British Virgin Islands Insurance Companies

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Preface

This publication has been prepared for the assistance of those who are considering the formation of insurance companies in the British Virgin Islands. It deals in broad terms with the requirements of British Virgin Islands law for the establishment and operation of such companies. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients seek legal advice in the British Virgin Islands on their specific proposals before taking steps to implement them.

Before proceeding with the incorporation of an insurance company in the British Virgin Islands, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

Copies of the Insurance Act together with the related regulations are available from the firm on request.

References to “$” mean the United States Dollar which is the currency of the British Virgin Islands.

Conyers Dill & Pearman

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1. INTRODUCTION

The British Virgin Islands (the "**BVI**") is a British Overseas Territory. The BVI is widely regarded as one of the world's premier offshore jurisdictions and ranks equally to the Cayman Islands, Barbados and the Bahamas on A.M. Best's Country Risk Tier Assignment. The legal system is based upon English common law supplemented by modern, flexible legislation. Worldwide communications are excellent and a wide range of services are provided by lawyers, insurance managers, accountants, trust companies and international banks. The time zone is that of the Eastern United States, the currency is the United States Dollar and regular air transportation is via Puerto Rico, St. Thomas or Antigua.

2. REGULATORY FRAMEWORK

2.1. Insurance Legislation

The BVI Insurance Act 2008 (as amended) (the "**Insurance Act**") and the attendant Insurance Regulations (the "**Regulations**") applies to any person carrying on insurance business in or from within the BVI. "**Insurance business**" is defined in Section 3(1) of the Insurance Act as "the business of undertaking liability under a contract of insurance to indemnify or compensate a person in respect of loss or damage, including the liability to pay damages or compensation contingent upon the happening of a specified event, and includes life insurance business and reinsurance business". No person shall carry on insurance business in or from within the BVI unless they hold the requisite licence under the Insurance Act. Section 4 defines certain circumstances in which insurers are deemed to be carrying on insurance business in or from within the BVI. Insurance managers, agents, adjusters and brokers are also required to obtain a license under the Insurance Act.

The Insurance Act distinguishes between life and health business and property and casualty business. Life and health business consists of life, annuity or accident and disability and health contracts. Anything else falls under the property and casualty business heading. A further distinction is made between domestic and non-domestic insurance business. Domestic business includes every contract insuring a person domiciled or resident in the BVI at the date thereof, or the subject matter of which is property of any kind within the BVI or in transit to or from the BVI, and also includes insurance against risks of any kind in relation to a person resident outside of the BVI in relation to such person or any immovable property or personal property situated or held outside of the BVI, provided the BVI insurer carrying on such business holds a category A licence.

2.2. Categories of Insurance Licence

A category A licence, which may be issued only to a BVI business company, entitles the holder to carry on insurance business in the BVI, including domestic business. A category B licence is for companies incorporated outside the BVI establishing a branch operation in the BVI and entitles the holder to carry on insurance business in the BVI, including domestic business. A category C licence, which may be issued only to a BVI business company, entitles the holder to carry on insurance business that is not domestic business, including, if the licence permits, reinsurance business that is not open market business[1]. A category D licence, which may be issued only to a BVI business company, entitles the

[1] Open market reinsurance business is reinsurance business where the insurer is not connected with the reinsurer.

holder to carry on reinsurance business, including open market reinsurance business. A category E licence, which may be issued only to a BVI business company, entitles the holder to underwrite related party business only (where related party business refers to a business deal or arrangement between two or more persons who have a common or special interest in the business). Lastly, a category F licence, which may be issued only to a BVI business company, entitles the holder to underwrite related party business with a maximum unrelated party business underwritten in order to qualify as an insurer for such purpose as may be allowable under the laws of a foreign jurisdiction.

The Financial Services Commission (the "**Commission**") may issue an insurer's licence to an applicant to carry on both life and health business and property and casualty business if the Commission is satisfied that the applicant may be so licensed, having regard to the applicant's resources and business plan.

