

What you need to know about the regulation of investment business in the BVI

GUIDE

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Introduction

As with all well-regulated jurisdictions, the BVI regulates financial service activities like buying and selling investments, holding investments on behalf of others, managing investments and providing investment advice.

The Securities and Investment Business Act 2010 (as amended, the **Act**) is the legislation that regulates these activities in the BVI. It is based on financial services legislation in the United Kingdom and other offshore financial centres.

This guide examines the activities that constitute investment business (the term for financial services business in the Act), and the applicable exemptions available, under the Act.

The definitions used in this guide are set out at the end of it.

What activities are regulated?

The basic prohibition

The Act prohibits a person from carrying on, or holding out itself as carrying on, investment business of any kind in, or from within, the BVI unless the person holds a licence to carry on that kind of investment business.

A person does not need to hold a licence to carry on investment business if the:

- person is an excluded person; or
- investment activity carried on by the person is an excluded activity.

Components of the basic prohibition

To understand the basic prohibition, it is necessary to look at its components, which are:

- What is an investment?
- What constitutes carrying on investment business?
- What does 'in or from within the BVI' mean?
- How is a licence obtained?
- Who is an excluded person?
- What is an excluded activity?

We will look at each of these components in turn.

There is a decision tree at the back of this guide which assists in analysing whether a person's activities will constitute carrying on investment business.

What is an investment?

The term **investment** is defined broadly in the Act and includes:

- shares, partnership interests and fund interests;
- debentures, loan stock, bonds, certificates of deposit and other investments creating or acknowledging indebtedness (excluding things like bills of exchange, letters of credit, banknotes, leases, mortgages and charges);
- warrants and other instruments entitling the holder to subscribe for the kind of investments mentioned above;
- certificates representing investments which confer contractual or property rights;
- options to acquire or dispose of investments, currencies, gold, silver, palladium or platinum;
- futures contracts;
- contracts for difference and any other contracts that seek to secure a profit or avoid a loss by reference to fluctuations in the value or price of any property or an index or other factor;
- long term life and health insurance contracts (excluding reinsurances contracts); and
- rights and interests in any of the kind of investments mentioned above.

Neither cash nor real estate is an investment under the Act.

What constitutes carrying on investment business?

General position

For the purposes of the Act, a person carries on investment business if, by way of business, the person engages in an investment activity and the person is not an excluded person or engaging in an excluded activity.

What does 'by way of business' mean?

The Act does not give any guidance on the meaning of 'by way of business'.

However, it is likely that the Commission would look to the guidance given in the 'Perimeter Guidance Manual' issued by the Financial Conduct Authority of the UK on this topic. It states that determining whether a person carries on an activity by way of business involves considering factors like the:

- degree of continuity of the activity;
- existence of a commercial element;
- scale of the activity;
- proportion which the activity bears to the other unregulated activities in which the person engages; and
- nature of the activity.

Other important factors that should no doubt be taken into account are whether the person:

- receives payment for carrying on the activity; and
- carries on the activity with a view to a profit.

None of these activities would, in itself, be conclusive and the question of whether a person carries on an investment activity by way of business will ultimately depend on the particular factual situation.

What are investment activities?

The activities which constitute investment activities under the Act are:

- **dealing in investments**
 - dealing in investments as an agent; and
 - dealing in investments as principal where the person:
 - holds out itself as willing, as principal, to enter into transactions to deal in investments of that kind at prices determined by the person generally and continuously rather than in respect of each particular transaction;
 - holds out itself as engaging in the business of underwriting investments of the kind to which the transaction relates;
 - holds out itself as engaging, as a market maker or dealer, in the business of buying investments of the kind to which the transaction relates with a view to selling them; or
 - regularly solicits members of the public for the purpose of inducing them, as principals or agents, to deal in investments and the transaction is, or is to be entered into, as a result of the person having solicited members of the public in that manner;
- **arranging deals in investments**
 - making arrangements with a view to:
 - another person (as principal or agent) dealing in a particular investment, being arrangements which bring about, or would bring about, a transaction; or
 - a person who participates in the arrangements to deal in investments;
- **managing investments**
 - managing investments of another person on a discretionary basis (other than as manager of a mutual fund); and

- acting as manager of a mutual fund;
- **providing investment advice**
 - advising a person on investments (other than as investment adviser of a mutual fund) where the advice:
 - is given in the person's capacity as an investor, potential investor or agent of an investor or potential investor; and
 - concerns the merits of the person dealing in a particular investment or exercising any right conferred by an investment to acquire, sell, subscribe for, underwrite or convert an investment; and
 - acting as investment adviser of a mutual fund;
- **providing custody services**
 - acting as custodian or depository of investments of another person (other than acting as custodian of a mutual fund or trustee of unit trust); and
 - acting as custodian of a mutual fund or trustee of unit trust;
- **administering investments**
 - administering, or arranging for the administration of, investments of another person (other than acting as administrator of a mutual fund); and
 - acting as administrator, registrar or transfer agent, of a mutual fund; and
- **operating an investment exchange**
 - providing a facility, whether by electronic means or otherwise, for the orderly trading of investments or for the listing of investments for the purposes of trading, by members of the investment exchange.

