

Financial Services Act 2008

Businesses on the Island regulated by the Financial Services Commission (FSC) will be aware that the Financial Services Act 2008 (FSA 2008) will come into force fully on 1 August 2008. The FSA 2008 brings within one Act of Tynwald the regulation in the Isle of Man of banking, investment business, corporate/trust and money transmission services and repeals from 1 August 2008 the Financial Supervision Commission Act 1984, the Investment Business Act 1991, the Banking Act 1998 and the Fiduciary Services Acts 2000 and 2005. However the FSA 2008 also brings substantive changes which will affect regulated businesses.

The FSA 2008 refers to specified “financial services activities” which are stated to include deposit taking, investment business, services to a collective investment scheme, corporate and trustee services, money transmission services and any other financial service of a prescribed description carried on by way of business (“regulated activities”). A person must not carry on a regulated activity on the Island without a licence issued under the FSA 2008.

An application for a licence under FSA 2008 is made to the FSC which must be satisfied that the applicant, its directors, controllers and key persons are fit and proper persons and the applicant is managed and controlled on the Island.

The FSA 2008 allows the FSC to make rules concerning licenceholders, regulated activities, the conduct of business by licenceholders and various other matters. In exercise of this power the FSC have made the Financial Services Rule Book 2008 which will apply to all holders of a licence under the FSA 2008. Continuing the theme of unifying the regulatory framework applicable to different activities, the Rule Book will apply general rules to all activities regulated under the FSA

2008 with certain rules in addition specific to each activity. Thus for example there are general requirements in relation to financial resources and reporting, which will apply to all licenceholders, with specific financial resources and reporting requirements applying to each type of regulated activity. While this approach is logical, it may increase the compliance burden for licenceholders.

From 1 August 2008 an application to the FSC for a new licence to carry on banking, investment or fiduciary business must be made under the FSA 2008 and the Rule Book will apply to such licenceholder.

There are detailed commencement and transitional provisions in relation to banking, investment business and fiduciary licences existing on 1 August 2008. An existing licence will authorise the holder for one year to carry on the corresponding activity under the FSA 2008, and will continue any exemptions applicable by virtue of such licence, subject in each case to the existing applicable conditions. The regulatory codes which applied to existing licenceholders immediately before 1 August 2008 will continue to apply until 1 January 2009, when the Rule Book will apply to all

licenceholders. The FSC is planning to issue licences under the FSA 2008 dated 1 January 2009 in place of those existing on 1 August 2008, and intends to work with an informal practitioner group to smooth the implementation process.

It should be noted however that Part 9 of the Rule Book will apply to existing licenceholders from 1 August 2008. Part 9 relates to the Criminal Justice (Money Laundering) Code 2007 as it applies to licenceholders, and contains provisions relating to anti-money laundering and combating the financing of terrorism.

If an activity under the present law does not, but under the FSA 2008 does, require to be regulated, such new requirement will not apply until 1 January 2009 or later if an application for a licence for such activity is made before 1 November 2008.

The FSA 2008 introduces some new intervention procedures available to the FSC in relation to licenceholders, such as the power to apply to the Court to appoint a receiver or a person to manage the affairs of a licenceholder in prescribed circumstances.

The Act also contains new provisions making certain agreements entered into after 1 August 2008 unenforceable in certain respects. In particular, an agreement made by a person carrying on a regulated activity (other than trust or company services) without an appropriate licence will be unenforceable by that person against the other party to the agreement. For example, a person in the Island who enters into an agreement to provide investment advice for a fee, but does not hold an appropriate licence under the FSA 2008,

will not be able to enforce that agreement against his client, and the client will be able to recover any fees paid.

Collective Investment Schemes Act 2008

The Collective Investment Schemes Act 2008 (CISA 2008) is a re-enactment of the Financial Supervision Act 1988 so far as the latter relates to collective investment schemes. CISA 2008 will come into effect on 1 August 2008 and the 1988 Act will be repealed.

The definition of a collective investment scheme remains as before except that CISA 2008 does not describe the arrangements which do not amount to a collective investment scheme but leaves them to be prescribed by the FSC. Those arrangements are prescribed in the Collective Investment Schemes (Definition) Order 2008, which will come into operation on 1 August 2008, and substantially mirror the present position. The one addition is that the Order will provide that a limited partnership whose interests are admitted to the Official List of the UK Listing Authority is not a collective investment scheme.

The existing regulations relating to collective investment schemes are largely continued under the Collective Investment Schemes Act 2008 (Appointed Day) Order 2008.

CISA 2008 does have some new provisions which are not contained in the Financial Supervision Act 1988.

CISA 2008 provides that a person must not act as a manager or administrator of a collective investment scheme unless the person has taken reasonable steps to be satisfied that other

functionaries (such as the promoter, governing body, trustee and asset manager) are suitable to act in relation to the scheme in the manner envisaged and, if it is established outside the Isle of Man, that that jurisdiction is a suitable one in which to establish the scheme.

CISA 2008 will also provide that the manager or administrator of a scheme who knows of or has reasonable cause to believe the occurrence of any matter which has or is likely to have a material adverse effect on a scheme must immediately notify the FSC in writing of the occurrence.

Under the Financial Services Act 1988 any provision of any document constituting an authorised scheme is void in so far as it would have the effect of exempting the operator,

manager or trustee from liability for any failure to exercise due care and diligence in the discharge of its functions in respect of the scheme. This is now extended by CISA 2008 to international schemes, and also to the promoter, governing body, administrator, and custodian of authorised and international schemes.

The FSC's powers of intervention in relation to collective investment schemes are extended. A new power to appoint a person to advise a collective investment scheme on the conduct of its affairs, or to appoint a person to assume control of the affairs of the scheme is introduced. Prior notice of the exercise of such power, with reasons, must generally be given, and there is a right of appeal to the new Collective Investment Schemes Tribunal.

The above points are not exhaustive and information is for guidance only and is not meant to be legal advice. For more specific details please contact Irini Newby at Simcocks Advocates – telephone +44 (0) 1624 690300 or email inewby@simcocks.com

Contact Us

In the Isle of Man

Simcocks Advocates Limited
Ridgeway House
Ridgeway Street
Douglas
Isle of Man IM99 1PY
Tel: +44(0)1624 690300
Fax: +44(0)1624 690333

In London

Central Court
23 Southampton Buildings
London
England WC2A 1AL
Tel: +44(0)20 3043 4243
Fax: +44(0)20 3043 4247

This document is intended to provide a general overview and should not in any way be construed as legal advice. Always seek specific advice in respect of any particular issue.

Issued by: Simcocks, Ridgeway House, Ridgeway Street, Douglas, Isle of Man, IM99 1PY
Tel: 01624 690 300 Email: mail@simcocks.com Web: www.simcocks.com

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