



Recent Bermuda Legislative and Regulatory Updates: 2019

Stephanie P. Sanderson, Corporate Partner at BeesMont Law Limited, provides a legal and regulatory update with respect to Bermuda.

Bermuda is a well-respected and successful centre for financial services, insurance, asset management and private-client business due to a sophisticated, modern and well-regulated approach to doing business. It has also more recently gained a reputation as a leading fintech jurisdiction and is attracting fintech business from all over the world.

Bermuda remains nimble and able to keep ahead of international regulatory trends. The jurisdiction continuously adapts its regulatory regimes to align with international developments. As a result, the jurisdiction's legislative and regulatory landscape is ever evolving. This article covers some key recent legislative and regulatory updates in Bermuda.

Technology and Innovation

The technology sector has been growing since the introduction of various pieces of legislation in 2018 to promote fintech. These included the Digital Asset Business Act 2018 (DABA) and the Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018. The Bermuda Monetary Authority (BMA) also established incentives to encourage fintech and insurtech growth and open innovation in the jurisdiction.

The DABA established the framework governing the licensing and supervision of digital asset business. This includes issuing, selling or redeeming virtual coins, tokens or any other form of digital asset; operating as a payment service provider business utilising digital assets, which includes the provision of services for the transfer of funds; operating as an electronic exchange; providing custodial wallet services; and, operating as a digital asset services vendor.

The BMA regulates digital asset business, including anti-money laundering (AML) and anti-terrorist financing (ATF), fraud prevention, valuation (or price) manipulation and the integrity of owners. The digital asset business regime includes minimum criteria for licensing, as well as a code of practice, statement of principles, client disclosure rules, prudential standards annual returns rules and cybersecurity rules. The BMA also issued digital asset business FAQs in 2019.

The Insurance Amendment Act 2018 came into effect in July 2018. This was in connection with an insurtech 'regulatory sandbox' to facilitate and promote innovative applications of technology in the insurance sector. The sandbox enables testing of financial technology to a limited number of clients in a live environment for a limited time period.

Digital Asset Custody Code of Practice

In May 2019, the BMA released the Digital Asset Custody Code of Practice. The stated purpose of the Code is to provide greater clarity to the digital asset industry about the standards expected by the BMA when considering whether a custodian is employing an acceptable level of care when safeguarding digital assets for a client.

A custodian, for the purposes of the Code, is any digital asset business that has sole or partial control over digital asset keys on behalf of clients. If a digital asset business outsources custody of client digital assets to a qualified custodian, then the digital asset business must be satisfied that the qualified custodian maintains comparable standards to those outlined in the Code.

The Digital Asset Custody Code of Practice covers business control requirements including hot/cold storage and liquidity, compliance, fraud detection and operational risk management as well as various technology controls such as multi-signature authorisation, account segregation and IT security controls.

BMA's Cyber Risk Report

The BMA issued its 'Cyber Report 2018' which covered different technology risks affecting Bermuda's (re)insurers, including key enterprise risks such as information security, cybersecurity and data privacy as well as feedback on its cyber-resiliency questionnaire. The BMA's report noted that: 'As with any material risk, all licensed undertakings are required to have robust policies, procedures and controls in place to identify, assess and manage cybersecurity risks on an on-going basis consistent with the prudent business minimum licensing criterion.'

Economic Substance

Bermuda passed economic substance legislation in December 2018 as a result of the international initiatives promoted by the European Union Code of Conduct Group for Business Taxation (COCG) and the OECD. Under the Economic Substance Act 2018 (ESA), all Bermuda registered entities that are carrying on 'relevant activities' must satisfy an economic substance test and will have certain notification and reporting obligations under the ESA.

A relevant activity under the ESA means the carrying on as a business of any one or more of the following activities: banking, insurance, fund management, financing, leasing, headquarters, shipping, distribution and service centre business, intellectual property, or, holding entity.

If the business carried on by a Bermuda registered entity does not fall within the relevant activities listed by the ESA then it will be out of scope of the economic substance regime.

Investment Funds

Bermuda's investment funds regime has been recently updated particularly to allow for additional oversight by the BMA and to

ensure that Bermuda's investment fund regulatory regime remains in line with international standards.

The Investment Funds Act 2006 regulates investment funds in Bermuda, and various reclassifications have been put in place. For example, 'Class A exempt funds' and 'Class B exempt funds' are now 'professional Class A funds' and 'professional Class B funds' respectively, and 'excluded funds' have been reclassified as 'private funds'. Professional funds and private funds are now collectively known as 'registered funds'. Registered funds need to apply to the Bermuda Monetary Authority (Authority) for registration and approval before commencing trading.