What does 'in or from within the BVI' mean?

The Act states that:

- a person carries on investment business in the BVI if that person:
 - occupies premises in the BVI for the purpose of carrying on investment business; or
 - solicits a person in the BVI for the purpose of offering to provide a service that constitutes investment business; and
- a BVI company that carries on, or holds out itself as carrying on, investment business outside the BVI is taken to carry on, or hold out itself as carrying on, investment business from within the BVI.

How is a licence obtained?

A person who wants to carry on a particular kind of investment business, must hold an investment business licence authorising it to do so.

To obtain an investment business licence to carry on a particular kind of investment business, a person must apply to the Commission. An application must be made on the prescribed form and be accompanied by the documents and information specified in the Regulatory Code 2009 (as amended, the **Code**).

Applying for an investment business licence is an involved process and an explanation of the steps involved is outside the scope of this guide, since in the vast majority of cases, transactions involving BVI companies are structured in a way that ensures none of the parties carries on investment business.

The Act states that the Commission may issue an investment business licence to an applicant if it is satisfied that:

- the applicant intends to carry on the particular kind of investment business if it is issued a licence;
- the applicant satisfies the requirements of the Act and the Code with respect to the application;
- the applicant will, once the licence is issued:
 - have capital resources at least equal to the amount that it is required to maintain under the Act; and
 - otherwise comply with the Act, the Code and any practice directions applicable to it;

- the applicant, its directors and senior officers and any persons holding a significant interest or controlling interest in the applicant satisfy the Commission's fit and proper criteria;
- the organisation, management and financial resources of the applicant are, or once a licence is issued to it will be, adequate for carrying on the particular kind of investment business; and
- issuing the licence is not against the public interest.

Who is an excluded person?

The Act specifies persons who, when carrying on a particular investment activity, are excluded persons and therefore do not carry on investment business for the purpose of the Act. They are:

- a person who:
 - solicits another person, who is not a member of the public, to provide that other person with a service that constitutes investment business;
 - solicits a licensee to provide a client of the licensee with a service that constitutes investment business;
 - makes an offer to another person, who is not a member of the public, to provide that other person with a service that constitutes investment business;
 - makes an offer to another person to provide a service that constitutes investment business where:
 - the offer is made through a licensee which holds a licence to provide investment advice and that other person is a client of the licensee;
 - the person making the offer does not have a place of business in the BVI; and
 - the service is performed outside the BVI; and
 - provides information or documents to the professional services provider of a company concerning an offer to provide, or the provision of, a service that constitutes investment business where the:
 - person does not have a place of business in the BVI; and
 - service is to be performed outside the BVI;
- subject to the eligibility criteria, each person mentioned below is an excluded person in the circumstances and to the extent specified:
 - a company where it undertakes an activity that constitutes investment business exclusively with, or for, a company within the same group;
 - a person who is a participant in a joint enterprise where the person undertakes an activity that constitutes investment business:
 - with or for another participant in the same joint enterprise; and
 - for the purposes of, or in connection with, the joint enterprise;
 - a person who is a partner in a partnership where the person undertakes an activity that constitutes investment business:
 - with or for another partner in the same partnership; and
 - for the purposes of, or in connection with, the partnership;
 - a director of a company where the director undertakes an activity that constitutes investment business:
 - with, or for, that company or a company in the same group; and
 - for the purposes of, or in connection with, the company;
 - a trustee of a trust where the trustee undertakes an activity that constitutes investment business for the purposes of, or in connection with, the trust, unless the trustee:
 - is the trustee of a unit trust; or
 - acts as the custodian of investments; and
 - a person who undertakes an activity that constitutes investment business in the person's capacity as:
 - an executor or administrator of an estate;
 - a receiver of an estate or of the assets of a company;
 - the administrator or liquidator of a company; or

- a trustee in bankruptcy; and
- a public fund, a private or professional fund or a recognised foreign fund where the fund undertakes an activity that constitutes carrying on business as a mutual fund in, or from within, the BVI.

