “investment business” *in or from within the BVI* to obtain a licence from the BVI Financial Services Commission (“FSC”). SIBA goes on to provide that a BVI business company that carries on, or holds itself out as carrying on investment business outside BVI is deemed to carry on, or hold itself out as carrying on, investment business from within BVI. In other words, any BVI business company, by virtue of the fact that it is incorporated in BVI, is subject to the licensing requirement if it carries on or holds itself out to be carrying on investment business even if it has no substantial presence in BVI.

The penalty for non-compliance with the licensing requirement is a fine of up to USD 75,000 for any company, and USD 40,000 for any individual committing the offence. Any director and senior officer of a BVI business company who knowingly authorises, permits or acquiesces in the commission of the offence also commits an offence.

What “investment business” is regulated?

The term “investment business” is broadly defined to mean engaging in “investment activity” by way of business, subject to some limited exclusions for certain types of activities or persons.

Schedule 2, Part A of SIBA sets out the regulated investment activities under the following broad categories:

1. Dealing in Investments;
2. Arranging Deals in Investments;
3. Managing Investments²;
4. Providing Investment Advice;

¹ The text of SIBA can be obtained at the website of the BVI Financial Services Commission website at http://www.bvifsc.vg/LegislationLibrary/tabid/211/DMXModule/626/Command/Core_ViewCategory/CategoryId/1/Default.aspx

² Another material change from the pre-SIBA position is that the business of “managing investments” now covers management of closed-end funds and management of managed accounts by an external fund manager (as opposed to its directors), which represents a change from the position that applied prior to SIBA’s coming into effect. Previously, a BVI entity is required to hold a fund manager licence only if it manages an open-ended mutual fund.

5. Providing Custodial Services With Respect to Investments;
6. Providing Administration Services With Respect to Investments; and
7. Operating an Investment Exchange.

The term “investment” is also defined broadly to cover shares, interests in a partnership or fund, debentures and other debt instruments, instruments giving entitlement to shares, interests or debentures, certificates representing investments, options, futures, contracts for difference, long-term insurance and other rights and interests in any of the earlier categories of investments.

Schedule 2, Part B of SIBA sets out a list of activities under each of the categories of regulated investment activities that do not constitute “investment business”. The list of excluded activities runs to 8 pages and it is not possible to summarize them in this brief paper. Some examples of excluded activities are dealing or arranging deals in investments which is incidental to the sale of goods or the supply of services or relating to employee share schemes, dealing as bare trustee where no remuneration is received and the provision of investment advice by a director of a company for the purposes of the company.

Schedule 2, Part C of SIBA sets out a list of excluded persons, of which significant exclusions are:

- A company undertaking investment activity exclusively with or for another company in the same group of companies;
- A partner undertaking investment activity with or for another partner(s) in the partnership for the purposes of, or in connection with, the partnership;
- A director of a company whose activity is with, or for the company of which he is a director or another company in the same group, and this activity is for the purposes of or in connection with the company concerned;

In all these cases, the person is excluded only if he does not otherwise carry on, or hold himself out as carrying on investment business, and does not receive remuneration for the investment activity as such.

Persons are also excluded where they solicit or make offers of investments to persons who are companies that are part of the same group and to persons who are licensed outside the BVI to carry on an activity equivalent to the investment activity in question and that person is regulated and supervised in respect of that business.

What are the consequences of having to obtain a licence?

To qualify for a licence under SIBA, the FSC must be satisfied of a number of matters, of which the following are the most significant:

- The applicant satisfies the requirements of SIBA and the FSC’s Regulatory Code;
- 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. These “fit and proper” criteria are similar to those used in other jurisdictions that regulate their financial services industries, and address the honesty, integrity, reputation, competence, capability and financial soundness of the relevant persons;
- The organization, management and financial resources of the applicant are or will upon issuance of the licence be adequate for the carrying on of the relevant investment business; and
- Issuing the licence is not against the public interest.

Continuing obligations of a licensee

BVI regulations impose a number of continuing obligations on licensees.

- **Financial resources:** licensees are required to maintain their business so as to be in a position to meet liabilities as they fall due. Although this is not currently provided for, it is anticipated that licensees will be required to maintain minimum capital resources (expected to be stipulated in amendments to the Regulatory Code) and may also require licensees to obtain professional indemnity and other insurance.
- **Audit:** it is also anticipated that amendments to the Regulatory Code will introduce a requirement for licensees to appoint an independent auditor and prepare audited financial statements annually, unless exempted by the FSC.

- **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.
- **Requirement for prior FSC approval of certain corporate actions:** Prior approval of the FSC is required for certain corporate actions by a licensee, including the appointment of a director or senior officer (each of whom must satisfy the FSC's "fit and proper" criteria), establishment of a foreign branch or representative office or the establishment or acquisition of a subsidiary and any change to the name of the licensee or the name under which it carries on business.
- **Requirement for prior FSC approval for disposal of "significant interests":** prior consent of the FSC must be obtained in respect of any acquisition or disposal of a "significant interest" in a licensee. The term "significant interest" is defined as meaning control of 10% of the voting rights of the licensee, 10% or more of the share in any distribution of surplus assets of the licensee or the right to appoint a director.
- **Appointment of authorised representative:** licensees are required to appoint a local "authorized representative" unless they have a significant management presence in the BVI. The meaning of the term "significant management presence" will be spelled out in amendments to the Regulatory Code. An authorized representative must be a BVI company, partnership or individual certified by the FSC for this purpose. The authorised representative acts as the main intermediary between the FSC and the licensee, and is required to maintain certain records as prescribed under applicable regulations. Portcullis TrustNet (BVI) Limited will be applying to be certified as an authorised representative and therefore expects to be able to provide this service to our clients. The timeline for obtaining this certification, as well as other details such as the costs for providing this service, are not currently known.

What should I do if I am potentially affected?

You should consult external BVI counsel if there is any question as to whether you may be affected by SIBA. The definitions of "investment activity", "investment business" and the categories of exclusions are not easy to follow. It is therefore advisable to engage independent advisors if you are concerned about the impact of this new Act. Portcullis TrustNet can refer you to appropriate external counsel, and if it becomes necessary to seek a license from the FSC, can assist you in the process of application.

Alternatively, if you are affected or concerned about being potentially impacted by SIBA, you may wish to consider re-domiciling your existing BVI company to an alternative jurisdiction.

If you have any questions regarding issues raised above, please contact Mr Christopher Lee Tel: +65 6496 0431 or e-mail: chris.lee@portcullis-trustnet.com.

Important notice: This paper is meant to be a general guide only. Portcullis TrustNet will not be carrying out a review of each company administered by it to ensure compliance with SIBA. Please seek independent legal or tax advice where appropriate.