2.3. The Regulator

The Commission was formed pursuant to the Financial Services Commission Act (the "**Commission Act**"), which established the separation of financial services from the BVI Government. The Commission is responsible for all regulation of BVI insurance companies. All Commission policies are overseen by a Board of Commissioners appointed by the Executive Council (which is the Cabinet of Government Ministers).

Operational responsibilities for the Commission are the responsibility of the Managing Director and the management team. The management team is comprised of the Managing Director, a Deputy Director and the various Division Heads. The management is appointed by the Commission's Board of Directors, which delegates the powers and responsibilities to perform day-to-day management of the Commission. The Insurance Division is responsible for the regulation, supervision and inspection of all insurance companies, insurance managers and other intermediaries operating within the BVI to ensure compliance with the provisions of the Insurance Act and Regulations and the head of this Division is referred to as the Director of Insurance Business.

The Commission Act also established the Licensing and Supervisory Committee responsible for, among other things, reviewing and determining applications for licenses. The Licensing and Supervisory Committee generally meets weekly and will approve insurance applications presented to it by the Director of Insurance Business.

In 2009 a Regulatory Code (the "**Code**") was enacted which governs, among other things, many aspects of insurance business in the BVI. Much of the detailed particulars relating to the administration and regulation of insurance formerly found in the Insurance Act and Regulations have now been set out in the Code.

3. INCORPORATION AND REGISTRATION OF INSURANCE COMPANIES

An insurance company may be incorporated as a BVI business company under the BVI Business Companies Act, 2004, as amended (the "**BC Act**") and will be subject to BVI law. Incorporation is achieved by filing copies of the Memorandum and Articles of Association of the proposed insurance company with the Registrar of Corporate Affairs. Following incorporation, the company is formally organised, with the allotment of shares and appointment of directors. (For details on incorporating a business company, please request a copy of our publication, “BVI Business Companies” and our Insurance Company Incorporation Package).

A minimum of one shareholder is required. For insurance companies, a minimum of two directors who must be individuals (and not corporations) are required. There is no BVI residency requirement for directors. The Commission will carry out its own due diligence on the proposed shareholders, directors and officers of the insurance company prior to its incorporation.

For a licensed insurer holding a category C, D, E or F licence, the company must have a locally based registered agent and a local registered office, which is typically provided by the registered agent. Insurance companies holding a category C, D, E or F licence are also required to have a resident insurance manager. The registered agent is required to perform a pre-incorporation due diligence review of the promoters of the company.

An application for registration as an insurer must be made to the Commission in the prescribed form (please refer to the Insurance Application Form and the Insurance Application Form Supplemental Package, available upon request), accompanied by the prescribed fee, draft copies of the constitutional documents of the company, a business plan with pro-forma statements containing five years of financial projections (a preliminary draft of the business plan may be submitted to the Commission for comments prior to making the formal application), notice of the address of the principal office of the insurer in the BVI and names and addresses of its manager resident in the BVI, its insurance agents and its directors as well as any information the Commission may reasonably require. The Commission is required to have regard to whether the applicant is a fit and proper person to be granted a license, either possessing or having available to it the knowledge and expertise necessary to carry on insurance business in a competent manner.

Approval by the Commission generally takes about four weeks from the time the Commission receives a complete application. The approval is subject to providing the Commission with a copy of the Certificate of Incorporation, certified copies of the Memorandum and Articles of Association, bank confirmation that the capital has been paid, evidence of satisfaction of any other requirements which the Commission has stipulated and the appropriate license fee. Once the Commission has received these materials, the license is issued and the company may commence business.

Once granted, the license remains in force upon payment of the annual license fees until cancelled by the Commission on any of the grounds specified in the Commission Act. In the event of cancellation, the Commission is required to give an insurer (i) reasonable notice in writing and (ii) an opportunity to make representations to it. An appeal against the cancellation may be made to the Financial Services Commission Appeal Board established under the Commission Act.