What is an excluded activity?

The Act specifies activities that are **excluded activities** and therefore do not constitute an investment activity for the purpose of the Act, including:

- **dealing in investments**
 - a person (as principal or agent) accepting, transferring or becoming a party (other than as debtor or surety) to an instrument creating or acknowledging indebtedness relating to any loan, credit, guarantee or other similar finance granted by the person or the person's principal;
 - the issue, redemption or repurchase by a:
 - company of its own shares, debentures or instruments giving an entitlement to its shares or debentures;
 - unit trust of its own fund interests; and
 - partnership of its own partnership interests;
 - a transaction involving any option, future or contract for differences where:
 - none of the parties involved is an individual; and
 - the sole or main purpose of the transaction is to limit a risk arising in a business that does not involve investment business;
 - dealing in investments as an agent if the:
 - dealing is undertaken in the course of carrying on any business or profession which does not otherwise constitute investment business;
 - dealing may reasonably be regarded as a necessary part of other services provided in the course of that business or profession;
 - agent does not receive or is not separately remunerated or rewarded for dealing as agent; and
 - agent does not hold out itself as generally providing the service of dealing as agent;
 - dealing by a company in its own shares or debentures with another company in the same group or a trustee for the benefit of:
 - employees or former employees of the company or another company in the same group; or
 - any spouse, widow, widower or child or stepchild under the age of 18 of any person mentioned above;
 - dealing in investments (as principal) which are to be held by a person as bare trustee for another person on that other person's instructions where:
 - the dealing takes place in the course of a business that does not otherwise constitute investment business;
 - the bare trustee does not receive (whether directly or indirectly) any remuneration (including commission) or reward for the transaction that constitutes dealing in investments (and, for this purpose, any remuneration the person receives separately for acting as bare trustee is disregarded); and
 - the bare trustee does not otherwise provide, or hold out itself as providing, the service of dealing in investments; and
 - a transaction entered into with or through a licensee by a non licensee who is acting as agent for one of its clients if any remuneration or other reward paid to the agent by any person (other than its client) is paid to its client and either:
 - the transaction is entered into on advice given to the client by a licensee; or
 - in all the circumstances it is clear that the client is not seeking (and has not sought) advice from the agent regarding the merits of the transaction;
- **arranging deals in investments**
 - arrangements that do not bring about a transaction;
 - arrangements made by a person for a transaction entered into by that person;

- arrangements made by a company, unit trust or partnership relating to the issue, redemption or repurchase by it of its own shares, debentures, fund interests or partnership interests (as applicable);
- arrangements made to provide a means by which one party to a transaction or potential transaction is able to speak to other parties to that transaction or potential transaction;
- arranging deals in investments where the:
 - arrangements are made in the course of carrying on any business or profession which does not otherwise constitute investment business;
 - arrangements may reasonably be regarded as a necessary part of other services provided in the course of that business or profession;
 - agent does not receive or is not separately remunerated or rewarded for making the arrangements; and
 - agent does not hold out itself as generally providing the service of arranging deals in investments;
- arrangements made by a non-licensee for a transaction to be entered into by one of its clients with or through a licensee if any remuneration or other reward paid to the non licensee by any person for making the arrangements is paid to its client and either:
 - the transaction is entered into on advice given to the client by a licensee; or
 - in all the circumstances it is clear that the client is not seeking (and has not sought) advice from the non licensee regarding the merits of the transaction;
- arrangements made for the sole purpose of providing finance to enable a person to deal in investments;
- arrangements made by a person to introduce another person to a licensee or an excluded person with a view to the provision of independent investment advice or discretionary investment management; and
- arrangements made by a company, a member of the same group or a trustee in connection with an employee share scheme; and
- **providing investment advice**
 - giving investment advice in any:
 - newspaper, journal, magazine or other periodical publication;
 - television or sound broadcast; or
 - electronic information service,
 if the principal purpose of the publication, broadcast or information service, taken as a whole and including any advertisements contained in it, is not to induce any person to deal in a particular investment;
 - giving investment advice in the course of a business that does not constitute investment business where the person does not receive any remuneration for the advice and the advice is not, or does not include:
 - a recommendation to a person to deal in a particular investment or to exercise, or refrain from exercising, rights conferred by a particular investment;
 - advice on the suitability of a particular investment for the person to whom, or in relation to whom, the advice is given; or
 - advice on the characteristics or performance of a particular investment;
 - giving legal or accounting advice with respect to an investment by a person in the course of carrying on business as a legal practitioner or an accountant;
 - giving investment advice by a person as trustee to any:
 - co-trustee for the purposes of the trust; or
 - beneficiary of the trust concerning the beneficiary's interest under the trust,
 if the person does not otherwise carry on, or hold out itself as carrying on, the business of providing investment advice or managing investments; and

- giving investment advice by a director of a company to another director of the company for the purposes of the company, if the director does not otherwise carry on, or hold out him/herself as carrying on, the business of providing investment advice or managing investments.

