

Implications of the BVI's new investment business licensing regime

James McConvill, consultant in the corporate and commercial practice group at Appleby in the British Virgin Islands, discusses the implications of the new SIBA legislation.

The British Virgin Islands' Securities and Investment Business Act has been hailed as representing nothing less than a revolution in the jurisdiction's regulatory regime. This feature discusses some of the implications of the Act and clarifies the various types of investment businesses that come within its scope.

Introduction

The British Virgin Islands' Securities and Investment Business Act 2010 (SIBA) came into effect in May this year.

The purpose of SIBA is to (1) provide for the licensing, regulation and supervision of investment business; (2) provide for the registration of public mutual funds, and the recognition of professional and private mutual funds; (3) to control the offers of securities to the public in the BVI, and (4) to create offences relating to insider trading and market abuse.

This article focuses on the investment business regime introduced by SIBA and explores two implications of the new regime, namely greater ongoing dealings with the BVI's corporate regulator (the BVI Financial Services Commission) for companies coming within this new regime and the potential impact of increased regulation on M&A activity in relation to these regulated entities.

Investment business regime under SIBA

The investment business licensing regime is the most significant change implemented by SIBA. It requires any person who carries out "investment business" of any kind in or from within the BVI to obtain a licence from the Commission.

The new regime has a broad application due to the wide definition of "investment business" in SIBA and because a BVI company is deemed to be carrying on investment business in the BVI even if all or a substantial part of that business is conducted outside the BVI.

There are different categories of investment business in SIBA, including: dealing in investments; managing investments; arranging deals in investments; providing investment advice; the operation of an investment exchange, or

providing custodial or administration services with respect to investments. "Investments" is also defined widely to include shares, bonds and other debt instruments, derivatives, interests in a partnership or fund, and contracts for difference.

Dealings with the BVI corporate regulator

According to the latest statistical data released by the Commission, there were 456,226 companies actively registered in the BVI as at 31 March 2010.

For the overwhelming majority of companies that are not existing regulated entities (e.g. trust companies, banks, investment businesses, money services businesses, and so on), their ongoing filing and other compliance requirements are relatively minor. There is no requirement to hold annual meetings, file financial statements and other reports, or obtain pre-approval for new directors and shareholders. Thus, for most companies the only ongoing requirement, and thus the only time they deal with the Commission, is to pay the annual government licence fee. Again for the overwhelming majority of companies, even this annual fee is very small (\$350).

For those companies that engage in "investment business", even if this is a subsidiary aspect of their overall business, and which are not existing regulated entities, this changes with the introduction of SIBA. There are a number of requirements, both ongoing and event-driven, which mean that the Commission plays a much greater role in the lives of these regulated entities and their directors, senior officers and significant shareholders.

Under SIBA, in order for an applicant to be granted an investment business licence, the Commission first needs to be satisfied that:

1. The applicant, its directors, senior officers and any person having a "significant interest" in the applicant satisfy the Commission's "Fit and Proper" criteria. Accordingly, the identity of and details about the company's directors, senior officers and significant owners need to be provided to the Commission, which is not the case for the bulk of BVI companies.

The Financial Services Commission has

guidelines in place to assist in determining whether relevant parties are deemed fit and proper. This requires the Commission to consider the honesty, integrity, reputation, competence, capability and financial soundness of the relevant persons.

"Significant interest" is defined to mean the right to control ten per cent or more of the voting rights of the regulated entity; the right to a ten per cent or more share in any distribution of the surplus assets of the regulated entity, and the power to appoint or remove one or more directors of the undertaking.

2. The organisation, management and financial resources of the applicant are adequate for the carrying on of the relevant investment business.

3. Issuing the licence is not against the public interest.

This is not an exhaustive list, and the Commission can take other matters into account in deciding whether to grant a licence.

Another feature of SIBA has to do with the transfer of ownership in a regulated entity. As a result of SIBA, a person who owns or holds a significant interest in a regulated entity must not "sell, transfer, charge or otherwise dispose of his interest in the licensee, or any part of his interest", unless the prior written approval of the Commission has been obtained.

