

SECTION 1

THE REGULATORY STRUCTURE FOR INVESTMENT BUSINESSES - INVESTMENT BUSINESS ACTS 1991 TO 1993

The [Investment Business Act 1991](#), as amended by the Investment Business (Amendment) Act 1993 ("the IBA") is the statutory basis for regulating investment business (see [Appendix A](#)).

1.1 THE GENERAL STRATEGY FOR LICENSING AND REGULATING INVESTMENT BUSINESSES

The Commission's main objectives in regulating investment businesses are to encourage sound and prudently managed business and to deter fraud. The aim of the Commission is to license and regulate only those businesses or activities which it can effectively supervise.

The General Licensing Policy for those seeking a Banking, Investment Business or Fiduciary Services Licence (see [Appendix J1](#)) sets out the general criteria the Commission will normally apply in assessing the fitness and propriety of licence applicants and of individuals with key roles and/or significant influence in respect of those businesses. The specific requirements and considerations applicable to investment business are summarised in the tables in Appendix A to E in the licensing policy. (See also [Section 2](#) below).

The licensing policy applies to applicants for investment business licences, which are required to meet the "fit and proper" criteria, and, on an on-going basis, to licenceholders which must continue to be "fit and proper". (See also [Section 3](#) below).

1.2 LEGISLATIVE FRAMEWORK

[Section 1 \(2\)](#) of the IBA states that "the Treasury may by Order prescribe activities which shall constitute investment business ...". Thus, the definition of "investment business" is contained in the [Investment Business Order 2004](#) (this replaced the Investment Business Order 1991 with effect from 01 December 2004) ("the Order") (see [Appendix B](#)). The IBA then goes on to state in [section 2](#) that: -

"... any person who carries on, or holds himself out as carrying on, in or from the Island, investment business -

- a. in respect of which no investment business licence is in force; or
- b. if such a licence is in force, other than in accordance with the conditions, if any, of the licence, shall be guilty of an offence."

Several points should be noted here.

Firstly, in order to be licensable, investment activity must be carried on by way of business. Thus, private transactions e.g. engaging in investment activities as a director of a private company would be unlikely to fall within the scope of the IBA.

Secondly, investment activity is licensable if it is carried on in or from the Island. This is clarified further in [section 2\(2\)](#) of the IBA. It is important to note that any Manx incorporated company, foreign company registered on the overseas company register, or limited partnership registered here which carries on investment business requires a licence, even if it is conducting its activities abroad. In practice, the Commission is unlikely to grant a licence to an organisation unless it is managed and controlled in the Island, as to do so could potentially leave the Island vulnerable to unscrupulous operators with no accountability in the Isle of Man. (See [Section 2](#) of this publication for further information).

Thirdly, an offence is committed not only if a person conducts investment business without a licence, but also if he conducts activity with a licence but in contravention of any conditions of that licence. The conditions which are attached (under [section 3\(4\)](#) of the IBA) to investment business licences concentrate, in most circumstances, upon the scope of activity which a licenceholder is permitted to conduct. Thus, if he conducts investment activity outside the scope of his conditions, he commits a criminal offence. Also, under [section 14](#) of the IBA a breach of a licence condition lays the licenceholder open to actions for damages at the suit of any private investor who suffers loss.

When an investment business licence is issued, a series of [Regulatory Codes](#) ("the Codes") apply to that licenceholder (see [Appendix C](#)). Information about these Codes is contained in Section 3 of this publication. Should a licenceholder breach any of the Codes, the Commission is empowered to take enforcement action (described in [section 22\(2\)](#) of the IBA).

This is the basic legislative framework for investment businesses licensed by the Commission. There are provisions within the legislation for certain persons to be exempted from requiring an investment business licence even though they are conducting investment business in the Island and this whole area is described in [Section 1.10](#) of this publication.

1.3 DEFINITION - GENERAL INTERPRETATION

The definitions of "investments" and "activities constituting investment business" which together with a number of specified exclusions define the scope of regulation are contained in the Order, a copy of which is contained in [Appendix B](#).

When considering the definition of investment business, attention should be paid to the interpretation provisions in [Schedule 3](#) of the Order as these refine, and in some circumstances widen, the scope of the words and expressions used in Schedules [1](#) and [2](#) of the Order. Examples are as follows: -

- a. Paragraph 1, Schedule 1, under the heading "Dealing in Investments", sets out the relevant activity constituting investment business as "Dealing in investments ... as principal ... or ... as agent".
- b.) Paragraph 1 (e), Schedule 3, defines "dealing" as "buying, selling, subscribing for or underwriting ...".
- c. Paragraph 1 (h), Schedule 3, gives "disposal" an extended meaning.
- d. Paragraph 1 (s), Schedule 3, defines (t) refers to "buying and selling" as including "any acquisition or disposal for valuable consideration".
- e. Paragraph 1 (t), [Schedule 3](#), defines (u) refers to "dealing" as including "offering or agreeing to deal ...".

