

BERMUDA MONETARY AUTHORITY

Trusts (Regulation of Trust Business) Act 2001

INFORMATION FOR PROSPECTIVE

APPLICANTS

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1.0 INTRODUCTION

These Guidance Notes have been issued by the Bermuda Monetary Authority (“the Authority”) to provide information for prospective applicants regarding the statutory provisions of the Trusts (Regulation of Trust Business) Act 2001 (“the Act”) and the supervisory process which the Authority will apply.

The Authority’s Guidance is of general application and seeks to take account of the wide diversity of undertakings that may be licensed under the Act. The Guidance will be kept up-to-date and revised versions published from time to time. The Authority cannot provide definitive interpretation of the provisions of the Act, since that is the prerogative of the Courts. However, the Authority, in administering the Act is prepared to offer its own views on the meaning of provisions.

It should be noted that the Authority has also published a Statement of Principles and a Code of Practice, as provided for under the Act. The Statement of Principles provides guidance on the Authority’s approach in interpreting the minimum criteria and in exercising its power to grant, revoke or restrict a licence and in exercising its power to obtain information, reports and to require production of documents. The Code of Practice provides guidance on the duties, requirements, procedures, standards and sound principles to be observed by persons carrying on trust business. Copies of both these documents can be found on the Authority’s website (www.bma.bm).

2.0 REGULATORY SCOPE

The Act’s requirements are the statutory basis for regulating trust business in Bermuda. The Act provides for a licensing regime for any person or entity (unless otherwise exempted) engaging in trust business, as defined by the Act, either in or from within Bermuda.

Section 9 (3) of the Act defines trust business as: -

the provision of the services of a trustee as a business, trade, profession or vocation,

3.0 APPLICATIONS

An application for an unlimited licence under the Act may be made by local or exempted companies incorporated under Bermuda’s Companies Act 1981 (“the Companies Act”); and by Overseas (Permit) Companies authorised by the Minister of Finance under the Companies Act to conduct business in Bermuda. Applications for a limited trust licence may be made by Partnerships formed under the Partnership Act 1902 or the Exempted Partnerships Act 1992; and by Overseas Partnerships permitted by the Minister of Finance to conduct business in

Bermuda; and by other unincorporated entities or by individuals conducting trust business, as defined, in or from within Bermuda.

An unlimited licence authorises the licensee to carry on trust business and to solicit business from the public generally.

A limited licence does not allow the holder to act as sole trustee and restricts it to holding trust assets not exceeding \$30 million unless the Authority agrees to a higher aggregate amount. In exercising this discretion, the Authority has regard to the Government's policy approach in the Act, in particular in seeking to promote the use of trust company structures where trustees manage material amounts of assets. Where an applicant for a limited trust licence or an existing holder of such a licence subsequently wishes to seek consent for a larger amount than \$30 million of assets to apply to his or her business, an application for a higher figure must be made to the Authority. In considering such applications, the underlying objective of the Authority is to determine the point at which the nature and scale of the applicant's business will be such as to indicate that a trust company should instead be established for the conduct of the business in question. In assessing applications, the Authority has regard to the interaction of a number of factors including: the absolute amount of the assets proposed to be managed; the nature and range of the trust business being carried on; the number of individual trust relationships involved; the variety and complexity of the trust responsibilities which are to be conducted and the resources that the undertaking has at its disposal. Broadly, other things being equal, the more varied and complex the trust responsibilities being conducted, the more restrictive the Authority's stance in approving limits greater than \$30 million.

All applications for a trust licence, whether limited or unlimited, must be made using Form T1 and accompanied by such fees as may be prescribed (see appendix 1 for the current Fee Schedule). A copy of the application form is in Appendix 2 of these Notes and is also available in electronic form on the Authority's website (www.bma.bm). As a first step, proposed applicants are encouraged to contact the Authority, prior to submitting a formal application, to discuss their proposals and how the minimum licensing criteria will be met.

