

Legislative and regulatory developments in Bermuda for Q3 2022

Briefing Summary: This report provides a summary of important legislative and regulatory developments in Bermuda for the quarter ended 30 September 2022. For this quarter, we focus on developments in the following sectors: Anti-Money Laundering (“AML”)/Anti-Terrorist Financing (“ATF”) and Sanctions; Banking; Digital Assets; Employment and Immigration; Insurance; Investment Business; Telecoms/Utilities; and General Legal/Regulatory Reforms.

Service Area: Corporate, Regulatory

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AML/ATF and Sanctions

The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 provide that the Bermuda regulated sectors and relevant persons must apply enhanced customer due diligence to customers in high-risk jurisdictions. On 12 July 2022, the Minister of Legal Affairs and Constitutional Reform issued the AML-ATF Advisory 2/2022 (“**Advisory**”) highlighting the following high-risk countries:

1. Democratic People’s republic of Korea*;
2. and Iran*

The Advisory also noted that risk should be minimized (which may include enhanced due diligence measures) in high-risk situations, with respect to the following countries:

1. Albania
2. Barbados
3. Burkina Faso
4. Cambodia
5. Cayman Islands
6. Haiti
7. Jamaica
8. Jordan
9. Mali
10. Morocco
11. Myanmar*
12. Nicaragua*
13. Pakistan

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14. Panama
15. Philippines
16. Senegal
17. South Sudan*
18. Syria*
19. Turkey
20. Uganda
21. United Arab Emirates
22. Yemen*

Each country marked with an (*) is subject to sanctions measures at the time of publication of the Advisory which require firms to take additional measures, in accordance with the International Sanctions Regulations 2013.

Notably, Malta has been removed as a jurisdiction subject to increased monitoring by the Financial Action Task Force.

Banking

Banks and Deposit Companies Amendment Act 2022

On 1 July 2022, the Bermuda Government announced that the Banks and Deposit Companies Amendment Act 2022 ("**Amendment Act**") had been tabled before the House of Assembly. The primary purpose of the Amendment Act is to provide the Bermuda Monetary Authority ("**BMA**") with an express power to issue codes of conduct in relation to the manner in which an institution conducts deposit-taking business, as well as allow for the regulation of banking fees.

The Amendment Act will allow the BMA to ensure banking institutions are complying with consumer protection requirements in an appropriate manner and promoting better and fairer treatment of their customers.

The Amendment Act received Royal Assent on 2 August 2022.

Revised Banking Code of Conduct

On 11 August 2022, the BMA published a revised banking code of conduct which will have a six-month transition period. The revised code of conduct is in line with amendments to the Bermuda Monetary Authority Act 1969 which expand the BMA's regulatory remit to encompass the oversight of the conduct of business by financial institutions with the aim of promoting fair outcomes for customers.

Operational Cyber Risk Management Code of Conduct: Banks and Deposit Companies

On 26 September 2022 the BMA published a notice with respect to the Operational Cyber Risk Management Code of Conduct: Banks and Deposit Companies ("**Banks Cyber Code**"). Banks and deposit companies are required to comply with the Banks Cyber Code by 15 February 2023.

Digital Assets

On 26 July 2022, the BMA published guidance notes for entities seeking exemption from dual licensing due to the ancillary nature of their activities ("**Exemption Guidance Notes**"). The Exemption Guidance Notes provide information for entities seeking an exemption from the requirement to be licensed under the Investment Business Act 2003, pursuant to the Investment Business (Non-Registrable Persons) Order 2022, on the basis that the otherwise licensable activities are carried on in an ancillary manner to activities conducted and licensed under the Digital Asset Business Act 2008 ("**DABA**").

The Exemption Guidance Notes pertain to entities licensed to conduct digital asset business which carry on investment business in an ancillary manner. It is expected that a comparable exemption in respect of licensed investment providers will be provided for under the DABA regime, at which time, this guidance will be updated accordingly.