The definitions in [Schedule 3](#) must therefore be kept in mind when reading the Order as a whole.

It is also important to note how "Investments" are defined in [Schedule 2](#) of the Order. For instance, life assurance and pension products are defined as investments, and so those selling such products are subject to licensing and regulation. It should be noted, however, that neither cash nor land is classed as an investment. Thus, advising clients on bank accounts, etc is not licensable under the IBA (although certain types of activity involving cash and deposits might be regarded as banking activity).

1.4 DEFINITION - DEALING IN INVESTMENTS

The definition of "dealing in investments" reads as follows :-

"Dealing in investments either:-

- i. by a professional dealer as principal; or
- ii. as an agent".

A "professional dealer" is defined either as a market-maker or a person who regularly solicits members of the public to deal in investments. Thus, the activities of private investment companies are unlikely to be caught by this definition.

The definition of "agent" includes dealing under a power of attorney as powers of attorney may be used in place of discretionary investment management agreements. . It also includes acting as a nominee. However, the Commission has exempted from a licensing requirement those nominee companies which are subsidiaries of holders of Isle of Man banking or investment business licences on the grounds that the licence (and the Regulations and Codes applying to the licence) will be extended to the activity of such nominee companies (see [Appendix E2](#)). Also excluded from the scope of the IBA are those nominees whose sole function is to hold shares in private companies for the benefit of those who control such companies. Nominee companies which hold only assets not covered by [Schedule 2](#) of the Order (definition of "investments") do not, of course, require a licence at all. See Sections [1.9](#) and [1.10](#) of this publication for further information.

1.5 DEFINITION - ARRANGING DEALS IN INVESTMENTS

The definition of "arranging deals in investments" reads as follows:

1. Making arrangements with a view to another person dealing in investments.
2. This paragraph does not apply to a person by reason of his making arrangements with a view to a transaction to which he himself will be a party, except in the case of a professional dealer or attorney."

The Commission regards any activity which directly brings about, or would bring about, an investment transaction as "arranging deals" for the purposes of the order. The Commission believes that any activity which contributes directly to the execution of an investment transaction should be regarded as arranging deals.

An obvious example of arranging deals would be giving instructions to stockbrokers on behalf of a client (although merely making introductions to a stockbroker may not be licensable - see [Section 1.9](#) of this publication). Where a "professional dealer" (i.e. one who regularly solicits members of the public to deal in investments) interposes himself between the investor and the market, whether he takes a position or not, he will be regarded as "arranging deals". The Commission considers that "members of the public" may include, amongst others, existing clients of the person arranging the deal and other licensed institutions.

1.6 DEFINITION - MANAGING INVESTMENTS

The definition of "managing investments" reads as follows:

1. Managing investments belonging to another person.
2. Managing investments includes:-
 - a. an attorney managing investments under a power of attorney;
 - b. the provision of safe custody services for investments.
3. This paragraph does not include the provision of safe custody services for bearer investments where:-
 - a. the service provided is limited to safekeeping; or
 - b. safe custody is provided only in connection with a transport or delivery service."

The activity of managing investments may be regarded as having three main elements: advising or deciding, transacting (but not as a principal), and servicing (dealing with such things as dividends, rights issues, etc).

Safekeeping services (e.g. providing a facility limited to receipt of, storage and return of investments) and where there is no other element to the service such as advising or deciding, transacting, or servicing is not considered to fall within the definition of "managing investments".

1.7 DEFINITION - INVESTMENT ADVICE

The definition of "investment advice" reads as follows :-

"Giving to persons in their capacity as investors, or potential investors, advice on the merits of their :-

- a. dealing in an investment; or
- b. exercising any right conferred by an investment to deal in or convert an investment".

The Commission regards any form of activity whereby a person encourages another person to undertake a specific investment transaction (as opposed to advice in general terms) as licensable activity under this

section.

The most obvious forms of investment advice would be evident from verbal and written correspondence where advice is explicitly provided. However, it is quite possible to fall within the definition of 'giving advice' when providing assistance with applications or instructions or when obtaining information or applications for a person. The common test is whether such behaviour is related to a specific investment transaction or series of transactions.

The Commission accepts that it may often be difficult to draw a distinction between investment advice and arranging deals. However, for the purpose of the IBA, since both activities are defined within the Order as 'investment business', whether one encourages someone to undertake a specific investment transaction (advising) or contributes directly to the execution of it (arranging), the activity will still be considered licensable, as long as it is done by way of business.

