

BVI Securities and Investment Business Act, 2010

Following the completion of an industry consultation, the British Virgin Islands ('BVI') has enacted the Securities and Investment Business Act, 2010 ('SIBA'). The enactment of SIBA represents an extremely important step for the continued development of the financial services sector within the BVI, providing the jurisdiction with a further modern and user friendly statute, in tune with the current regulatory environment, which will complement the BVI Business Companies Act, 2004 and the Insolvency Act, 2003.

Background

The objectives of SIBA are principally fourfold, in that it:

- introduces an investment business licensing regime to regulate entities conducting "investment business" in or from within the BVI;
- adopts restrictions on and regulations for the making of "public issues of securities" into the BVI;
- repeals the current Mutual Funds Act, 1996 and introduces an updated and modernised statutory regime, through SIBA and the Mutual Funds Regulations, 2010 which will regulate the BVI's investment funds industry; and
- introduces a market abuse regime.

Key features of SIBA

The key features of SIBA are as follows:

Investment Business

Any person carrying on activities constituting "investment business" in or from within the BVI will under SIBA be required to hold an investment business license specifically authorising that kind of investment business. For these purposes, the types of activity constituting investment business are as follows:

- dealing in investments;
- arranging deals in investments;
- managing investments;
- providing investment advice;
- providing custodial services with respect to investments;

- providing administrative services with respect to investments; and
- operating an investment exchange.

Schedule 1 of SIBA gives a fairly broad definition of the types of things constituting "investments" for the purposes of SIBA.

Schedule 2 of SIBA makes provision for certain investment activities to be excluded from constituting investment business (detailed in Schedule 2 Part B of SIBA as "excluded activities") and for certain types of persons conducting investment business from being excluded from the requirement to hold an investment business license under SIBA (detailed in Schedule 2 Part C of SIBA as "excluded persons").

Significantly, the scope of SIBA will cover any BVI company carrying on investment business anywhere in the world and any person soliciting a person (including a BVI entity) in the BVI in order to offer a service constituting investment business. Therefore, the investment business provisions under SIBA will have application to both (i) BVI entities conducting investment business outside the BVI; and also (ii) BVI and non-BVI entities conducting investment business within the BVI (unless those activities constitute an exclude activity or the entity conducting the investment business qualifies as an excluded person).

Once licensed to conduct investment business, SIBA makes provision for various systems and controls for the operation of a licensee's business, covering corporate governance, advertisements and other administrative functions. A further regulatory regime will be implemented through the Regulatory Code, 2009 (the "Regulatory Code"), which has been amended so as to bring investment business licensees within the scope of the Regulatory Code, which came into force in the BVI on 1 February 2010.

Public Issues of Securities

Another feature of SIBA is that it introduces provisions regulating the offering of securities into the BVI.

Under the public issues provisions, subject to limited exceptions, no security may be offered to the public in the BVI unless (i) the offer is contained within a "registered prospectus"; and (ii) the offer complies with the Public Issuers Code. For these purposes, an offer of securities

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to any person in the BVI or an offer received by a person in the BVI is an offer of securities to the public. Importantly, the mere receipt by a BVI company at its registered office of an offer of securities will not, in itself, be sufficient to make that offer constitute a public offer.

Where an offer is deemed to be a public offer and so requiring the prospectus to be registered with the FSC, SIBA and the Public Issuers Code provide for prospectus content requirements. In addition, for public issues by BVI companies, certain provisions of the BVI Business Companies Act, 2004 are disapplied by Schedule 6 of SIBA.

As an ongoing obligation for public issuers, any amendments or supplements to a registered prospectus are also required to be registered with the FSC and a copy of all such amendments or supplements made available to every person who received a copy of the original prospectus.

In addition to the normal common law remedies available, SIBA also gives the Courts the powers to grant a compensation order in favour of subscribers who purchased securities offered pursuant to a public offer in reliance of a prospectus and suffered loss or damages as a consequence of any untrue or misleading statement contained within that prospectus or omission from that prospectus. Such orders may be made against the issuer; its directors; any guarantor of the issue; any person accepting responsibility for the prospectus; any promoter of the offer (including directors of the promoter); and any other person authorising the contents of the prospectus.

Mutual Funds

SIBA repeals the Mutual Funds Act, 1996 and introduces an updated and modernised statutory regime for the regulation of the BVI funds industry, through SIBA and the Mutual Funds Regulations, 2010. The framework for the regulation of BVI funds is not materially altered by the enactment of SIBA, such that many of the legislative changes made under SIBA and the Mutual Funds Regulations, 2010 merely codify the existing FSC policy which has developed over recent years in line with evolving international standards.

Notable changes introduced by SIBA are as follows:

- a codification of the requirement for BVI funds to have at least two directors;
- a requirement for all BVI funds to appoint an authorised representative resident in the BVI (being an agent licensed by the FSC to provide authorised representative services);
- a change in the minimum initial investment which may be made by investors investing into professional funds, requiring, subject to limited exceptions, all investors to make an initial minimum investment of at least US\$100,000 (the previous position under the Mutual

Funds Act, 1996 was that a majority of the investors into professional funds were required to invest at least US\$100,000);

- a change in the timeframe pursuant to which professional funds are able to commence business before receiving recognition from the FSC, enabling professional funds to commence business for up to 21 days before receiving FSC recognition, provided that the professional fund's application for recognition is submitted to the FSC for consideration within 14 days of the launch date (the previous position under the Mutual Funds Act, 1996 was that a professional fund could commence business for up to 14 days before receiving FSC recognition); and
- a requirement for professional and private funds intending not to appoint either an investment manager, administrator or custodian to apply to the FSC for an exemption from the requirement to appoint such a functionary.

In addition to the above, SIBA codifies the current FSC policies in relation to ongoing reporting obligations for funds recognised as either private or professional funds or registered as public funds.

Market Abuse

SIBA introduces a market abuse regime which introduces prohibitions against insider dealing in the BVI. The market abuse regime introduced under SIBA is very much in line with accepted international standards.

Transitional Provisions

SIBA provides for transitional provisions for existing BVI entities which are, on the date of SIBA coming into force either currently licensed under the Mutual Funds Act, 1996 or currently carrying on business activities which constitute "investment business" under SIBA. These transitional provisions will apply during the first six months following the enactment of SIBA and will enable such entities to come into compliance with SIBA during the transitional period without being in breach of SIBA. This will therefore facilitate the smooth transitioning for such entities into the new regulatory regime created by SIBA.

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