

BVI Investment Business (Approved Managers) Regulations, 2012

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The Investment Business (Approved Managers) Regulations, 2012 (the Approved Managers Regulations), provides, for eligible investment managers, a "regulatory light" regulatory regime which complements the more regulated investment business licensing regime available under the Securities and Investment Business Act, 2010 (SIBA).

| Key features

Under the Approved Managers Regulations, to be eligible to apply to be an "Approved Manager", an investment manager or investment advisor must:

- (a) be a BVI company or limited partnership;
- (b) be proposing to act as the investment manager or investment advisor to either (i) a private fund, professional fund or a closed-ended fund domiciled in the BVI, (ii) a foreign fund investing substantially all of its assets in a BVI domiciled fund, or (iii) a foreign fund from a recognised jurisdiction with equivalent characteristics to a private fund or professional fund;
- (c) satisfy the Financial Services Commission's (FSC) fit and proper test;
- (d) have, in the case of open-ended funds, aggregate assets under management of up to US\$400 million and, in the case of closed-ended funds, aggregate capital commitments of up to US\$1 billion; and
- (e) file an application for approval not less than seven days prior to the intended commencement of business.

Notwithstanding that an investment manager or investment advisor may be eligible to apply to be an Approved Manager, it may still alternatively apply for a Category 3B or 3E or Category 4A or 4B investment business license under SIBA. Therefore, eligibility for licensing as an "Approved

Manager" under the Approved Managers Regulations is no bar to opting-in for an investment business license under SIBA.

For eligible investment managers or investment advisors, the advantage of becoming licensed as an Approved Manager, as opposed to becoming licensed under SIBA, is that the ongoing obligations owed by an Approved Manager are less onerous than those which are owed by an investment business licensee under SIBA, as various provisions of SIBA and the Regulatory Code, 2009 (the Code) are disapplied for Approved Managers.

Summary of the Approved Managers Regulations

The Approved Managers Regulations apply to a BVI domiciled company or limited partnership which submits an application for approval under the Approved Managers Regulations and is so approved by the FSC.

For a BVI domiciled investment manager or investment advisor approved by the FSC under Regulation 7 of the Approved Managers Regulations, Section 4(1) of the SIBA (being the requirement to hold an investment business licence in order to carry on an activity constituting "investment business" for the purposes of SIBA) and the Regulatory Code, 2009 (the Code) do not apply. Following approval under the Approved Managers Regulations, an Approved Manager shall be treated as a licensee for the purposes of the Financial Services Commission Act, 2001 (the FSC Act) (which essentially means it will be a regulated person and will be subject to enforcement and other action under the FSC Act) and may carry out any of the business outlined in Regulation 9 of the Approved Managers Regulations.

To be eligible to apply for approval as an Approved Manager, an applicant must be acting as an investment manager or investment advisor to one of the persons specified in Regulation 9 of the Approved Managers Regulations (see paragraph 3 below) (i.e. a BVI domiciled fund (whether a private fund, professional fund or closed-ended fund); a foreign fund investing substantially all of its assets in a BVI domiciled fund); or a foreign fund domiciled in a recognised jurisdiction with equivalent characteristics to a private fund or professional fund, with, in either case, assets under management not exceeding US\$400 million or, in relation to closed-ended funds, such other amount as may be prescribed in the guidelines issued pursuant to Regulation 9(3) of the Approved Managers Regulations (the Guidelines). The Guidelines provide that for close-ended funds, this is US\$1 billion.

1. Application process for approval as an Approved Manager

Regulation 4 of the Approved Managers Regulations requires an applicant for approval as an Approved Manager to submit an application to the FSC in the prescribed form at least seven days prior to the intended date of commencement of the relevant business, unless the FSC accepts in writing a shorter period.

A person who submits such an application for approval as an Approved Manager may commence and carry on relevant business for a period of up to thirty days, such period being extendable for a further period of thirty days by the FSC (either upon request by the applicant or on its own volition).