Employment and Immigration

Increasing Pensions

The Contributory Pensions (Amendment of Benefits) Order 2022 was tabled before the House of Assembly on 1 July 2022. The purpose of the Order is to increase pensions and other benefits under the Contributory Pensions Act 1970 by 2.75%. This increase will be backdated to 16 August 2021.

Update on Economic Investment Certificate in Bermuda

On 15 July 2022, the Bermuda Government provided an update on the Economic Investment Certificate ("**EIC**"). As of 11 July 2022, the total amount invested stood at \$349.6 million dollars (\$349,644,195), since the program was launched on 1 March 2021. This investment includes over \$94 million (\$94,180,923) in real estate purchases and over \$255 million (\$255,463,272) invested into new and existing businesses.

Since the program's inception, the investments to date represent 19 applications being approved, covering 48 persons, including dependents. There is an active, growing pipeline of over 41 persons who have registered their expressions of interest in the program. The total investments in the EIC pipeline now exceed \$88 million dollars.

Under the revised policy, qualifying investments are possible in Bermuda in any one or more of the following areas (not exclusive):

1. purchase Bermuda real estate (residential or commercial);
2. invest in the development and launch of a new Bermuda-based business;
3. purchase Bermuda Government bonds;
4. contribute to Bermuda's Sinking Fund;
5. contribute to the newly established Bermuda Trust Fund;
6. donate to a Bermuda Registered charity;
7. make a direct or indirect equity investment in an existing Bermuda-based business, excluding exempted undertakings; and/or

- invest in such other social or practical venture that benefits Bermuda, as may be determined by the Minister.

Update on Work from Bermuda Initiative

On 9 August 2022, the Ministry of Economy and Labour reported that in the two years since launching the 'Work from Bermuda' ("WFB") initiative on 9 August 2020, the Government of Bermuda had received 1315 WFB applications, with 1127 approved. Currently, there are 234 WFB certificate holders residing in Bermuda.

This policy targets individuals who:

- have the financial means to sustain themselves fully;
- would like to work in Bermuda in a non-Bermuda-based or a non-Bermuda registered legal entity or partnership; or
- would like to complete their post-secondary studies from Bermuda.

Non-Bermudians are also reminded that the WFB certificate is not the only program that allows individuals to reside in Bermuda. Those who meet the eligibility requirements may apply for Permission to Reside on an Annual Basis for periods of up to five (5) years.

Insurance

Guidance Notes on Management of Climate Change Risks for Commercial Insurers

On 11 August 2022, the BMA published Guidance Notes on Management of Climate Change Risks for Commercial Insurers ("**Climate Guidance Notes**"). The Climate Guidance Notes outline the BMA's expectations for commercial insurers and insurance groups regarding their management and reporting of climate change risks. Specifically, the Climate Guidance Notes focus on corporate governance and risk management practices for climate risk in the context of environmental, social and governance risks of insurance business conducted by such insurers.

Although the Climate Guidance Notes focus on how climate change impacts risks that are transferred to insurers, the BMA expects insurers to also specifically consider their own external impact on climate change as it may also revert back and affect in short, mid or long-term their own financial performance, reputation and operations and, by extension, the financial soundness of the sector as a whole.

The Climate Guidance Notes apply to commercial insurers and seek to take into account the diversity of such insurers in the market. While it targets minimum standards the BMA expects insurers to embed into their operations, the BMA's expectations continue to be based on the principle of proportionality. Therefore, an insurer's application will be dependent on the nature of its operations and the scale, complexity and risk profile of its insurance business.

Updated Insurance Code of Conduct

In August, 2022, the BMA published revisions to the Insurance Code of Conduct (the “Code”). These revisions are intended to ensure that the Code remains aligned with international standards and able to address emerging issues. Overall, the amendments aim to improve and enhance the Code and its application, while at the same time, incorporating various housekeeping changes intended to simplify the document.

The BMA recognizes that the Code applies to all insurers registered under the Insurance Act 1978 (regardless of whether the insurer forms part of a broader group) and will continue to assess the insurer’s compliance with the Code based on the nature, scale and complexity of its operations. The BMA does not prescribe the exact manner in which regulated insurers can demonstrate compliance with the Code and expects individual insurers to use their best judgment when determining what is proportional to their individual circumstances.