The BMA also issued guidance notes in January 2019 with respect to professional Class A and professional Class B investment funds covering qualification criteria, registration process, and continuing annual filing requirements.

New Insurer Classes

The BMA has stated that it recognises the growing importance of disruptive innovation in the insurance and wider financial industry and the critical role that innovation plays in promoting efficiency and enhancing competitiveness in the market.

The Insurance Act 1978 was amended in 2019 to provide for the supervision and regulation of two new classes of insurer, namely 'Class IIGB' and 'collateralised insurers', and the supervision and regulation of a new form of insurance intermediary, namely an 'insurance marketplace provider'.

The collateralised insurer class aims at insurers that wish to make use of leverage and transact with a greater variety of cedant types, including unrated non-affiliated cedants. The Class IIGB designation is relevant for innovative business models using digital assets. The insurance marketplace provider category was introduced due to the growing interest in the establishment of insurtech related providers. An insurance marketplace provider is an intermediary which provides a platform, of any type, established for the purpose of buying, selling or trading contracts of insurance.

Insurance Brokers and Agents Code of Conduct

In February 2019, the BMA published the Code of Conduct for Insurance Brokers and Insurance Agents, which establishes the duties, standards and requirements of insurance brokers and agents. It also assists the BMA in the supervision and regulation of insurance brokers and insurance agents under the Insurance Act 1978. The Code covers the following areas: business to be conducted in a prudent manner; adequate accounting, record keeping systems, and reporting requirements; client relationships; disclosures; complaint handling; business continuity and disaster recovery; conflicts of interest; fraud; client due diligence; outsourcing; reputation of Bermuda; and, cooperation with regulatory authorities.

Outsourcing Guidance

In June 2019, the BMA published Guidance Notes on Outsourcing for Banks, Deposit Companies, the Bermuda Stock Exchange, Corporate Service Providers, Trust Companies, Money Service Businesses, Investment Businesses, Fund Administrators and the

Credit Union (Guidance Notes), which will come into force on May 1 2020. The Guidance Notes require licensed entities to have in place adequate policies and procedures to manage and monitor existing activities that have been outsourced, as well as to assess the risks arising from outsourcing new activities.

Financial Sanctions

All individuals and legal entities who are within or undertake activities within Bermuda must comply with financial sanctions that are in force. In September 2018, 'Financial Sanctions Guidance' was published by the Financial Sanctions Implementation Unit (FSIU), a unit of the Ministry of Legal Affairs Headquarters, which is responsible for carrying out certain functions with respect to the implementation of targeted financial sanctions for terrorism, terrorist financing and proliferation financing in Bermuda. The guidance provides important information on various obligations under Bermuda's financial sanctions regime, including the approach for licensing and compliance issues.

Non-Licensed Persons (NLPs)

The Proceeds of Crime (Miscellaneous) (No 2) Act 2018 came into effect in September 2018 and the list of business activities required to register as NLPs was expanded to include lending, leasing and financial guarantees. Non-licensed persons, for the purposes of Bermuda's anti-money laundering and anti-terrorist financing regime, must register with the BMA.

BMA Enforcement Statement of Principles

The BMA recently issued a Statement of Principles and Guidance on the Exercise of Enforcement Powers which explain when and in what circumstances the BMA will consider taking enforcement action under the following regulatory legislation: Insurance Act 1978; Banks and Deposit Companies Act 1999; Investment Business Act 2003; Investment Funds Act 2006; Trusts (Regulation of Trust Business) Act 2001; Corporate Service Provider Business Act 2012; Money Service Business Act 2016; Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing, Supervision, and Enforcement) Act 2008; Credit Unions Act 2010; and, Digital Business Act 2018. The Statement of Principles and Guidance consolidates the BMA's 2010 and 2012 Enforcement Statement of Principles into a unified enforcement guide.

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Author Bio: Stephanie P. Sanderson is a Partner at BeesMont Law Limited. She practices in all areas of corporate and commercial law and leads BeesMont Law's Technology & Innovation team. She also specialises in Bermuda international tax transparency law, corporate governance, and regulatory and compliance matters, including AML/ATF, data protection and privacy law. Stephanie has been recommended by Legal 500 and recognised by IFLR1000 as an outstanding individual and 'Leading Lawyer' who has demonstrated her skills by advising on innovative transactions. Chambers and Partners recognises Stephanie as having an impressive transactional offering with noteworthy compliance and regulatory expertise and being highly regarded by her clients.



Stephanie P. Sanderson

Partner, Corporate | BeesMont Law Limited

D: + 1 (441) 474 9006

spsanderson@beesmont.bm