

Continuing obligations for British Virgin Islands regulated entities

Service area / [Corporate](#)

Location / [British Virgin Islands](#)

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The Securities and Investment Business Act (“SIBA”) and the Investment Business (Approved Managers) Regulations, 2012 (the “Approved Managers Regulations”) set out a number of on-going administrative requirements with which regulated entities in the British Virgin Islands (the “BVI”) must comply. Failure to comply with these obligations can result in fines being imposed against the regulated entity and/or the regulated entity’s licence being revoked by the BVI Financial Services Commission (the “FSC”). This guide sets out the key continuing obligations under SIBA and the Approved Managers Regulations however is not intended to be exhaustive.

Please note that additional requirements apply to funds which are not covered by the scope of this guide. Please refer to our client guides “Continuing Obligations for BVI Private and Professional Funds” and “Continuing Obligations for BVI Public Funds” in this regard.

Securities and investment business act

Entities wishing to carry out “investment business” in the BVI (unless they fall within the requirements of the Approved Managers Regulations) must obtain a licence from the FSC pursuant to SIBA. Investment business is widely defined and covers: (i) dealing in investments; (ii) arranging deals in investments; (iii) investment management; (iv) investment advice; (v) custody of investments; (vi) administration of investments; and (vii) operating an investment exchange. For further information regarding when a licence is required

under SIBA please contact the Carey Olsen BVI team. SIBA sets out a number of requirements with which an entity which is regulated and licenced under SIBA (a “Licensee”) must comply on an on-going basis in addition to the continuing obligations which generally apply to BVI companies or partnerships. These can be divided into annual filing requirements, positive obligations and actions which must not be undertaken without the consent of the FSC:

Annual filing requirements

- **Financial statements** – the financial statements of a Licensee, signed by a director or trustee of a unit trust, must be submitted to the FSC within six months of the end of its financial year accompanied by:
 - a. a director’s or trustee’s certificate in the approved form;
 - b. an auditor’s report;
 - c. a report on the affairs of the Licensee made in respect of the relevant financial year to the members or investors of the Licensee; and
 - d. such other documents as may be prescribed from time to time.

Financial statements must include, amongst other things: (i) a statement of the financial position of the Licensee as at the last date of the financial year; (ii) a statement of the financial performance of the Licensee in relation to the financial year; and (iii) a statement of cash flows for the Licensee in relation to the financial year, and shall be prepared in accordance

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with such accounting standards as may be prescribed and approved by the directors of the Licensee (and must state the date on which such directors approval was obtained).

Failure to comply with this requirement carries a fine of US\$20,000 where the Licensee is a company and US\$15,000 where the Licensee is an individual, on summary conviction.

Positive obligations

- **Authorised representative** – a Licensee must appoint and at all times have an authorised representative who shall be a person or entity resident in the BVI and certified by the FSC, unless the Licensee has a significant management presence in the BVI determined in accordance with the Regulatory Code, 2009 (the “Regulatory Code”). CO Authorised Representative Ltd. is experienced in providing such service. The functions of the authorised representative are to:

- a. act as the main intermediary between the Licensee and the FSC;
- b. accept service of notices and other documents on behalf of the Licensee; and
- c. keep such records or copies of such records as may be prescribed from time to time.

Failure to comply with this requirement carries a fine of US\$15,000 where the Licensee is a company and US\$10,000 where the Licensee is an individual, on summary conviction.

All documents to be submitted to the FSC by the Licensee must be submitted by its authorised representative and all fees to be paid by a Licensee to the FSC must be paid by its authorised representative on behalf of the Licensee.

- **Auditor** – a Licensee must appoint and at all times have an auditor for the purpose of auditing its financial statements whose appointment has been approved by the FSC in writing prior to their appointment. Failure to comply with this requirement carries a fine of US\$15,000 where the Licensee is a company and US\$10,000 where the Licensee is an individual, on summary conviction.

A Licensee must, within 14 days of the appointment of its auditor, submit a notice of appointment to the FSC. The FSC may at any time, by notice in writing, direct a Licensee to supply to the FSC a report prepared by its auditor or such other person as may be nominated by the FSC on such matters as the FSC may determine, which may include an opinion on the adequacy of the accounting systems and controls of the Licensee. If a Licensee fails to appoint an auditor then the FSC may appoint an auditor for the Licensee.

The auditor has an obligation to report immediately to the FSC any information relating to the affairs of the Licensee that he or she has obtained in the course of acting as its auditor that, in his or her opinion, suggests that:

- a. the Licensee is insolvent or is likely to become insolvent or is likely to be unable to meet its obligations as they fall due;
- b. the Licensee is in breach of its obligations regarding the maintenance of a financially sound condition or maintenance of capital resources (please see below);
- c. the Licensee has significant weaknesses in its internal controls which render it vulnerable to significant risks or exposures that have the potential to jeopardise the Licensee’s financial viability;
- d. a criminal offence has been or is being committed by the Licensee in connection with the business of the Licensee; or
- e. serious breaches of SIBA or the Regulatory Code or money laundering or terrorist financing legislation have occurred in respect of the Licensee in connection with the business of the Licensee,

the above obligation not being removed by the resignation of the auditor or the termination of their appointment.

Where an auditor resigns or their appointment is terminated before the expiration of their term of office, the auditor shall inform the FSC of the termination of his or her appointment or his or her resignation and disclose to the FSC the circumstances that gave rise to such termination or resignation.