The most substantive changes to the Code are as follows:

- Confirmation that section 1 (Introduction) of the Code includes “Collateralized Insurer” and “Class Innovative Insurer General Business” in the definition of limited purpose insurer.
- Section 4 (Corporate Governance) has been expanded to make it clear that an insurer’s Board of Directors must include an appropriate number of independent directors without executive responsibility.

In this regard, the Code now includes definitions of ‘independent non-executive director’ (that is to say, an independent director with no past ties to the company) and ‘non-executive director’ (which includes board members or senior executives of the parent company or the parent company’s subsidiaries but not executives of the insurer or its subsidiaries).

Pursuant to these changes, in regards to an insurer that is a subsidiary of another Bermuda regulated entity and/or Bermuda registered insurance group or that is a subsidiary of an entity which is not a Bermuda registered entity or group but is subject to prudential regulation in another country, the Board must have an appropriate number of non-executive directors. In regards to an insurer that is registered in Bermuda and is a subsidiary of a parent company that is not a Bermuda registered entity and is not prudentially regulated, the Board must have an appropriate number of independent non-executive directors.

- Section 4 (Corporate Governance) has been further amended to require that the Board review board membership and the composition of its committees not less than every three years and upon a material change in the insurer’s business activities or risk profile.
- Section 4 (Corporate Governance) was further amended to require the insurer to adopt a risk culture that encourages behaviour and conduct that aligns with its risk appetite and develops governance mechanisms for measuring and monitoring risk culture effectiveness, such assessments to be conducted on a regular basis.
- Section 5 (Risk Management Framework) was amended to require the insurer to demonstrate the economic impact of the risk mitigation techniques that originate from its reinsurance contracts.

- A definition of “Environment, Social and Governance Risk” now appears at section 5 (Risk Management Framework), effectively meaning that more specific climate risk requirements are now included in the Code, bringing it in line with the BMA’s 11 August 2022 guidance note setting out the BMA’s minimum expectations for insurers generally regarding the management and reporting of climate risks.
- Section 5 (Risk Management Framework) was further expanded to require each insurer to have a Business Continuity and Disaster Recovery plan that addresses all its key business processes and critical business functions. The effectiveness of the plan should be tested regularly and the documents constituting the plan must be available for inspection by the BMA.
- Section 7 (Outsourcing) was amended to enhance the requirements for material outsourcing arrangements critical to the insurer’s operations to ensure that the insurer’s due diligence and risk process is undertaken prior to the insurer entering an outsourcing arrangement. The BMA also requires the insurer to carry out contingency planning in the event that the service provider is unable to provide the outsourced activity for any reason.

The amended Code came into force on 1 September 2022 and regulated entities are required to be compliant with sections 1 through 7 by 1 September 2023 and section 8 by 1 March 2023.

Investment Business

The Investment Business Amendment Act 2022 (“**Amendment**”) took effect on 27 July 2022.

Prior to the Amendment coming into effect, a person carrying out investment business in or from Bermuda was required to be licensed under the IBA unless they were excluded in accordance with the provisions of the IBA or exempt pursuant to the Investment Business (Exemptions) Order 2004 (“**2004 Order**”).

The Amendment, amongst other things:

1. broadens the scope of the IBA beyond those persons with a place of business maintained in Bermuda such that “in or from Bermuda” now includes persons:

- carrying on investment business and incorporated or formed in Bermuda; and
- formed or incorporated outside Bermuda and carrying on investment business in or from Bermuda.

2. introduces the concept of a “Class A Registered Person”;
3. does not make material amendments to the exclusions such that persons that were previously excluded will remain excluded after the Amendment;
4. repeals the 2004 Order such that persons are no longer “exempt” but instead fall within two categories of either “Class B Registered Persons” or “Non-Registerable Persons”;
5. introduces a new relevant activity of promoting investments to the public;
6. introduces a concept similar to the existing re/insurance and digital asset sandbox facility whereby a “test license” may be issued to carry out certain investment business for a defined period and subject to any restrictions imposed by the BMA; and
7. enhances reporting requirements for entities that fall within the scope of the IBA.