There are no excluded activities for providing custody services, administering investments or operating an investment exchange. The only excluded activity for managing investments relates to the supply of goods or services.

Foreign financial institutions dealing with BVI companies

Frequently, a foreign financial institution (like a broker or investment adviser), that is appropriately licensed in its home jurisdiction but not under the Act, will enter into a transaction with a BVI company that may potentially constitute carrying on investment business under the Act.

In most cases, the foreign financial institution's activities will not be caught by the Act because the company does not carry on business or (apart from its registered office) have any presence in the BVI and the foreign financial institution:

- does not have any employees, agents or premises located in the BVI;
- performs its activities in connection with the transaction:
 - outside the BVI; and
 - using an entity established outside the BVI; and
- does not solicit the company in the BVI because (for example):
 - the company approached it and asked it to provide services to the company that resulted in the parties entering into the transaction; or
 - the company's directors or shareholders are located in a place outside the BVI and it solicited the directors or shareholders in that place in accordance with the applicable laws in that place.

When the circumstances described above apply, the foreign financial institution will not carry on investment business in the BVI.

What are the consequences of breaching the general prohibition?

Penalties

A person who carries on investment business in breach of the Act is guilty of an offence, and on conviction on indictment, is liable to a penalty of up to US\$40,000 (in the case of an individual) or US\$75,000 (in the case of a body corporate).

Where a body corporate commits an offence, a director of the body corporate who knowingly authorised, permitted or acquiesced in the offence, also commits an offence, and on conviction, is liable to the same penalty as the body corporate.

Contracts unenforceable

Under the Financial Services Commission Act 2001 (as amended), where a person (the **unauthorised party**) enters into a contract in the course of an unauthorised financial services business carried on by the unauthorised party:

- the unauthorised party cannot enforce the contract against the other party to it (the innocent party); and
- the innocent party has the right to recover from the unauthorised party:
 - any money paid or other property transferred to the unauthorised party under the contract; and
 - compensation for any loss suffered by the innocent party as a result of parting with the money or other property in an amount:
 - agreed between the parties; or
 - (on the application of either party) determined by the court.

Where the innocent party:

- elects not to perform the contract; or
- recovers money paid or other property transferred by it to the unauthorised party under the contract,

it must repay any money, or return any other property, to the unauthorised party it received under the contract.

Where any property transferred under the contract has passed to a third party, the value of the property (at the time it was transferred) must be repaid by the unauthorised party or innocent as applicable.

If the court considers it just and equitable in the circumstances, it may allow the unauthorised party to:

- enforce the contract; or
- retain any money paid or other property transferred under the contract.

In exercising its power, the court must consider whether the unauthorised party reasonably believed that the unauthorised party was not unlawfully carrying on unauthorised financial services business by entering into the contract. Since this is an objective test, ignorance of the law is unlikely to amount to a reasonable belief.

Is there any published guidance?

Unfortunately, to date, the Commission has not published any guidance that assists with the interpretation of the Act. There is no indication that the Commission will do so.

Definitions

The following definitions apply in this guide.

Commission means the BVI Financial Services Commission.

deal or **dealing** means, in relation to an investment, to buy, sell, subscribe for or underwrite, the investment.

eligibility criteria means, in relation to an excluded person, that the person does not:

- otherwise carry on, or hold out itself as carrying on, investment business; and
- receive (whether directly or indirectly) any remuneration (including commission) for the activity that would otherwise constitute investment business (and, for this purpose, any remuneration that the person receives separately for acting in the capacity specified in the relevant paragraph is disregarded).

fund interest means the rights or interests (however described) of investors in a mutual fund relating to the property of the mutual fund and excludes a debt issued by the mutual fund.

joint enterprise means:

- an enterprise entered into by two or more persons for a commercial purpose related to a business carried on by those persons that is not an investment business; and
- where one of the persons is a company, partnership or unincorporated association, any other company, partnership or unincorporated association in the same group is regarded as participating in the joint enterprise.

investment activity means an activity relating to an investment that is specified in the Act as being an investment activity.