Where the FSC does not grant approval to an applicant within the above period (or extended period), the person is required to cease carrying on the relevant business.

2. Documents to be provided in an application

Regulation 5 of the Approved Managers Regulations, requires an application for approval as an Approved Manager to be signed by a director or the general partner, accompanied by the following:

- (a) a copy of the applicant's constitutional documents;
- (b) the details of each director or general partner and senior officer of, and each person who owns or holds an interest in, the applicant;
- (c) a written declaration by the applicant that each director or general partner and senior officer of, and each person who owns or holds an interest in, the applicant is fit and proper;
- (d) the number and details of the funds that the applicant intends to act for upon commencement of relevant business;
- (e) the date upon which the applicant intends to commence relevant business;
- (f) a copy of the investment advisory or investment management agreement between the applicant and each person with whom the applicant intends to act;
- (g) a written confirmation as to which individual will be carrying out the day-to-day investment business functions of the applicant;
- (h) a written confirmation as to whether or not the applicant has delegated or intends to delegate any of its relevant business functions (and where any of the functions will be so delegated, an outline of the functions which will be delegated; details of the person to whom the functions will be delegated; and a copy of the delegation agreement);
- (i) a written confirmation from the applicant's legal practitioner that the legal practitioner has agreed to act for the applicant; and
- (j) a written declaration by the applicant's authorised representative or legal practitioner that the application for approval as an investment manager is complete and meets the application requirements of the Approved Managers Regulations.

Under Regulations 5(4) and (5) of the Approved Managers Regulations, where an application does not comply with the above or is not accompanied by the requisite application fee, the application shall be considered as incomplete and may be denied by the FSC.

3. Business which may be undertaken by an Approved Manager

Regulation 9 of the Approved Managers Regulations provide that an Approved Manager may carry on any of the following investment business functions:

- (a) act as an investment manager or investment advisor to a private fund or professional fund;
- (b) act as an investment manager or investment advisor to a closed-ended fund incorporated, formed or organised in the BVI with the characteristics of a private fund or professional fund (the Guidelines provide guidance as to the funds which qualify as a "closed-ended fund" and what constitutes "characteristics of a private fund or professional fund" for these purposes);
- (c) act as an investment manager or investment advisor to a person who is affiliated to a fund structure within (a) and (b) above;
- (d) act as an investment manager or investment adviser to a fund incorporated or formed in a recognised jurisdiction that has equivalent characteristics to a private fund or professional fund;
- (e) act as an investment manager or investment advisor to such other person as the FSC may approve on a case by case basis. Included amongst the types of "other persons" for these purposes which the FSC has to date approved, includes, significantly, managed accounts;
- (f) act as an investment manager or investment advisor to a person that is:
 - (i) incorporated, formed or organised outside the BVI in a non-recognised jurisdiction;
 - (ii) has equivalent characteristics to a private fund, professional fund or a closed-ended fund (again, the Guidelines provide guidance as to what constitutes "equivalent characteristics" for these purposes); and
 - (iii) invests all or substantially all of its assets in one or more fund structures falling within (a) or (b) above (in determining what constitutes "substantial" for these purposes, account shall be taken of whether the aggregate of the fund's investment in the funds falling within (a) and (b) above amount to more than fifty percent of its total assets).

For the purposes of the above, a list of recognised jurisdictions is contained within the Securities and Investment Business (Recognised Jurisdictions) Notice, 2010 and, for these purposes the following are recognised jurisdictions:

- Argentina
- Australia
- Bahamas
- Bermuda
- Belgium
- Brazil
- Canada
- Cayman Islands
- Chile
- China
- Denmark
- Finland
- France
- Germany
- Gibraltar
- Greece
- Guernsey
- Hong Kong
- Ireland
- Isle of Man
- Italy
- Japan
- Jersey
- Luxembourg
- Malta
- Mexico
- Netherlands

- Netherlands Antilles
- New Zealand
- Norway
- Panama
- Portugal
- Singapore
- Spain
- South Africa
- Sweden
- Switzerland
- United Kingdom
- United States of America

4. Renewal of Approved Manager status

Regulation 6(2) of the Approved Managers Regulations requires the continued approval of an Approved Manager to be renewed annually by the payment of the annual license fee (the renewal fee) and the filing of an annual return by 31 January of each year.

