

Solvent Liquidations of Funds in the British Virgin Islands

Introduction

As a regulated entity, the statutory considerations relevant to the solvent liquidation of a fund domiciled and regulated in the British Virgin Islands (“BVI”) are, as might be expected, more stringent than those applying to unregulated entities domiciled in the BVI.

This note deals with solvent liquidations of BVI funds (being private, professional or public funds licensed under the *Mutual Funds Act, 1996*). Close-ended funds, which are not regulated in the BVI, will not be subject to these statutory considerations. Similarly, insolvent liquidations are subject to different considerations under *Insolvency Act, 2003*.

Whilst BVI companies are free to choose any person to act as their liquidator in the event of a solvent liquidation under the *BVI Business Companies Act, 2004* (“BCA”), provided that the liquidator is an “eligible individual” (an eligible person essentially being a real person who is not connected to the company, ie not a director), under Section 200(3) of the BCA a resolution by the directors or members of a “regulated person” can not be passed unless the Financial Services Commission (the “FSC”) has:

- (a) given its prior written consent to the company being put into voluntary liquidation; and
- (b) approved appointment of the individual proposed as the voluntary liquidator.

Section 200(4) goes on to provide that any resolution passed in contravention of sub-section (3) and any appointment of a liquidator who has not been approved by the FSC under sub-section (3)(b) is void and of no effect.

For these purposes, a “regulated person” has the meaning specified in the *Insolvency Act, 2003* and will include all funds licensed by the FSC under the *Mutual Funds Act, 1996*.

Historically, BVI funds commencing a solvent liquidation under the BCA would deal with their obligations under Section 200(3) of the BCA within the same letter of application to the FSC signed by the directors of the fund to request the cancellation of their license. Additionally, whilst there are no comparable provisions in the *Partnership Act, 1996*, BVI funds set up as limited partnerships would, by convention, similarly follow the same process with the FSC.

Significantly for BVI funds, the FSC published a guidance note on 8 April 2008, which formalises the steps required to be followed on solvent liquidation. The FSC notes in this guidance note that its content is expected to be complied with fully.

The guidance note provides as follows as it relates to the approval of solvent liquidations:

- (a) the FSC must receive and be satisfied with confirmation in writing from the directors or an authorised or legal representative, that the regulated person is in good regulatory standing;
- (b) the FSC must receive confirmation in writing that the regulated person is solvent;
- (c) the FSC must receive confirmation in writing and be satisfied that:
 - the liquidation of the regulated person will not have any adverse or potential adverse consequence for customers or investors;
 - the liquidator has liquidation experience and professional competence to liquidate the specific company. With this in mind, the liquidator is required to demonstrate that he or she either:
 - holds an insolvency practitioner’s license issued by the FSC;
 - has an appropriate professional qualification and experience of providing legal or financial advice to companies in the relevant financial sector;
 - has experience in liquidating companies in the relevant financial sector; or
 - is an eligible liquidator pursuant to the regulations made under Section 240 of the BCA, in circumstances where he or she is a director of the company in respect of which he or she is to serve as liquidator; and
 - the liquidator is fully conversant with relevant financial services legislation, including industry specific legislation (i.e. the *Mutual Funds Act, 1996*) and the BCA.

For these purposes “good regulatory standing” means that:

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- (a) Registry of Corporate Affairs and regulatory fees and administrative penalties (where applicable), financial statements and other filing requirements in respect of the company are up to date;
- (b) all of the company's functionaries requiring approval or notification are so approved or notified; and
- (c) no regulatory or enforcement action is pending against the company.

In demonstrating solvency, the FSC expects to receive the most recent audited financial statements and unaudited statements subsequent to the audited financial statements for the period up to the date on which the board of directors resolves to apply to liquidate the regulated person. For professional or private funds, this includes the most recent unaudited statements of assets and liabilities

These statements and information are typically provided by the directors via its BVI legal counsel with the letter of application to the FSC mentioned above.

The guidance note goes on to provide that the FSC approval of the liquidation and the liquidator will usually be conditional upon the regulated person or liquidator providing it with copies of the following:

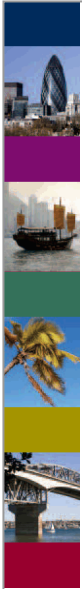
- (a) the board resolution proposing the liquidation;
- (b) the notice of appointment of the liquidator, the declaration of solvency made by the directors and the Liquidation Plan filed with the Registry of Corporate Affairs under Section 204 (a) of the BCA;
- (c) the advertisement placed in the Gazette announcing the appointment of the liquidator pursuant to Section 204 (b) of the BCA;
- (d) a statement of account in relation to the actions and transactions of the liquidator;
- (e) the Certificate of Dissolution issued by the Registry of Corporate Affairs under Section 208 (b) of the BCA;
- (f) the notice placed in the Gazette announcing the regulated person has been struck-off the Registry of Corporate Affairs; and
- (g) such other document or information as the FSC considers appropriate.

This information is usually provided to the FSC by the liquidator and/ or the company's BVI legal counsel following the commencement of the liquidation and the publishing of the relevant notices.

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