The Commission will thus need to be provided with detailed information about the proposed transfer of interest, including details of the person to whom the interest is proposed to be transferred. This process of review by the Commission can often take several weeks to work through, with the attendant cost of having to engage BVI advisors to liaise with the Commission. Additionally, a person must not acquire (whether directly or indirectly) a significant interest in a regulated entity unless the prior written approval of the Commission has been obtained. In all cases, when assessing a transfer, acquisition or disposal, the Commission must ultimately be satisfied that any person obtaining a significant interest in the licensee meets the Commission's fit and proper criteria.

There is also a requirement for regulated

entities to prepare and file fully audited financial statements with the Commission on an annual basis. While existing regulated entities are used to a similar requirement, it is a significant difference to the position applying to the vast

ty, structure and diversity of the business).

While SIBA is favourable in bringing the BVI into line with international best practice in this area of regulation, a reluctance to merge with or acquire a BVI company engaged in invest-

ment business is one possible consequence of SIBA when one looks at how the new regime works.

While a regulatory regime relating to investment business that adheres to international best practice could certainly attract some busi-

While SIBA is favourable in bringing the BVI into line with international best practice in this area of regulation, a reluctance to merge with or acquire a BVI company engaged in investment business is one possible consequence of SIBA when one looks at how the new regime works. The key changes that could impact on the attractiveness of these regulated entities for potential suitors is the requirement for the Commission to approve any transfer, acquisition or disposal of a significant interest in a regulated entity, and also for directors, senior officers and shareholders with a significant interest to be disclosed to, and approved by, the Commission.

majority of BVI companies under the BVI Business Companies Act 2004, where there is no requirement to appoint an auditor or to file financial statements with the Commission. Under this Act, all that is required is that BVI companies keep records that "are sufficient to show and explain the company's transactions" and "will, at any time, enable the financial position of the company to be determined with reasonable accuracy".

The potential impact on M&A activity

The compliance requirements of, and thus the role of the Commission in relation to, regulated investment businesses will be further enhanced shortly when the BVI's Regulatory Code is extended to investment businesses. A draft Regulatory (Amendment) Code 2010 was released for comment in July this year. Among the new requirements will be the need for some regulated entities to provide the Commission with a business plan when applying for a licence; a requirement for regulated entities to establish and maintain a conflicts of interest policy, and a requirement for regulated entities to maintain capital resources at a level adequate to support its investment business (taking into account the nature, size, complexi-

ty, structure and diversity of the business). While SIBA is favourable in bringing the BVI into line with international best practice in this area of regulation, a reluctance to merge with or acquire a BVI company engaged in investment business is one possible consequence of SIBA when one looks at how the new regime works. The key changes that could impact on the attractiveness of these regulated entities for potential suitors is the requirement for the Commission to approve any transfer, acquisition or disposal of a significant interest in a regulated entity, and also for directors, senior officers and shareholders with a significant interest to be disclosed to, and approved by, the Commission.

The time and cost of liaising with the Commission throughout the process of negotiating and putting into effect a change in the ownership of a regulated entity will certainly be an issue for many. Another significant issue is the requirement for the identity and personal details of the directors, senior officers and significant shareholders to be disclosed to, and then assessed by, the Commission.

There are a multitude of reasons why the BVI is the offshore jurisdiction of choice for the registration of international business companies. One of these reasons is that the identity of the directors and shareholders of a BVI company is not normally publicly-accessible information, and directors and shareholders are not scrutinised by the Commission unless the com-

pany is an existing regulated entity (such as an insurance company, bank or trust company). While a regulatory regime relating to investment business that adheres to international best practice could certainly attract some busi-

Conclusion

The operation of SIBA is still in its infancy. We are yet to obtain a full picture of how the new regime, particularly in relation to the licensing of investment businesses, will play out in practice. It is, however, undoubtedly the case that the regulatory landscape for BVI companies engaging in investment business from wherever in the world has changed. This is a good thing as it further emphasises the BVI's position as a leading offshore financial centre. One of the potential implications of SIBA, being the impact on M&A activity in relation to investment businesses, has been explored above. No doubt there will be other implications that emerge over time. ■