Guidance Notes on the Maintenance of Net Assets, Capital and Liquidity

On 26 July 2022, the BMA published guidance Notes on the Maintenance of Net Assets, Capital and Liquidity (“**Liquidity Guidance Notes**”). These Liquidity Guidance Notes provide guidance for investment providers and prospective applicants regarding the provisions of section 10A of the IBA, the Investment Business (Prudential Standards) (Standard Licences, Test Licences, and Class A Registered Persons) (Capital, Net Assets and Liquidity) Rules, and the supervisory process the BMA will apply.

In particular, the Liquidity Guidance Notes address the following areas:

1. assessment and calculation of minimum net assets;
2. the market risk based capital requirement;
3. maintenance of adequate liquidity;
4. requirements for Class A Registered Persons;
5. additional guidance for reporting in respect of the market risk based capital requirement; and
6. prudential information return instructions with respect to:
 - credit risk;
 - operational risk;
 - market risk; and
 - market-related off-balance sheet credit exposures (counterparty credit risk).

Investment Business Act 2003 Code of General Business Conduct and Practice

On 26 July 2022, the BMA published the Investment Business Act 2003 Code of General Business Conduct and Practice (“**Investment Code**”). The Investment Code replaces the Investment Business Act 2003 General Business Conduct and Practice Code of Conduct and the Advertising Code, both of which were issued in June 2010.

The Investment Code’s objectives are to provide guidance to investment providers as to the:

1. integrity and fair dealing standards required under the IBA in relation to the conduct of investment business;
2. skill, care and diligence required in providing any services that they provide or indicate a willingness to provide; and
3. the standards required in other areas pursuant to the IBA, as well as to the best practice in the industry.

The Investment Code specifically addresses:

1. professional conduct standards;
2. advertising and promotion;
3. client relationships;
4. portfolio management;
5. conflicts of interest;
6. futures, options and contracts for differences;
7. enhanced standards for retail over-the-counter leveraged products; and
8. investment business transactions over the internet or other forms of communication.

Legislative Developments

The following pieces of legislation came into force on 27 July 2022:

1. Investment Business (Prudential Standards) (Statutory Returns) Rules 2022 – this legislation addresses:

- annual returns for investment providers;
- quarterly returns for investment providers;
- quarterly returns for investment providers carrying on investment business involving contracts for differences with retail clients; and
- supplementary matters.

2. Investment Business (Prudential Standards) (Standard Licences, Test Licences, and Class A Registered Persons) (Capital, Net Assets and Liquidity) Rules 2022 – this legislation addresses:

- minimum net assets to be maintained;
- requirement to maintain increased minimum net assets;
- procedure for determining if minimum net asset requirement is not appropriate;
- requirement to maintain fluctuating market risk-based minimum capital;
- minimum liquid asset requirement;
- capital and liquidity requirements for Class A registered persons; and
- the process for notifying the BMA.

3. Investment Business (Class B Registered Persons) Order 2022 – this legislation defines Class B Registered Persons for the purposes of the IBA.

4. Investment Business Amendment Regulations 2022 – this legislation amends the Investment Business Regulations 2004 to bring them in line with the amendments to the IBA and consequential amendments to the investment business regime.

5. Investment Business (Non-Registerable Persons) (Designation) Order 2022 – this legislation defines Non-Registerable Persons for the purposes of the IBA.

6. Investment Business (Exemptions) Order 2004 Revocation Notice 2022 – this legislation revokes the Investment Business (Exemptions) Order 2004 which defines various persons exempt from the requirement to hold a licence under the IBA.

Telecoms and Utilities

On 27 July 2022, the Regulatory Authority of Bermuda (“**RA**”) published its Electronic Communications Sectoral Review Consultation Document. The Consultation Document served to initiate a comprehensive review of the electronic communications sector, including all applicable policies, legislation, regulations, and administrative determinations. Comments from the public, electronic communications participants, sectoral providers, and other interested parties with respect to the Consultation Document were due by 31 August 2022. The RA will issue a Final Decision at the conclusion of the consultation process.