4. MINIMUM CAPITAL REQUIREMENTS

A BVI insurer is required to ensure that its contributed capital is maintained in an amount not less than the greater of (i) the minimum applicable to it as specified in the Regulatory Code; or (ii) such amount as the Commission may direct. The minimum fully paid up share capital of an insurance company or the contributed reserve fund of a mutual insurance company is:

(a) $200,000 where the insurer proposes to carry on life and health business;

(b) $100,000 where the insurer proposes to carry on property and casualty business; or

(c) $300,000 where the insurer proposes to carry on both life and health business and property and casualty business.

The capital or contributed reserve fund may be in US Dollars or the equivalent in a foreign currency and may take the form of cash or an irrevocable letter of credit issued by a financial institution approved by the Commission.

5. MARGIN OF SOLVENCY

A BVI insurer is required to (a) ensure at all times that it maintains its capital resources at a level that is adequate to support its insurance business, taking into account the nature, size, complexity, structure and diversity of that business and its risk profile and (b) maintain adequate systems and controls to monitor and assess its capital adequacy requirements on an ongoing basis.

An insurer is required to maintain a minimum margin of solvency. This is the amount by which the total value of an insurer's assets must exceed the total amount of its liabilities (as set out in the Regulations).

A BVI insurer shall ensure that, at all times, it maintains a minimum solvency margin as follows:

in the case of a property and casualty insurer, a sliding scale applies as follows:

(a) if the insurer's annual net written premium is less than $500,000, the prescribed minimum solvency margin is $100,000;

  (i) if the insurer's annual net written premium is greater than $500,000, but less than $5,000,000, the prescribed minimum solvency margin is 20% of the annual net written premium;

  (ii) if the insurer's annual net written premium is greater than $5,000,000, the prescribed minimum solvency margin is $1,000,000 plus 10% of the difference between the annual net written premium and $5,000,000;

(b) in the case of a life and health insurer, the prescribed minimum solvency margin is $250,000; and

(c) in the case of an insurer with both property and casualty business and life and health business, the prescribed minimum solvency margin is $250,000 plus the amount required for the property and casualty business based on the insurer's annual net written premium from such business.

Allowable assets for the purposes of calculating the margin of solvency are prescribed in the Regulations as follows:

(a) cash in hand or cash on deposit with a recognised financial institution;

(b) an irrevocable letter of credit:

(i) not exceeding $1,000,000 issued by a recognised financial institution; or

(ii) exceeding $1,000,000 if approved by the Commission;

(c) a debt security issued or guaranteed by the government of a recognised country or of a country approved by the Commission;

(d) debt securities traded on a recognised exchange and issued or guaranteed by:

(i) a government other than a recognised government;

(ii) a municipal corporation under the authority of a recognised government; or

(iii) a corporation other than one specified in subparagraph (ii), that, in each case, is rated by a recognised credit rating agency as having:

- a current high grade rating, subject to the value of such debt securities and all other assets and securities issued by the counterparty not exceeding 20% of the sum of the insurer's total liabilities and the minimum margin of solvency for the corporation or government; or

- a current medium grade rating, subject to the value of such debt securities and all other assets and securities issued by the counterparty not exceeding 15% of the sum of the insurer's total liabilities and the minimum margin of solvency for the corporation or government;

(e) investments in an index that is traded on a recognised exchange, subject to the value of an investment in any single index not exceeding 30% of the sum of the insurer's total liabilities and minimum margin of solvency;

(f) mutual funds traded on a recognised exchange, subject to the value of an investment in any single mutual fund not exceeding 30% of the sum of the insurer's total liabilities and minimum margin of solvency, provided that the value of the assets contained in the mutual fund shall be based on the assets considered allowable under the Regulations;

(g) equity securities quoted on a recognised exchange, subject to the value of such securities and all other assets and securities issued by the counterparty not exceeding 15% of the sum of the insurer's total liabilities and minimum margin of solvency;

(h) premiums receivable not more than six months overdue;

(i) net reinsurance balances receivable not more than six months overdue;

(j) accounts receivable net of provision for bad and doubtful debts and not more than six months overdue;