1.8 DEFINITION - MANAGING ETC. COLLECTIVE INVESTMENT SCHEMES

The definition of "Managing etc. Collective Investment Schemes" reads as follows:-

"5 Acting as manager or trustee of any collective investment scheme, whether or not such scheme is established in the Island, or providing any of the services which the operator of such a scheme would normally undertake".

This should be read in conjunction with paragraph 19 of [Schedule 1](#) of the Order.

Investment business carried on in connection with collective investment schemes is the subject of a separate section. To summarise the position, the general rule is that managers and trustees of collective investment schemes and third party fund administrators require will an investment business licence to operate in or form the Isle of Man. Further information relating to collective investment schemes and their managers/trustees/administrators etc. can be found in the Commission's Regulatory Guide to Collective Investment Schemes, which may be accessed via Handbooks tab on this website.

1.9 EXCLUDED ACTIVITIES

Part II of [Schedule 1](#) of the Order (paragraphs 6-23) lists a number of activities which, whilst on the face of it appear to be licensable, are excluded from the scope of the IBA. It is necessary to peruse the Order itself in order to obtain a definitive list of excluded activities and persons. However, the following exclusions are particularly noteworthy:-

- a. Inter-group transactions/employee share schemes
- b. Any necessary investment advice given in the course of a profession or non- investment business is not licensable (see [paragraph 10, Schedule 1](#) of the Order) unless the person holds himself out as being prepared to provide an investment business service in addition to their professional service.
- c. Any investment related activities carried out by a person in the course of a business licensed under the Corporate Services Providers Act 2000 are excluded to the extent that the person is licensed to undertake that activity under that Act.
- d. The Commission does not intend to regulate those people who merely introduce their clients to licensed businesses in order that they may receive independent advice or be provided with a service where independent discretion is exercised in relation to investments. However, if a person arranges a specific investment deal on behalf of his client with another licensed business or introduces a client to a person other than for an independent service, the activity may be licensable. In order to demonstrate independence, it is generally considered that the licenceholder to whom the client is introduced would have a minimum of six agencies (e.g. in the case of an independent financial adviser) or have access to a significant range of investment products (e.g. in the case of a stockbroker or a portfolio manager).
- e. In the main, the Commission regards the investment activity of trustees as constituting fiduciary rather than investment business (see [Schedule 1](#) Article 2 paragraph 16 of the Order). However, if a trustee holds himself out as providing an investment business service in addition to his trustee service, this would be licensable as investment business. This also applies to a personal representative who holds himself out as being willing to offer investment business services in addition to acting as a personal representative.

The Commission appreciates that professional trustees will possess a range of skills which may include investment expertise. Provided such skills are demonstrated or promoted as part of a trustee service, this would not be considered as holding out as being prepared to offer investment services. However, an advertisement which, for example, explicitly offered an investment service in addition to a trustee service would fall outside of the exclusion – that is, it would be considered to be holding out as providing investment business in addition to a trustee service.

The activities of nominees who hold shares in private companies for the benefit of those who control such companies (as operated by corporate administrators) are also excluded from the scope of the IBA by virtue of [Schedule 1](#) Article 2 Part II paragraph 16 of the Order.

- f. Any investment activities carried on by insurance companies or retirement benefits scheme administrators which hold permits, registrations or authorisations under the Insurance Act 1986 or the Retirement Benefits Schemes Act 2000, will not require an investment business licence (see [Schedule 1](#), Article 2 Part II, paragraph 21, of the Order).

1.10 EXEMPTIONS

In addition to the exclusions contained in [Schedule 1](#), Article 2 Part II of the Order, a number of other persons are exempt from requiring an investment business licence even though their activities are classed as investment business.

These persons are exempted by Regulations made under Section 2(3) of the IBA. Five sets of Regulations have been made under this section:-

- a. Investment Business (Exemption) (Banks and Building Societies) Regulations 1992 ([Appendix E1](#)).
- b. Investment Business (Exemption) (Miscellaneous) Regulations 2001 ([Appendix E2](#))
- c. Investment Business (Exemption) (Certificates of Deposit) Regulations 1992 ([Appendix E3](#))
- d. Investment Business (Exemption) (Fund Managers) Regulations 1999 ([Appendix E4](#))

- e. Investment Business (Group Pension Schemes) Regulations 1996 ([Appendix E5](#))
- f. Investment Business (Exemption) (Temporary Business Continuity Operations) Regulations 2002 ([Appendix E6](#))

Whilst such persons are exempt from a licensing requirement, they are "permitted persons" as defined by section 5(1) of the IBA ([Appendix A](#)). The Commission has powers to carry out investigations, issue directions and request information in respect of any investment business being carried on or which has at any time been carried on by a permitted person or person who has ceased to be a permitted person (see sections 8, 8A and 9 of the IBA ([Appendix A](#))).