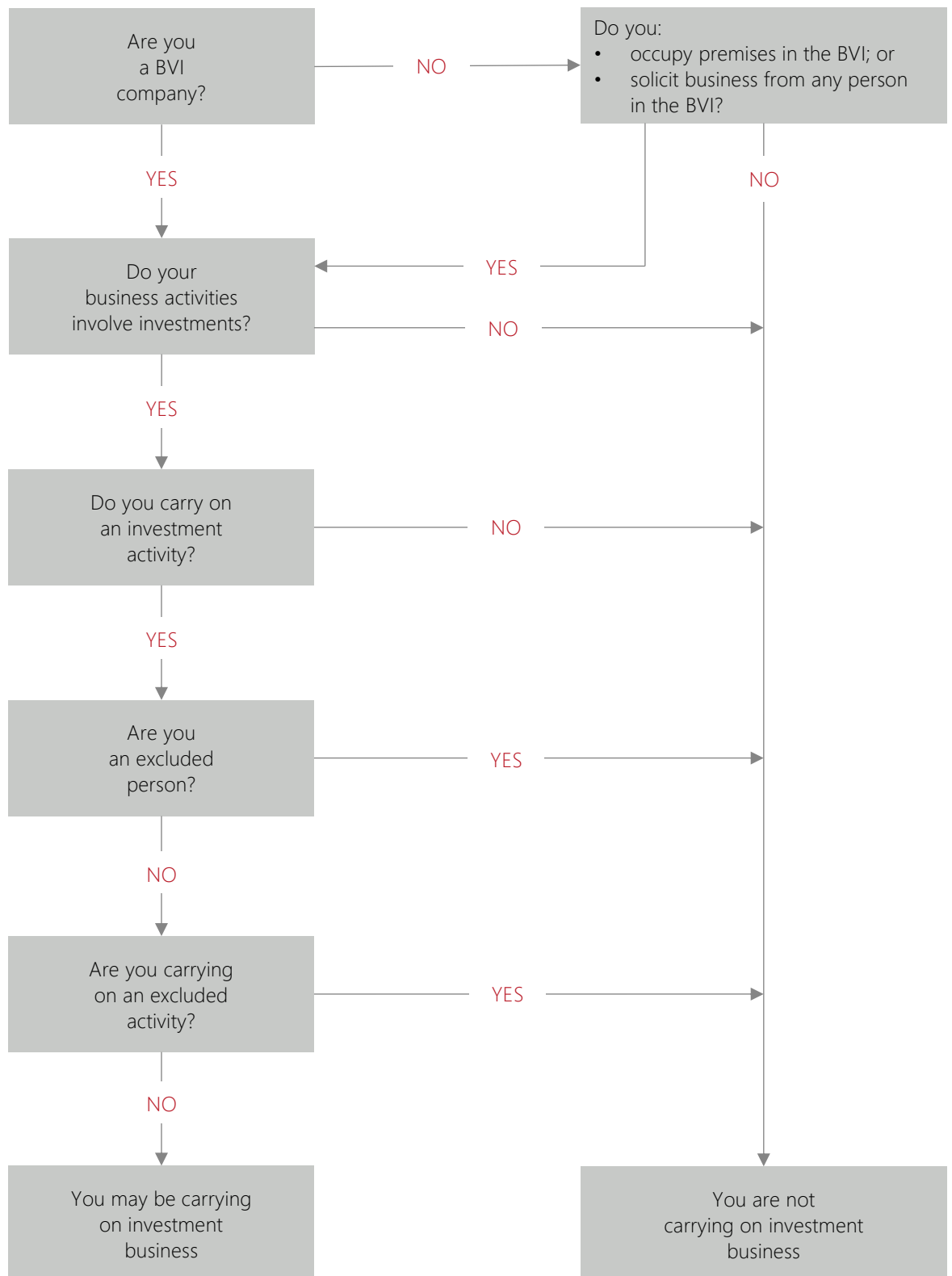
licensee means a person who is licensed under the Act to carry on a particular kind of investment business.

member of the public means, in relation to a person who solicits, any other person except:

- a company in the same group as the person who solicits;
- a person participating in a joint enterprise with the person who solicits;
- a person holding a licence under the Act, the Banks and Trust Companies Act 1990 (as amended) or the Company Management Act 1990 (as amended) or an insurer's licence under the Insurance Act 2008 (as amended); or
- a person licensed under the laws of a foreign jurisdiction to carry on an activity equivalent to an activity for which a licence specified in the preceding paragraph is required if the person is regulated and supervised in carrying on that business.

Investment business decision tree

Definitions used in this guide apply in the decision tree below.



Contacts

A full list of contacts specialising in BVI law can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2023 MOURANT OZANNES ALL RIGHTS RESERVED