(k) 75% of the value of secured factored loans with any of the insurer's affiliates, subject to such allowable value not exceeding 75% of the sum of the insurer's total liabilities and minimum margin of solvency;

(l) 20% of the value of secured advances to and investments in the insurer's affiliates (other than secured factored loans), subject to such allowable value of the advance or investment and all secured factored loans not exceeding 75% of the sum of the insurer's total liabilities and minimum margin of solvency; and

(m) where the Commission, in the case of a particular BVI insurer, approves, and to the extent of the approval:

  (i) an investment in, or an advance to, an affiliate of the insurer, that does not fall within paragraph (k) or (1) above;

  (ii) an investment in a non-traded mutual fund.

A charge or mortgage over immovable property is not an allowable asset.

For the protection of BVI policyholders, a foreign insurer is required to establish a trust in support of payment of any claims by BVI policyholders. However, a foreign insurer may opt to pay a deposit to the Commission in lieu of forming a trust. All BVI insurers carrying on domestic business and foreign insurers carrying on domestic business that do not establish a trust are required to pay to the Commission a deposit: (a) in the amount of $25,000 or (b) in an amount that is equal to the total of its domestic liabilities, whichever is the higher. A BVI insurer or foreign insurer who contravenes this requirement commits an offence and is liable on summary conviction to a fine not exceeding $40,000.

The Act provides that where a BVI insurer carrying on domestic business is not rated A++, A+ , A or A- by AM Best or other rating agency or institution it shall include a cut through reinsurance clause in any reinsurance contract that it enters into. The clause should provide that in the event of a valid claim arising under the reinsurance contract, the reinsurer will, in lieu of payment to the reinsured, pay directly to the insured under the original insurance effected by the original insured that portion of any loss for which the reinsurer would otherwise be liable to pay to the reinsured. Further, payment is required to be made under the reinsurance contract notwithstanding (i) any bankruptcy, insolvency, liquidation or dissolution of the reinsured; or (ii) where the reinsured has made no payment under the insurance policies.

6. LIFE AND HEALTH INSURERS

In addition to the minimum capital and solvency requirements referred to above, life and health insurers are required to appoint and at all times have an actuary approved by the Commission, having regard to the qualifications stipulated in the Code, and to prepare and file a certified actuarial valuation of their assets and liabilities annually and at other intervals which may be determined by the Commission.

An insurer carrying on life and health business is required to keep separate and distinct accounts in respect of its life and health business and to maintain a segregated fund consisting of money or securities in which trustees may invest trust money which is available only to meet the liabilities arising under contracts of life and health business in respect of which the segregated fund is maintained. Withdrawal of money from such funds is subject to statutory restrictions.

Under the Insurance Act, a life and health insurer shall not declare any dividend, redeem any debenture or preference share or purchase, redeem or cancel any of its own shares unless a certificate from the insurer's approved actuary is filed with the Commission stating that the insurer's margin of solvency prescribed by the Regulations is sound and will not thereby be breached and that the assets in the insurer's segregated funds continue to be sufficient at all times to meet its life and health liabilities.

Transfers of the whole or any part of the life and health business of an insurer require the consent of the High Court.

7. SEGREGATED PORTFOLIO COMPANIES

Segregated portfolio companies ("**SPC**") formed under the BC Act are permitted under the Insurance Act and are often the preferred vehicles for insurance companies. The SPC structure permits a company to segregate an asset or pool of assets from the rest of its assets without incurring the expense and complications of incorporating a separate company. An SPC may create and issue shares in one or more classes, the proceeds of the issue of which are included in the segregated portfolio assets of the relevant segregated portfolio. The directors of an SPC are required to segregate portfolio assets from assets of other segregated portfolios or general assets. Segregated portfolio assets are only available to meet liabilities to creditors of the SPC in respect of the relevant segregated portfolio who are entitled to have recourse to the segregated portfolio assets and are protected from creditors of the SPC who are not creditors in respect of that segregated portfolio. A procedure is available to terminate segregated portfolios which no longer have any assets and liabilities, as well as a procedure to reinstate such portfolios. The BC Act also provides a procedure which allows directors to correct any failure to properly attribute a contract to a particular portfolio.

