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TECH news

## British Virgin Islands Company Law Update for Companies, Limited Partnerships and Investment Managers

This TechNews highlights the development of legislation in the British Virgin Islands ("BVI") in relation to the following:

- Enhanced record keeping requirements for companies and limited partnerships
- Registration of an additional foreign character name for limited partnerships
- Changes to the Securities and Investment Business Act, 2010 (the "SIBA")

### Enhanced Record Keeping Requirements for Companies and Limited Partnerships

On 12 November 2012, the Mutual Legal Assistance (Tax Matters) (Amendment) Act, 2012 (the "MLAT") and the Partnership (Amendment) Act, 2012 (the "PAA") were introduced in the British Virgin Islands ("BVI").

These two Acts addressed the absence of legal obligations requiring BVI companies and BVI limited partnerships to keep records and underlying documentation, mainly accounts, relating to transactions.

The enactment clarifies and ensures continuing compliance with the BVI Business Companies Act,

2004 (the "BC Act") and the Partnership Act, 1996 (the "P Act") in related matters.

### New Record Keeping Requirements

The MLAT requires directors of BVI companies and the PAA requires partners of BVI limited partnerships to keep records and underlying documentation for at least 5 years from completion of a transaction or termination of a business relationship to which the records and underlying documentation relate. Such records and underlying documentation shall be construed to include accounts. There is no obligation to produce or file financial statements with any authorities in the BVI.

Such records and underlying documentation relate to all paperwork associated with the preparation of financial statements, such as bank statements, invoices, contracts, ledgers and transactional documents, etc. They can be kept within or outside the BVI.

Where the records and underlying documentation are not kept at the office of the registered agent, the company or limited partnership must provide its registered agent with a written record of the physical address of the place(s) at which the records and underlying documentation are kept.

Where there is change of place, the company or limited partnership must provide its registered agent with the physical address of the new location within 14 days of such change.

### **Continuing Obligations**

The obligations under the BC Act and the P Act in relation to record keeping requirements continue to apply.

BVI companies and limited partnerships must keep records that

- (i) are sufficient to show and explain their transactions; and
- (ii) enable their financial position to be determined with reasonable accuracy, at any time.

For non-compliance, a company is liable on summary conviction to a fine of US\$10,000 whereas a limited partnership is liable on summary conviction to a fine of US\$5,000.

It has recently been proposed that the penalty for non-compliance be intensified, to a fine not exceeding US\$100,000 or to imprisonment for a term not exceeding 5 years. This proposal will become effective when the Mutual Legal Assistance (Tax Matters) (Amendment) Act, 2013 comes into force.

### **Additional Foreign Character Name for Limited Partnerships**

Under the PAA, a limited partnership may register an additional foreign character name subject to the following provision.

Such name cannot be registered if

- (i) the name is identical or similar to that of an existing limited partnership or an existing company incorporated under the BC Act (not applicable to a limited partnership that is affiliate to another limited partnership in the same group); or
- (ii) the name is, in the opinion of the Registrar, offensive, objectionable or contrary to public policy or public interest or, for technical or other reason, is not practicable to register.

## **Changes to the SIBA**

### **Approved Investment Manager Regime**

On 10 December 2012, a new approved investment manager regime was introduced, with the coming into force of the Securities and Investment Business (Amendment) Act, 2012 (the "SIBA Amendment Act"), the Investment Business (Approved Managers) Regulations, 2012 (the "Regulations") and the Approved Investment Managers Guidelines.

The new regime, which practitioners dubbed as a 'regulation light' regime, is a cost effective one as it simplifies the licensing process with fewer ongoing obligations and facilitates early commencement of business.

Subject to the new regime, persons who qualify as approved investment managers will not be required to obtain a licence as formerly under the SIBA or be subject to the BVI Regulatory Code, 2009. Instead, they may apply to be approved investment managers pursuant to the Regulations.

