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International Cooperation: The Legal Position and Practice in the British Virgin Islands

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1. Introduction

- 1.1. The British Virgin Islands (BVI) Financial Services Commission (FSC) is the authority that is responsible for regulating financial services business that is carried on in or from within the BVI. This includes banking and trust company business, company management business, mutual fund business, and insurance business.
- 1.2. The financial services system comprises 10 banks, 389 insurance companies, 3,409 mutual funds, 544,000 registered international business companies (of which fewer than 200,000 are active), and 79 registered agents. Three of the 10 banks are permitted to do business only outside the BVI, and all of them (apart from the government-owned bank) are foreign owned. The insurance sector includes local and captive insurance services being offered by 389 companies. The 346 captive insurers constitute the bulk of insurance business carried on from within the territory. Captive insurers are managed by 14 insurance managers with an established physical presence in the BVI.
- 1.3. The BVI's international business companies (IBCs) market represents a substantial portion of its financial sector. The BVI has thus far registered 544,000 IBCs, all of which must have registered agents, who are licensed under the Company Management Act or the Banks and Trust Companies Act (BTCA) and who are also required to maintain a physical presence in the BVI. Some agents may also have licenses to manage trusts. Other agents are allowed only to manage a limited number of trusts.

- 1.4. The FSC's powers to obtain and disclose confidential information are exercisable against a wide range of persons and in comprehensive circumstances, otherwise known as the gateway provisions. These powers are set out in two pieces of legislation, namely, the Financial Services Commission Act, 2001 (FSC Act) and the Financial Services (International Cooperation) Act, 2000 (FS(IC) Act). The latter deals exclusively with the legal framework for the FSC to provide assistance to, and receive assistance from, a foreign regulatory authority. A foreign regulatory authority is defined as including an authority in a country outside the British Virgin Islands that exercises regulatory functions that, in the opinion of the FSC, relate to companies or financial services.

2. Financial Services Commission Act

- 2.1. Under the FSC Act, the FSC's compulsory powers are exercisable against a regulated person, a person connected with a regulated person, a person carrying on financial services business, and a person reasonably believed to have the required information. The powers are exercisable by the FSC for the purpose of discharging its functions or ensuring compliance with any financial services legislation. The procedure that is followed is for the FSC to issue a notice requiring the recipient of the notice to produce such information as may be specified in the notice.
- 2.2. In addition, under the FSC Act, the FSC's Board of Commissioners has power to request (as opposed to require) any person engaged in or related to any financial services business to furnish the FSC with such information as the board may specify. The board cannot compel a person to produce documents that have been requested, whereas the FSC can compel a person to produce documents that have been required by applying to a magistrate for a search warrant.
- 2.3. The FSC does not have the power to require, nor does the board have the power to request, the disclosure of information that a person would be entitled to refuse to disclose or produce on the grounds of legal professional privilege. This provision of the FSC Act is a codification of the common law doctrine. Documents are subject to legal professional privilege where they are given to a legal practitioner by a client or his representative for the purposes of seeking legal advice or by any person in contemplation of or in connection with legal proceedings. Information is not subject to legal professional privilege if it is communicated or given with a view to furthering a criminal purpose. The FSC Act spe-

cifically provides that it does not prevent a legal practitioner from giving the name and address of his client.

- 2.4. The gateway provisions under the FSC Act allow for disclosures as follows:
 - 2.4.1. for the purpose of legal assistance in the investigation of a criminal activity on a request by an international organization recognized by the board or a law-enforcement authority in a country approved by the board;
 - 2.4.2. for the purpose of assisting a foreign regulatory authority, including a trading or a security or exchange authority in a country or jurisdiction approved by the board, in discharging duties or exercising powers corresponding to those of the FSC;
 - 2.4.3. to the governor, the Executive Council, the board, the FSC's Licensing and Supervisory Committee, or an officer of the FSC;
 - 2.4.4. to any person for the purpose of discharging any duty under any financial services legislation in the BVI;
 - 2.4.5. on the order of a court of competent jurisdiction for the purposes of any criminal or civil proceedings in the BVI;
 - 2.4.6. to any person for the purpose of
 - criminal proceedings in the BVI;
 - disciplinary proceedings, whether within or outside the BVI, relating to the discharge by a legal practitioner, auditor, accountant, valuer, or actuary of his professional duties; and
 - disciplinary proceedings relating to the discharge by a public officer, a member or employee of a BVI statutory board, or a commissioner or employee of the FSC of his or her duties; and
 - 2.4.7. legal proceedings in connection with the winding up of a regulated person in the BVI or the appointment of a receiver.
- 2.5. Where disclosure is made to an international organization, foreign law-enforcement authority, or foreign regulatory authority, those authorities are prohibited from making further disclosures without the prior written consent of the board. To facilitate compliance with this provision in the law, the FSC requires a written undertaking to this effect before granting assistance. The rationale for this provision is to preserve/protect the confidentiality of information that is disclosed by

the FSC to foreign authorities. Although some foreign regulators have objected that such an undertaking may effectively require them to act in breach of obligations under their respective laws, it is suggested that the reasonable exercise of the board's discretion would allow those authorities to make disclosures in keeping with their legal and constitutional obligations.¹

