

Securities and Investment Business Act, 2010: key considerations for investment managers

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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 which will be relevant to users of BVI vehicles as investment managers of funds or other structures.

To facilitate the smooth transitioning of existing BVI entities into the new regulatory regime, transitional provisions exist under SIBA and the secondary legislation which accompany it, the Mutual Funds Regulations, 2010 and the Regulatory (Amendment) Code, 2010. Importantly, the regulatory changes brought about by SIBA will affect both existing licensed investment managers and also investment managers previously not required to be regulated.

Existing licensed investment managers

The regulatory regime applicable to BVI licensed investment managers has not substantially changed as a consequence of SIBA, with many of the “changes” representing the codification of existing FSC regulatory policies. Following the enactment of SIBA, existing licenses to provide investment management services under the Mutual Funds Act, 1996 were automatically deemed from 17 May 2010 to be a Category 3 Sub-category B investment business licenses under SIBA. The key changes as it relates to existing licensed investment managers are as follows:

- Requirement to seek prior written approval from the FSC for the following changes:
 1. appointment of directors or senior officers - previously the FSC policy had been that the appointment of a director required the prior written consent of the FSC;

2. disposal or acquisition of a “significant interest” in the investment manager - for these purposes a “significant interest” is 10% or more of the voting or economic rights or a stake giving the ability to appoint or remove a director. Again, the requirement to obtain prior written consent had previously been FSC policy in any event; and
3. opening, maintaining or operating through a branch or incorporating, forming or acquiring a subsidiary.

Importantly, when considering the appointment of new directors, senior officers or a change in persons holding a “significant interest”, attention will need to be paid to the experience and qualification of those individuals so that they pass the FSC’s “fit and proper” test;

- A requirement to notify the FSC within 21 days of any change of name.
- A requirement to notify the FSC within 14 days of the appointment of a new auditor - if the outgoing auditor has resigned or ceased to hold office before the expiration of his term of office, it is also a requirement to notify the FSC of such and the circumstances that gave rise to such termination or resignation.
- A requirement to maintain at all times professional indemnity insurance.
- A requirement to at all times keep records that are sufficient to show and explain its transactions; enable its financial position to be determined with reasonable accuracy; enable it to prepare such financial statements and make such returns as its required under SIBA and the Regulatory Code; and enable its financial statements to be audited. Such records are required to be kept for 5 years - this obligation is not substantially different to the obligation which exists in any event under Section 98 of the BVI Business Companies Act, 2004.
- A requirement to file audited accounts with the FSC within 6 months of its financial year end, accompanied by a directors’ certificate in the approved form; auditors’ report; and shareholders’ report - previously, licensed investment managers were required to have an auditor and so audit their accounts, but there was no such obligation to file those accounts with the FSC.
- A requirement to appoint an “authorised representative” under SIBA who has been approved and licensed by the FSC for these purposes - the provisions of SIBA requiring licensees to have an authorised representative do not come into force until 12 October 2010.

To the extent that an existing licensed BVI investment manager is also providing investment management or other services constituting investment business to non fund structures and/ or other investment accounts (eg close-ended funds; managed accounts etc), such activities will now be caught by SIBA and so will require it to have obtained an extension to its existing license by 12 October 2010 (being the end of the transitional period).

Existing unregulated investment managers

The principal regulatory change introduced by SIBA is that it will bring BVI entities currently providing investment management services to non fund entities (which are currently unregulated entities) within the new regulatory regime, so requiring them to be licensed by the FSC.

For such entities, unless their business activities fall within one of the activities for which an exclusion or exemption applies, they will now be required to hold an investment management license under SIBA and need to be licensed as such by 12 October 2010.

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