### **Key Features of the New Regime**

The following are key features of the new regime:

- For eligible investment managers, the new regime offers an alternative to licensing requirements under Part I of the SIBA.
- The eligible investment manager must be a BVI company or a BVI limited partnership.
- The approved investment manager may commence business 7 days after filing the application with the Financial Services Commission (the "Commission"), pending formal approval.
- The approved investment manager is subject to a limit on the size of funds which it manages or advises. The aggregate assets under management of open ended funds cannot exceed US\$400 million and the capital commitments of closed ended funds cannot exceed US\$1 billion.
- Where the abovementioned limits are exceeded, the approved investment manager must inform the Commission immediately pursuant to the Regulations. Within 3 months of the limits being reached, the approved investment manager must either have submitted an application for a licence under Part I of the SIBA or the funds which it manages or advises must have decreased below the limits, otherwise it must immediately cease business upon expiry of the 3 months' period as specified under the Regulations.

## Application as Investment Manager

Under the Regulations, an application as approved investment manager must be submitted in the prescribed form together with the requisite documentation to the Commission at least 7 days prior to the intended date for the commencement of business. The applicant may commence and carry on the business for a period up to 30 days from the date of application. The Commission may extend the said specified period for an additional period of up to 30 days. During the specified or extended period, the applicant will be deemed to have been approved as an investment manager.

Where the approval is eventually not granted, the applicant must cease carrying on the business upon expiry of the specified or extended period.

The application fee is US\$1,000.

## Ongoing Obligations

An approved investment manager must

- (i) have an authorized representative and at least 2 directors at all times, one of whom to be an individual;
- (ii) notify the Commission of any change to the information provided in its application to the Commission within 14 days of such change;
- (iii) notify the Commission of any matter related to it or its conduct that may have material impact or significant regulatory impact on it or its relevant business;
- (iv) submit to the Commission an annual return by 31 January each year and unaudited financial statements within 6 months of the end of the financial year; and
- (v) pay an annual renewal fee of US\$1,500.

## Change to "significant interest" Provision governing a Licensee under the SIBA

Section 11 of the SIBA requires the prior written approval of the Commission before the disposal or acquisition of a significant interest in a licensee. Section 11(1) has now been amended to include the words "whether directly or indirectly" as follows:

"A person owning or holding a significant interest in a licensee shall not **whether directly or indirectly** sell, transfer, charge or otherwise dispose of his interest in the licensee, or any part of his interest, unless the written approval of the Commission has been obtained."

This insertion clarifies the Commission's position that for any significant change in ownership of a licensee, even if made indirectly via a change of ownership of a parent company of the licensee, prior approval must first be obtained.

In addition, a new subsection (3A) as stated below has been inserted under Section 11 deeming a licensee to have caused, permitted or acquiesced to a change of significant interest.

"Where a sale, transfer, charge or other disposition referred to in subsection (1) takes place, the licensee shall, for the purpose of subsection (3), be deemed to have caused, permitted or acquiesced in the sale, transfer, charge or other disposition referred to in subsection (1)."

With regard to all of the above, a licensee under the SIBA should ensure that its shareholders are aware of the amendments, in particular in the case of a licensee who is part of a larger structure, as changes in ownership at the higher level of the structure may trigger a breach by the licensee and the licensee may have limited control of such changes.

For more information, please approach your usual Tricor contact or any one of the executives named below.

| EXECUTIVES OF THE BVI SERVICES TEAM IN HONG KONG                                |   |
|---|---|
| <b>Stella Fu</b><br>Tel: (852) 2980 1669<br>stella.fu@hk.tricorglobal.com       | <b>Tsuann Kong</b><br>Tel: (852) 2980 1843<br>tsuann.kong@hk.tricorglobal.com         |
| SENIOR MANAGEMENT TEAM RESIDENT IN THE BVI                                      |   |
| <b>Clair Burke</b><br>Tel: (1 284) 494 6947<br>clair.burke@bvi.tricorglobal.com | <b>Gareth Watkins</b><br>Tel: (1 284) 494 2775<br>gareth.watkins@bvi.tricorglobal.com |