3. Financial Services (International Cooperation) Act, 2000

- 3.1. The FS(IC) Act contains detailed provisions on how the FSC should execute requests for assistance by foreign regulatory authorities and stringent provisions to enforce compliance with the FSC's compulsory powers.
- 3.2. The four main factors for consideration upon receiving a request are the following:
 - 3.2.1. reciprocity by the requesting authority—whether corresponding assistance would be given to the FSC;
 - 3.2.2. whether the inquiries relate to the possible breach of a law or other requirement that has no parallel in the British Virgin Islands (there is no express requirement to establish dual criminality);
 - 3.2.3. the nature and seriousness of the matter to which the inquiries relate and whether the assistance could be obtained by other means; and
 - 3.2.4. whether it is appropriate in the public interest to grant the assistance sought.
- 3.3. It should be noted that the FSC has not refused assistance on any of the above grounds.
- 3.4. Where the FSC is satisfied that assistance should be granted to a foreign regulatory authority, it may exercise its compulsory powers against any person by issuing a direction requiring that person to furnish information, produce documents, or otherwise provide assistance. It is suggested that "assistance" may be interpreted to mean informal interviews. Where a person fails to comply with a direction within three days from the date of the direction or such longer period as the FSC may permit, the FSC may apply to a magistrate for an order requiring the person to

¹An example of this issue is given later in this chapter.

comply with the direction. An application to a magistrate must be processed by the magistrate within seven days of the application, and the failure to comply with an order of a magistrate is an offense punishable, on summary conviction, by a fine not exceeding ten thousand dollars.

- 3.5. As with the FSC Act, under the FS(IC) Act, a person shall not be required to disclose information or produce documents which he or she would be entitled to refuse to disclose or produce on the grounds of legal professional privilege, except that a barrister or solicitor may be required to furnish the name and address of his or her client.

4. Difficulties Encountered in Obtaining/Sharing Information

Objection to Undertaking

- 4.1. The requirement to undertake not to make further disclosure without the prior written consent of the board has met some resistance from two overseas regulators. In both cases, the objection to giving such an undertaking was based on the premise that the overseas regulator was required, or may have been required by law, to pass confidential information to other authorities—investigative, prosecutorial, or legislative.
- 4.2. The reluctance to give the undertaking was therefore sparked by a conflict between the laws of the requesting authority and of the requested authority, that is, the FSC. A lack of understanding of the relevant provisions of BVI law and skepticism that approval for further disclosure would not have been granted may also have played a part. Once a relationship of mutual trust and cooperation was developed, however, the misgivings abated and the process worked smoothly. In one instance, the terms of what would otherwise have been a standard undertaking were reworked to meet the needs of the overseas regulator while satisfying the requirements of the FSC Act.
- 4.3. Save in those exceptional cases, foreign regulatory authorities seeking assistance from the FSC have readily undertaken to be bound by the requirement to seek the prior written consent of the board prior to making further disclosure of confidential information.

Lack of Forthrightness by Requesting Authority

- 4.4. The lack of candor by a requesting authority has a serious impact on the effective execution of a request. Full and frank disclosure of all relevant matters (including any negotiations with the parties who have been requested to produce documents) is essential.

- 4.5. In one instance, the FSC received a request for assistance from a foreign regulatory authority, and the FSC issued a notice to a regulated entity to produce documents pursuant to the request. In the interim, attorneys for the requesting authority entered into negotiations for the production of the same documents with attorneys who were representing the BVI-regulated entity. The negotiations were not disclosed to the FSC. In fact, the FSC first became aware of the negotiations when it wrote to the regulated entity imposing a final deadline for the production of the documents. The regulated entity informed the FSC that its attorneys were negotiating the production of documents with attorneys for the foreign regulator and that it would be advisable to await the outcome of the negotiations. This was obviously the cause of considerable embarrassment to the FSC.
- 4.6. Fortunately the matter was resolved favorably and the requested documents were produced.

Overstepping Boundaries

- 4.7. In one instance, in what could perhaps be best described as an overexuberant effort to achieve the desired result, a foreign regulatory authority made direct contact with a local bank, informing bank officials that an order had been obtained in the jurisdiction where the foreign regulator was located restraining accounts that were held in the BVI and warning the bank that it would incur liability if any sums were withdrawn from those BVI accounts. The foreign regulator ignored the advice of the FSC to restrain the accounts using available procedures under other BVI legislation and threatened the bank that, as a constructive trustee of the accounts, it would incur liability if any sums were withdrawn from those accounts. The bank had earlier provided documents to the FSC pursuant to a request for assistance in the same matter, and the FSC was concerned that the approach of the foreign regulator may have undermined the bank's previously cooperative approach.
- 4.8. Needless to say, the foreign regulator's approach was a source of concern to the FSC and contrary to sound international cooperation procedures.

5. Conclusion

- 5.1. Notwithstanding the difficulties that are sometimes experienced in the international cooperation process, the statutory scheme set out in the FSC Act and the FS(IC) Act has been effective in allowing the FSC to

obtain and disclose confidential information subject to such safeguards as are necessary to both facilitate sound regulatory practices and protect legitimate interests.

- 5.2. The FSC's ability to provide assistance is demonstrated by the following statistics on informal and formal requests:

	2001	2002	2003
Informal	12	32	37
Formal	1	13	10

- 5.3. When an informal request for information is received, the FSC provides information that is publicly available and advises the person making the request on the procedure for obtaining requested information that is not publicly available. When a formal request for assistance is received, the FSC may grant assistance under either the FSC Act or the FS(IC) Act, provided that the requirements of the relevant legislation have been satisfied.