

Securities and Investment Business Act, 2010

KEY CONSIDERATIONS

With the enactment of the Securities and Investment Business Act, 2010 (“SIBA”) in the BVI, which came into force on 17 May 2010, the regulation of the BVI’s financial services industry has undergone a number of significant changes. These changes may affect your BVI entities.

Transitional provisions exist under SIBA and the secondary legislation which accompanies it to facilitate the smooth transitioning of existing BVI entities into the new regulatory regime. **Importantly, the regulatory changes brought about by SIBA will affect both existing licensed entities, such as funds and investments managers and also BVI entities which are currently unregulated but will now be required to be licensed under SIBA.**

Funds

The Mutual Funds Act, 1996, the statute which has regulated the BVI funds industry for more than a decade has, as a consequence of SIBA, been repealed and replaced by SIBA and its underlying secondary legislation, the Mutual Funds Regulations, 2010 (the “Mutual Funds Regulations”) and the Public Funds Code.

The regulatory regime applicable to private and professional funds (the two categories of funds pursuant to which the overwhelming majority of BVI funds are licensed) is not substantially changed as a consequence of SIBA, with many of the “changes” merely representing the codification of existing regulatory policies operated by the Financial Services Commission (the “FSC”), which have evolved over time in line with international standards.

The regulatory regime applicable to public funds, which is a category of fund utilised for retail offerings by BVI funds will be changing under SIBA, although the precise regulatory landscape has not been finalised, as a consultation of the draft Public Funds Code (pursuant to which most regulatory changes will be contained within) is currently ongoing.

The key regulatory changes for existing private and professional funds are as follows:

- A requirement to have at least 2 directors, one of whom must be an individual, as opposed to a corporate director - *under the transitional provisions,*

existing funds with a single director have until 3 August 2010 to appoint a second director;

- A requirement to have at all times an investment manager; administrator and custodian, although significantly, upon written application to the FSC, the FSC can exempt a fund from the requirement to appoint a custodian or investment manager - *under the transitional provisions, existing funds without an investment manager or custodian have until 3 August 2010 to either appoint such functionary or apply to the FSC for an exemption;*
- A change in the minimum investment threshold for professional funds, requiring all investors to make an initial investment of at least US\$100,000 (excluded from this requirement are “exempted investors”, being essentially investors affiliated with the fund’s investment manager) - *under the transitional provisions, existing professional funds may continue to accept initial investments of less than US\$100,000 (provided that the majority of investors have invested not less than US\$100,000) until 11 October 2010;*
- A requirement to have an auditor and to file audited financial statements with the FSC within 6 months of the financial year end - *under the Mutual Funds Regulations, the FSC may, on written application made by or on behalf of a private or professional fund, exempt a fund from the requirement to appoint an auditor;*
- A requirement to appoint an authorised representative, who must be authorised by the FSC for the provision of such services to entities licensed under SIBA - *under the transitional provisions, existing funds have until 12 October 2010 to appoint an authorised representative;*
- An obligation to notify the FSC of changes to any functionary of the fund; any director, authorised representative or auditor ceasing to act; any change in the fund’s place of business; any amendment to its offering memorandum or supplements; any amendment to its memorandum and articles of association within 14 days - *whilst not previously a statutory requirement, by convention as a consequence of stated FSC preference, this is something that existing funds typically did in any event;*
- A requirement for the fund’s offering memorandum to contain a specified investment warning set out in Regulation 9(4) of the Mutual Funds Regulations - *whilst most existing funds already contain a form of*

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investment warning not dissimilar to the investment warning now required by Regulation 9(4) of the Mutual Funds Regulations, all existing funds will need to update their fund documents to come into compliance with this requirement. Under the transitional provisions, existing funds have until 3 August 2010 to ensure that this investment warning is specified in their offering documents;