An application to the Commission for registration as an SPC must be accompanied by an adequate business plan for the proposed SPC and for each proposed segregated portfolio of that company. An SPC is required to include in its name the letters "SPC" or the words "Segregated Portfolio Company".

8. BOOKS AND RECORDS

Every insurance company must maintain permanently at its office in the BVI such books and records as will (i) show adequately the type and classes of insurance business carried on by the insurance company and (ii) as will enable the Commission at any time to conduct a proper examination of the insurance company's affairs and to ascertain with reasonable accuracy its financial position. The Insurance Act provides that the Commission shall have at all reasonable times access to all the books, securities, records and documents of any insurer which relate to its insurance business. At a minimum, the following must be kept at the company's BVI office:

(a) financial statements;

(b) a record of premium income and claims paid including reinsurance;

(c) a register of the insurance company's directors and officers showing their names and addresses;

(d) minutes of all proceedings of the insurance company's general meetings, meetings of its directors and of its Committees;

(e) general and subsidiary ledgers and general journals;

(f) a record of the insurance company’s reinsurance programs or treaties showing underwriting limits by each class of insurance and amounts retained by the insurance company;

(g) an up-to-date list of all the insurance company’s agents; and

(h) any other registers or records as may be directed or authorised by the Commission.

If original records are maintained outside the BVI, up to date copies must be kept in the jurisdiction.

9. INSURANCE FILINGS

9.1. Annual Filings

Every licensed insurer is required to prepare accounts for each financial year in accordance with accounting principles acceptable to the Commission. The accounts must be audited by the insurer's auditor, who must be approved by the Commission. Insurers are also required to prepare annually and deliver to the Commission within three months of the end of each financial year, or at such later date as may be permitted by the Commission upon written application by the insurer, a statement of the conditions of the insurer's affairs as at the end of the preceding financial year, in the approved form and accompanied by an auditor's statement. Any companies licensed to carry on life and health business must also have its actuary prepare and file a certified actuarial valuation of the insurer’s assets and liabilities annually and at other intervals which may be determined by the Commission.

9.2. Exemptions

The Commission has the ability to grant exemptions from the application of any of the provisions of the Insurance Act or the Regulations where:

(a) the Commission is satisfied that the regulation and supervision of the affairs of such insurer is conducted by a competent authority in a country or jurisdiction outside the BVI which the Commission adopts and considers adequate;

(b) the business of such insurer is restricted exclusively to insuring risks of its parent company or affiliated companies; or

(c) the Commission is satisfied that it is in the public interest to do so.

Exemptions may include, for instance, permitting assets to be treated as allowable assets for the purposes of calculating the margin of solvency.

9.3. Records Open to Public Inspection

Pursuant to Section 78 of the Insurance Act, the Commission is required to keep registers of insurance licenses, certificates of authority issued to insurance managers, agents, brokers and adjusters and a register of names and addresses of all directors of every licensed insurer. These registers are open to inspection by the public. In addition, the Commission is required to publish a list of licensed insurance and authorised insurance managers, agents, brokers and adjusters during March in each year. Applications for licenses and financial statements, however, are not available to the public.

10. TAXATION AND GOVERNMENT FEES

10.1. Taxation

Business companies which are incorporated as insurance companies and shareholders thereof who are not ordinarily resident in the BVI are exempt from BVI income, corporation or profits tax, withholding tax, capital gains tax, capital transfer tax, estate duty or inheritance tax.

10.2. Government Fees

Any insurance company which is a BVI business company is required to pay an annual government fee based on the number of shares it is authorised to issue. For a current listing of government fees please contact Conyers Dill & Pearman.

In addition to the annual government fee, an insurance company is required to pay an additional fee for an application to carry on insurance business in or from within the BVI and a fee for the issue and the annual renewal of an insurer's license. The annual license fee is due January 1 in each year and is not pro-rated over the year.