- **Maintenance of records** – as is the case for BVI incorporated companies and partnerships, a Licensee must keep records for at least five years (even after the cancellation or revocation of a Licensee’s licence) which: (i) are sufficient to show and explain its transactions; (ii) allow its financial position to be determined with reasonable accuracy at any time; (iii) enable it to prepare such financial statements and make such returns as it is required to make under SIBA and the Regulatory Code; and (iv) to enable its financial records to be audited in accordance with SIBA.
- **Client assets** – a Licensee must ensure that client assets are identified or identifiable and appropriately segregated and accounted for and make arrangements for the proper protection of client assets. Failure to comply with this requirement carries a fine of US\$50,000 on summary conviction and US\$75,000 on indictment where the Licensee is a company and US\$25,000 on summary conviction and US\$40,000 on indictment where the Licensee is an individual.
- **Maintenance of financially sound condition** – Licensees must at all times maintain their business in a financially sound condition by: (a) having assets; (b) providing for its liabilities; and (c) generally conducting its business, so as to be in a position to meet its liabilities as they fall due. If a Licensee forms the opinion that it does not comply with this requirement then it must immediately notify the FSC in

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writing of this fact. Failure to notify the FSC carries a fine of US\$25,000 where the Licensee is a company and US\$15,000 where the Licensee is an individual, on summary conviction.

- **Maintenance of capital resources** – where the Regulatory Code prescribes a minimum capital resource requirement applicable to a category of licensee then a Licensee must ensure that at all times its capital resources are maintained in an amount not less than the prescribed minimum (or such other amount as may be specified by the FSC). If a Licensee forms the opinion that it does not comply with this requirement then it must immediately notify the FSC in writing of this fact. Failure to notify the FSC carries a fine of US\$25,000 where the Licensee is a company and US\$15,000 where the Licensee is an individual, on summary conviction.

Actions which must not be undertaken without the consent of the FSC

- **Appointment of directors and senior officers** – a Licensee must not appoint a director or senior officer without the prior written approval of the FSC which will only be granted where the proposed appointee satisfies the FSC's fit and proper criteria and the appointment complies with any guidelines issued by the FSC in this regard. Failure to comply with this requirement carries a fine of US\$10,000 where the Licensee is a company and US\$5,000 where the Licensee is an individual, on summary conviction.
- **Transfers of a significant interest in a licensee** – a person holding a significant interest in a Licensee shall not, whether directly or indirectly, sell, transfer, charge or otherwise dispose of his or her interest in the Licensee, or any part of his or her interest therein, unless the prior written approval of the FSC has been obtained. In addition, a person may not, whether directly or indirectly, acquire a significant interest in a Licensee unless the prior written approval of the FSC has been obtained. Breach of this requirement may result in enforcement action being taken by the FSC against the Licensee for causing, permitting or acquiescing in such transfer taking place.
- **Branches and subsidiaries** – a Licensee shall not, without the prior written approval of the FSC, open, maintain or carry on business through a branch or a representative or contact office outside the BVI or incorporate, form or acquire a subsidiary.
- **Change of name** – a Licensee must not change its corporate name or the name under which it carries on business unless the prior written approval of the FSC has been obtained.
- **Shares** – every share in a Licensee which is a company must be issued fully paid for in cash on issue unless otherwise permitted by the Regulatory Code or authorised by the FSC in writing on the application of the Licensee.

- **Professional indemnity and other insurance** – a Licensee must at all times maintain such professional indemnity and other insurance as may be prescribed.

Investment Business (Approved Managers) Regulations, 2012

The Approved Managers Regulations provide a lighter regulatory framework for persons wishing to act as an investment manager or investment advisor in respect of assets not exceeding US\$400 million to: (i) a private fund or professional fund; (ii) a closed-ended fund that is incorporated in the BVI and has the characteristics of a private or professional fund; (iii) a person who is affiliated to a fund specified in limbs (i) or (ii) above; (iv) such other persons as the FSC may approve on a case-by-case basis on application; or (v) a person that is incorporated outside of the BVI, has equivalent characteristics to a private fund, professional fund or closed-ended fund and invests all or a substantial part of its assets in one or more funds specified in limbs (i) or (ii) above. Such persons may elect to be approved under the Approved Managers Regulations rather than pursuant to SIBA.

Annual filings

- **Financial statements** – an approved investment manager is required to prepare and submit financial statements in accordance with the provisions of SIBA (please see the description above in this regard); however there is no requirement for an approved investment manager to appoint an auditor or for its financial statements to be audited.
- **Return** – an approved investment manager must, no later than the 31 January each year, file a return with the FSC:
 - a. stating that it is not in breach of the requirements of the Approved Managers Regulations that entitle him to continue as an approved investment manager;
 - b. confirming that each director, senior officer and shareholder with a significant interest in the approved investment manager is fit and proper; and
 - c. providing, as at 31 December of the previous year, details of:
 1. the persons for which it provides services;
 2. the assets under management for each person for which it acts;
 3. the number of investors in each person for which he acts; and
 4. any significant complaints received by the approved investment manager.
- **Annual renewal fee** – an annual renewal fee must be paid to the FSC.

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Required appointees

An approved investment manager shall at all times have:

- at least two directors, one of whom shall be an individual; and
- an authorised representative in accordance with SIBA (please see the description above in this regard).

Requirements to notify the FSC of any change

An approved investment manager shall, within 14 days of the change of any of the information submitted in its application to the FSC, notify the FSC in writing of the change, providing details of the change and a written declaration as to whether or not the change complies with the requirements of the Approved Managers Regulations.

In addition to notifying the FSC of any change as set out above, an approved investment manager must notify the FSC of any matter in relation to the approved investment manager or in the approved investment manager's conduct of a relevant business which has or is likely to have a material impact or a significant regulatory impact with respect to the approved investment manager or the relevant business.



FIND US

Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
F +1 284 494 4155
E bvi@careyolsen.com



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Visit our corporate team at
careyolsen.com

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