

The changing face of financial services regulation in the British Virgin Islands: a case of keeping up with the Joneses | BY AKI CORSONI-HUSAIN

In January 2009 the British Virgin Islands' Financial Services Commission (FSC) presented its case for a number of changes and additions to the BVI's regulatory and legislative landscape. Due to the popularity of BVI corporate and partnership vehicles among the international financial community these changes are having, and will continue to have, far reaching consequences. They are immediately relevant to all BVI vehicles and may additionally be relevant to businesses seeking to market services and products to those vehicles.

In order of priority these changes include the following: First, the introduction of regulation and potential BVI licensing requirements on investment intermediaries (including the repeal of the current mutual funds regime). Second, a revamp of laws and regulations for the prevention of money laundering and terrorist financing. Third, the imposition of licensing requirements on financing and money services businesses. In addition the FSC has indicated that the other stalwarts of BVI regulation – those laws relating to fiduciary service providers and insurance companies will continue to undergo review and, in the coming months, be amended.

These are radical changes for a jurisdiction that has long prided itself on the longevity and coherence of the statutes establishing the cornerstones of the current regulatory landscape: namely, the Banks and Trust Companies Act, 1990, the Insurance Act, 1994, and the Mutual Funds Act, 1996.

International context

So what is causing this upheaval? In six words: international pressure on offshore financial centres. In more words: reports from the Caribbean FATF (Financial Action Task Force), the International Monetary Fund (IMF), the 'Foot Review' of UK Overseas Territories and Crown Dependencies, the FSC's admission in 2007 to the International Organization of Securities Commissions (IOSCO), as well as very recent pressure from the G20 in the context of tax information exchange agreements. No doubt at the end of this current process the BVI is likely to have a regime in place which is as comprehensive as any of the other key offshore jurisdictions and, in many ways, reflective of practices and customs which have long been taken for granted in on-shore locations.

Regulation of investment intermediaries

The enactment of the draft Securities and Investment Business Act (SIBA) will undoubtedly cause the biggest change to the current regime. SIBA can be divided into four distinct sections: First, a new investment business licensing regime to regulate investment advisers, broker-dealers, market makers, custodians and operators of investment exchanges. Second, the adoption of restrictions on, and regulation of, public issues

of securities in a non-mutual funds context. Third, the repeal of the Mutual Funds Act and replacement with Part III of SIBA and subsidiary legislation. Fourth, the introduction of a market abuse regime providing for offences of insider trading and market manipulation.

The investment business regime. A person carrying on 'investment business' in or from within the BVI will be required to hold a licence covering the relevant categories of investment business. Investment business is defined by reference to 'investment activities' in relation to 'investments', such terms are set out in detail in Schedules 1 and 2 of the draft Act. It is important to note that SIBA will apply to any BVI company which carries on investment business anywhere in the world even if its only link with the BVI is the location of its registered office and also to any person who solicits a BVI person (including companies) in order to offer them investment services.

Non-BVI persons should take note of these new provisions as they have the potential to capture cross-border business. However as a result of certain exemptions in SIBA, a non-BVI person providing investment services to a BVI Business Company whose only link with the BVI is the location of its registered office may well fall outside of scope.

Once licensed, firms will be required to meet prudential (capital) requirements, implement systems and controls and comply with conduct of business rules. Further detail will be set out in a forthcoming FSC Regulatory Code.

The public issuing regime. Part II of SIBA introduces a new regime to restrict issues of securities to 'the public' in the BVI. If within the scope of the new regime, the firm issuing securities will be required to register a prospectus with the FSC and to comply with a number of requirements to be set out in a forthcoming 'Public Issuers Code'. The FSC has made it clear that this regime is not intended to be extra-territorial, in the sense that a BVI Business Company will not be restricted from offering its securities outside of the BVI. The FSC has also indicated that foreign issuers should not be restricted from offering securities to BVI Business Companies where received by them outside of the BVI.

The new mutual funds regime. The Mutual Funds Act will be repealed and replaced with Part III of SIBA. The general structure and landscape of the BVI mutual funds industry will remain with the categories of public, private and professional funds being retained. Investment managers and fund administrators will be licensed under Part I of SIBA. Many of the proposed changes codify current FSC practice but particular points to note are as follows: (i) a general audit requirement for private and professional funds; (ii) the minimum initial investment for professional fund of \$100,000 will apply to almost all investors rather than just a majority of investors as is currently required; (iii) all funds, managers and administrators without a 'significant management presence' will be required to

This article first appeared in *FinancierWorldwide's September 2009 Issue*.
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have an authorised representative in the BVI; and (iv) a general requirement for private and professional funds to have an offering document and to appoint a manager, administrator and custodian.

The new market abuse regime. New offences of insider dealing, market manipulation and misleading statements are in Part IV, however they apply only where an individual located in the BVI carries on the activity.

SIBA will likely become law towards the end of 2009. Transitional provisions mean that it will come into force around mid-2010.

Revamp of anti-money laundering rules

The BVI's anti-money laundering (AML) regime was comprehensively overhauled at the beginning of 2008 with the introduction of the Anti-Money Laundering Regulations and the Anti-Money Laundering and Terrorist Financing Code of Practice. The new legislation substantially reflects FATF's internationally recognised 40+9 Recommendations and is in many ways similar to the benchmark EC Third Money Laundering Directive of 2007. On this basis FATF's Caribbean arm was largely complementary of the BVI regime in its November 2008 review.

However many provisions of the 2008 laws were sharply criticised by the private sector as being unworkable and in February 2009 the FSC acknowledged these shortcomings through a number of amendments, including: (i) the production of a list of jurisdictions which can be treated as 'recognised jurisdictions', equivalent to the BVI for AML purposes; (ii) the recognition that BVI funds may outsource AML compliance, including the money reporting officer function, to administrators or other functionaries in recognised jurisdictions; (iii) the acceptance that a non-BVI overseas administrator in a recognised jurisdiction observing its local AML/KYC regime for a BVI fund is compatible with that fund's own obligations under the Code; (iv) and an acknowledgment from the FSC that funds, managers and administrators who deal with customers in recognised jurisdictions may benefit from streamlined KYC requirements.

Introduction of regulation for financing and money services businesses

On 16 July 2009 the Financing and Money Services Act became law, it will come into force on a future date yet to be announced. Once in force it will subject an eclectic group of businesses to financial regulation. The Act itself is sub-divided into two areas – 'financing' on the one hand and 'money services' on the other.

Financing. Broadly, this captures the business of providing credit to borrowers resident in the BVI, the provision of credit to a borrower in the BVI in the course of any business conducted in the BVI and the business of leasing property (excluding real estate) to a person resident in the BVI. Financiers operating exclusively outside the BVI will not be caught.

Money services. The definition of money services is wide and includes money transmission services, cheque cashing services, currency exchange services and businesses issuing, selling and redeeming money orders or travellers cheques. Businesses operating exclusively outside of the BVI should not be caught. BVI companies are deemed to operate in the BVI solely by virtue of their registered office.

A final thought

The government and FSC are keen that the BVI be a well regulated financial centre, they are even keener that the BVI be seen to be well regulated. In the coming months they will update the Caribbean FATF with a progress summary and a review by the IMF is also imminent. It is no coincidence that regulatory enforcement action has gained pace over the last few years and will continue to do so for the foreseeable future. In much the same way that the BVI must ensure it keeps up with international benchmarks, there really has been no time as now for financial services businesses based in the BVI or using BVI vehicles to ensure they comply with applicable regulatory regimes and keep track of all new developments. ■

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