Failure to pay the renewal fee shall incur the penalties prescribed for late payment of fees under Schedule 2 of the Financial Services (Administrative Penalties) Regulations, 2006. Where an Approved Manager becomes liable to the maximum penalty under those regulations and fails to pay the renewal fees and penalties within 30 days of becoming liable to the maximum penalty, its license shall be cancelled and it shall cease to function as an Approved Manager (and so shall not carry on further business).

5. Restrictions on an Approved Manager

Subject to the assets under management in relation to open-ended funds not exceeding US\$400 million or its equivalent in another currency, or, in relation to closed-ended funds, capital commitments not exceeding US\$1 billion, an Approved Manager is not restricted as to the number of funds for whom it may act.

Where an Approved Manager acts for both open-ended and close-ended funds, the aggregate assets under management in relation to open-ended funds and the aggregate capital commitments in relation to the close-ended funds shall be segregated and treated separately for the purposes of the calculating compliance with these eligibility thresholds.

However, under Regulation 10(2) of the Approved Managers Regulations, an Approved Manager shall not carry on any other business except the relevant business outlined in Regulation 9 of the Approved Managers Regulations.

Under Regulation 11(1), where an Approved Manager ceases to qualify as such, it shall:

- (a) not take on any new relevant business; and
- (b) notify the FSC immediately that it is no longer qualified to act as an Approved Manager.

Where an Approved Manager ceases to qualify as an Approved Manager, it shall within three months cease to carry on the business and shall apply for an investment business license under SIBA. This three month period is extendable for a further period of three months where the FSC considers it appropriate having regard to the business of the Approved Manager and such other matters as the FSC considers relevant.

Where, in relation to open-ended funds, an Approved Manager has either assets under management exceeding US\$400 million, or its equivalent in another currency, or in relation to closed-ended funds, aggregate capital commitments exceeding US\$1 billion, it shall within seven days notify the FSC in writing of that fact and shall cease to qualify as an Approved Manager unless, within three months:

- (a) it no longer has assets under management which in aggregate exceed US\$400 million or in relation to closed-ended funds, capital commitments exceeding US\$1 billion;
- (b) it submits an application to be licensed to carry-on investment business under SIBA; and
- (c) the FSC, having regard to any risk that may be associated with the Approved Manager or any of the funds for which it acts, approves in writing that it may continue to function as an Approved Manager.

6. Ongoing obligations of an Approved Manager

Under Regulation 13(1) of the Approved Managers Regulations, an Approved Manager is required at all times to have at least two directors, one of whom shall be an individual. In addition, an Approved Manager is required to have an authorised representative.

Where there is any change to any of the information provided by the Approved Manager pursuant to its application for approval, it is obligated under Regulation 13(2) of the Approved Managers Regulations to notify the FSC within 14 days, 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.

Additionally, under Regulation 13(3) of the Approved Managers Regulations, the Approved

Manager shall notify the FSC of any matter in relation to it or its conduct of a relevant business, which has or is likely to have a material impact or significant regulatory impact with respect to the Approved Manager or the relevant business.

An Approved Manager is required to prepare and submit financial statements, which need not be audited, and, by 31 January of each year, file an annual return which:

- (a) states that it is not in breach with the Approved Managers Regulations that entitle it to continue as an Approved Manager;
- (b) confirms that each director, general partner and senior officer of, and shareholder with a significant interest in, the Approved Manager is fit and proper; and
- (c) details the persons to whom it provides services; the assets under management of each person for which it acts; the number of investors in each person for which it acts; and any significant complaints received by the Approved Manager (what constitutes "significant complaint" for these purposes shall be construed in accordance with section 69B of the Code).

The filing of this annual return is linked to the renewal of an Approved Manager's status detailed in paragraph 4 above.

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