- A requirement for each investor to provide a written acknowledgment that he has received, understood and accepted the investment warning set out in Regulation 9(4) of the Mutual Funds Regulations (this acknowledgment would typically be contained within the fund's subscription documents) - *whilst we assume not intended, the transitional provisions are silent as to there being a transitional period for existing funds to implement this change;*
- A requirement for the fund's constitutional documents to contain the statements provided for within Section 55(2)(b) or (c), as applicable - *For private funds this statement is substantially identical to the statement that was previously required. However, this is a new requirement for professional funds. Under the transitional provisions, existing funds have until 12 October 2010 to come into compliance with this requirement;* and
- A requirement to maintain financial records sufficient to show and explain its transactions and to enable the fund's financial position to be determined with reasonable accuracy. Such records must be retained for a period of 5 years - *this requirement to maintain financial records was a requirement under the BVI Business Companies Act, 2004 in any event. Under the transitional provisions, existing funds must come into compliance with this requirement by 3 August 2010.*

The above regulatory changes will therefore necessitate certain updating changes to be made to both the offering documents and constitutional documents of existing funds, in addition to introducing additional ongoing regulatory obligations.

Investment Managers

The regulatory regime applicable to BVI licensed investment managers has similarly not substantially changed as a consequence of SIBA, with many of the "changes" again merely representing the codification of existing FSC regulatory policies.

The key regulatory changes for existing BVI investment managers are as follows:

- Directors and senior officers may not be appointed without the prior written approval of the Commission;
- The acquisition or disposal of a "significant interest" in a licensee (a "significant interest" effectively being a 10% interest or a stake giving a right to appoint or remove a director); the issuance or allotment of a

"significant interest"; or an increase or the decrease by a person holding a "significant interest" of a stake in a licensee, must obtain the prior written approval of the FSC;

- The opening, maintaining or carrying on business of a branch, representative or contact office or the incorporation, formation or acquisition of a subsidiary must obtain the prior written approval of the FSC;
- A statutory requirement to maintain professional indemnity and other insurance;
- Any change in the corporate name or trading name must be notified to the FSC within 21 days;
- A requirement to maintain financial records sufficient to show and explain its transactions and to enable the licensee's financial position to be determined with reasonable accuracy. Such records must be retained for a period of 5 years - *this requirement to maintain financial records was a requirement under the BVI Business Companies Act, 2004 in any event.*
- A requirement to appoint an authorised representative, who must be authorised by the FSC for the provision of such services to entities licensed under SIBA - *under the transitional provisions, the deadline for appointing an authorised representative is 12 October 2010;*

In addition to existing BVI licensed investment managers, investment managers to non-fund structures are also now caught by the investment business provisions of SIBA (see below).

Unregulated Entities

The principal regulatory change introduced by SIBA is that it will bring certain unregulated entities within the new regulatory regime, so requiring them to be licensed by the FSC.

Under SIBA, any person carrying on activities involving "investments" which constitute "investment business" in or from within the BVI will now be required to hold an investment business license specifically authorising that kind of investment business.

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

- shares, interests in a partnership or fund interests;
- debentures, other debenture or loan stock, bonds, certificates of deposit and other instruments acknowledging indebtedness;
- instruments giving entitlements to shares, interests or debentures;
- certificates representing investments;

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- options;
- futures;
- contracts for differences;
- long-term insurance contracts;
- rights and interests in investments; and
- such other things as maybe specified as investments in the Investment Business Regulations.

Whilst the Investment Business Regulations are as yet unpublished, the clear purpose of this catch all provision is to enable any obvious omissions from the definition of an “investment” which come to light as SIBA is used in practice to be deemed to be an “investment” and so caught by the regulatory regime.

If you are therefore currently involved in business activities involving “investments”, relevant therefore will be whether these activities constitute “investment business”. The activities 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.

If your business activities fall within one of these activities, unless one of the exclusions or exemptions apply, you may therefore need to apply for a license under SIBA.

Significantly, the scope of SIBA will cover (i) any BVI company carrying on investment business anywhere in the world; and (ii) any person soliciting a person (including a BVI entity) in the BVI in order to offer a service constituting investment business.

If you would like to discuss the impact of these regulatory changes upon your BVI entities, please contact your usual Ogier contact as soon as possible.

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