General Legal / Regulatory Reforms

Approved Residential Schemes Guidelines

On 15 July 2022, the Bermuda Government released a statement with respect to an overview of the Approved Residential Schemes Guidelines (“**Guidelines**”). These Guidelines will function as one of a range of economic development tools to facilitate economic development and regeneration within the Economic Empowerment Zones (“**EEZs**”).

Amendments made in 2019 to the Economic Development Act 1968 allowed for the designation of Approved Residential Schemes within the EEZs as well as the removal of restrictions allowing non-Bermudians to purchase residential units forming part of an Approved Residential Scheme. The amendments now permit a restricted person, both local companies and exempted companies, to purchase any unit (freehold property, condominium, or tourist accommodation) that forms part of an Approved Residential Scheme, without restriction. This also applies to the rental of property. This increases the potential participants in the Approved Residential Scheme, and in doing so further diversifies the scope of potential demand for residential units in the EEZs through an Approved Residential Scheme development.

The Guidelines set out the policy for Approved Residential Schemes and the process for applying to the Minister of Planning for a development project. To offset the potential negative impact of the EEZ regeneration, when reviewing an application, the Minister of Planning shall consider affordability as well as how the development project will prevent the displacement of current lower income residents and persons currently operating businesses in the area.

Amendments to the Bermuda Monetary Act 1969

On 2 August 2022, the Governor granted Royal Assent to a bill to amend the Bermuda Monetary Authority Act 1969 by adding a principal object to cover matters related to the conduct of business by financial institutions. The passing of the Bermuda Monetary Authority Amendment Act 2022 provides the BMA with the express mandate and powers to provide a new avenue of protection for customers using products and services provided by Bermuda's regulated financial services providers. The BMA has always viewed consumer protection as a necessity to the growth and confidence of the financial services industry in Bermuda. In this regard, historically the BMA focused on prudential matters, such as risk management, governance and general solvency issues, including breaches of law. However, this amendment will expand the BMA's regulatory remit to encompass the oversight of the conduct of business by financial institutions with the aim of promoting fair outcomes for customers. The BMA's approach will now include requiring greater transparency on the part of financial institutions, as well as their use of effective policies, procedures and internal structures to treat customers fairly and, in particular, to handle their customers' complaints through appropriate mechanisms. Resolution of individual customer complaints will remain outside of the BMA's regulatory remit.

The regime will commence with issuing new or revised codes covering the conduct of business to each financial services sector. These new or revised sectoral codes will be issued on a phased basis and will allow for an appropriate transition period to ensure compliance, beginning with the insurance and banking sectors.

The Bermuda Monetary Authority Amendment (No. 2) Act 2022 also received Royal Assent on 2 August 2022. This Act amends the Bermuda Monetary Authority Act 1969 to update certain definitions under the Third Schedule and to correct fees incorrectly stated under certain headings of the Fourth Schedule; to make a consequential amendment to the Banks and Deposit Companies (Fees) Act 1975 to correct an annual fee incorrectly stated under Part I of the Second Schedule; and to provide that the Bill shall come into operation with retroactive effect as from 1 January 2022 so as to cause the fees revised under the Bill to be in accordance with the fee structure agreed upon by the Authority and industry for the year 2022.

Status of Cannabis Legislation

On 6 September 2022, Government House released a statement in relation to the Governor's position on the Cannabis Licensing Bill 2022. The Governor confirmed that she had received an instruction, issued on Her Majesty's behalf, not to Assent to the Bill as drafted.

It was further confirmed that the Secretary of State for Foreign Commonwealth and Development Affairs concluded that the Bill, as currently drafted, is not consistent with obligations held by the UK and Bermuda under the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances.

It was noted that the Governor had informed the Premier and relayed the UK's continued desire to work with Bermuda on reforms within the scope of existing international obligations. The Attorney-General also confirmed that the Government of Bermuda intends to continue to advance this initiative, within the full scope of its constitutional powers.

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