



Functionaries of BVI Hedge Funds Take Note

Amidst all the attention given to the BVI Securities and Investment Act, 2010 (“SIBA”), one provision has received surprisingly scant attention given its potential importance to the functionaries of BVI hedge funds.

In particular, section 41(2) of SIBA makes it an offence for any person to act as a functionary of a BVI hedge fund unless the fund has been properly recognised by or registered with the BVI Financial Services Commission (the “FSC”). In other words, this new offence creates an obligation on fund functionaries to ensure that their BVI hedge fund clients have the necessary regulatory authorisations they require under BVI law.

The maximum penalty which may be imposed in relation to this offence is a fine of US\$75,000.¹ Moreover, any breach of section 41(2) of SIBA is likely to be taken into account in any assessment of whether a functionary satisfies the Commission’s “fit and proper” criteria. In this regard, it is worth noting that the Commission has the power under SIBA to take enforcement action against any fund whose functionary is determined not to satisfy its “fit and proper” criteria.

The key features of the new section 41(2) offence are that:

- it applies to all functionaries of BVI hedge funds, including managers, administrators, custodians, investment advisors and prime brokers and, in the case of a fund that is a unit trust, the trustee, regardless of where they are domiciled; and
- it only applies in relation to BVI funds which are “mutual funds” and which are therefore required by SIBA to be recognised by the FSC as a “private” or “professional fund” or registered by the FSC as a “public fund”. As a quick rule of thumb, closed-ended funds will never fall within the definition of a “mutual fund”, whereas open-ended funds which are structured as BVI companies, partnerships or unit trusts will almost always fall within the definition.

¹ We note there are uncertainties regarding the extra-territorial enforcement of such a penalty.

As a result of the new section 41(2) offence, we strongly recommend that all fund functionaries take steps to verify that their BVI hedge fund clients have the necessary regulatory authorisations in the BVI. This can be done in the following three ways:

1. A list of recognised and registered mutual funds appears on the FSC's website (www.bvifsc.vg under the link "Regulated Entities"). As such, a quick and basic check is to ensure the name of each BVI hedge fund client appears on this list.
2. Each BVI hedge fund client can also be asked to provide a copy of its certificate of recognition (for private and professional funds) or its certificate of registration (for public funds), which it will have received upon obtaining the necessary regulatory authorisation by the FSC.
3. Finally, it is possible to attend the FSC's offices to check that a client appears on the official register of mutual funds maintained by the FSC.

If, after taking any of these steps, it does not appear that a BVI hedge fund client is properly recognised or registered as a mutual fund, legal advice should be sought at the earliest opportunity.



This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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