## BARBADOS

Tricor Caribbean Limited  
Caribbean Corporate Services Limited  
info@bb.tricorglobal.com  
www.bb.tricorglobal.com

## BRITISH VIRGIN ISLANDS

Tricor Services (BVI) Limited  
info@bvi.tricorglobal.com  
www.bvi.tricorglobal.com

## BRUNEI

Tricor (B) Sdn Bhd  
info@bn.tricorglobal.com  
www.bn.tricorglobal.com

## DUBAI UAE

Tricor Praesidium Limited  
info@ae.tricorglobal.com  
www.ae.tricorglobal.com

## HONG KONG

Tricor Services Limited  
info@hk.tricorglobal.com  
www.hk.tricorglobal.com

## INDIA

SKP Tricor Corporate Services Pvt Ltd  
skpt.info@skptricor.com  
www.in.tricorglobal.com

## INDONESIA

PT Amalgamated Tricor  
info@id.tricorglobal.com  
www.id.tricorglobal.com

## JAPAN

Tricor K.K.  
info@jp.tricorglobal.com  
www.jp.tricorglobal.com

## LABUAN

Tricor Trustco (Labuan) Limited  
info@my.tricorglobal.com  
www.my.tricorglobal.com

## MACAU

Tricor Services (Macau) Limited  
tricor@macau.ctm.net  
www.cn.tricorglobal.com

## MAINLAND CHINA

Tricor Consultancy (Beijing) Limited  
Tricor Consultancy (Beijing) Limited –  
Shanghai Branch  
Tricor Consultancy (Beijing) Limited –  
Shenzhen Branch  
info@cn.tricorglobal.com  
www.cn.tricorglobal.com

## MALAYSIA

Tricor Services (Malaysia) Sdn Bhd  
info@my.tricorglobal.com  
www.my.tricorglobal.com

## SINGAPORE

Tricor Singapore Pte Ltd  
info@sg.tricorglobal.com  
www.sg.tricorglobal.com

## THAILAND

Tricor Outsourcing (Thailand) Limited  
Tricor Executive Recruitment Limited  
info@th.tricorglobal.com  
www.th.tricorglobal.com

## UNITED KINGDOM

Tricor Services Europe LLP  
info@uk.tricorglobal.com  
www.uk.tricorglobal.com



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### TRICOR SERVICES LIMITED

#### GROUP CHIEF EXECUTIVE & GROUP MANAGING DIRECTOR

**Johnny Ng**  
Tel: (852) 2980 1100  
johnny.ng@hk.tricorglobal.com

#### GROUP MANAGING DIRECTOR

**Julian Chow**  
Tel: (852) 2980 1238  
julian.chow@hk.tricorglobal.com

### CHINA AND HONG KONG

#### CHIEF EXECUTIVE OFFICER, PRACTICE LEADER, CORPORATE SERVICES & CHINA CONSULTANCY SERVICES

**Natalia Seng**  
Tel: (852) 2980 1688  
natalia.seng@hk.tricorglobal.com

#### PRACTICE LEADER, CORPORATE SERVICES

**Betty Yeung**  
Tel: (852) 2980 1882  
betty.yeung@hk.tricorglobal.com

#### DEPUTY CHIEF EXECUTIVE OFFICER, PRACTICE LEADER, BUSINESS SERVICES & CHINA CONSULTANCY SERVICES

**Shirley Tsang**  
Tel: (852) 2980 1298  
shirley.tsang@hk.tricorglobal.com

#### PRACTICE LEADER, INVESTOR SERVICES

**Allan Tong**  
Tel: (852) 2980 1818  
allan.tong@hk.tricorglobal.com

Please visit our website at [www.tricorglobal.com](http://www.tricorglobal.com)  
or email: [info@hk.tricorglobal.com](mailto:info@hk.tricorglobal.com)

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