Along with Form T1, pursuant to section 11(6) of the Act, an applicant must submit a statement setting out the nature and scale of the trust business that is to be carried on (ie a detailed business plan). The details which are to be included in this statement are set out in Appendix 3. The minimum licensing criteria are the same for both limited and unlimited licensees – controllers/officers to be fit and proper persons, business to be conducted in a prudent manner [eg adequate insurance] with necessary integrity and skill etc – subject to certain minor differences between companies, partnerships and individuals (eg different level of minimum net assets required to be maintained). These are also certain related differences in the Act's requirements (eg limited licensees are not subject to the requirement to produce audited financial statements). The Statement of Principles,

published under the Act, should be consulted for more details on these differences.

The Authority also requires that an applicant submit as appropriate completed Personal or Institutional Questionnaires (Appendix 4 & 5). Questionnaires are required from each shareholder/controller, director and officer (as defined in sections 2 and 4 of the Act).

In considering an application for a trust business licence, the Authority may: -

- a) carry out any enquiries which it considers appropriate (eg approaching other regulators);
- b) ask the applicant, or any specified representative of the applicant, to attend a meeting with the Authority to answer questions and explain any matter the Authority considers relevant to the application;
- c) seek additional information from the applicant;
- d) visit the applicant to review proposed premises and files regarding business that it is proposed to transfer into the licensed entity;
- e) request any information furnished by the applicant to be verified in such manner as the Authority may specify; and
- f) take into account any other information which it considers relevant in relation to the application.

The Authority will not grant a licence unless satisfied that the minimum criteria are met or are capable of being met by the applicant. It must be stressed that, even when satisfied, the Authority always retains discretion to refuse an application.

The Act imposes no time limit within which the Authority must reach a decision in respect of an application. In practice the Authority always seeks to deal as promptly as possible with applications. The time required to complete its initial enquiries may vary, however, depending on the nature of the issues which may arise and the difficulty or otherwise in obtaining any additional information which may be necessary. Generally, the Authority would not expect an application to remain outstanding for in excess of 3 months; and in most cases the timetable will be appreciably less.

4.0 SUPERVISORY PROCESS

Supervision enables and requires judgments to be made about the nature of a trust undertaking's business, the quality of its management, the effectiveness of its controls and compliance, the fairness of its treatment of customers and about its financial viability. In order for the Authority to make these judgments, it needs to keep under review information from a range of sources.

The Authority's regulation of trust businesses involves regular discussions with the senior management of licensed firms, together with scrutiny of financial information on the institution's performance, receipt and review of statutory certifications and regular compliance visits to the institution's premises. While the Act provides certain supervisory powers for the Authority to require information from institutions, the Authority expects undertakings to provide voluntarily and routinely the information necessary for its supervision. When concerns arise about the completeness or timeliness of such information, the Authority may decide to utilise its formal powers to require information.

The Act also enables the Authority to commission reports on an institution's business from an accountant or other person with relevant professional skills. Use of this provision can offer an alternative means of conducting part of the on-site element of regulation which is required. However, this route will normally be used only exceptionally, when the nature of the specific business may call for particular skills in order to conduct a fuller review of the risks involved in the business or where particular concern or difficulties may have arisen in the Authority's normal on-site work.

4.1 Reporting Requirements

The Act requires that companies holding unlimited trust licences provide the Authority with audited financial information on an annual basis, submitted not later than four months after the end of their financial year. The Act also requires that each licensed trust undertaking annually provides a certificate to the Authority confirming that it has complied with all the statutory requirements (ie minimum criteria, codes of conduct and, in the case of an undertaking which is not a company, the limitations imposed by Section 11[A] [1] and [2]) or indicating any failure to do so. The form that such certificates should take can be found on the Authority's website.

In addition to this reporting, the Authority should be notified immediately of any significant developments in relation to an undertaking. Matters that should be reported include, but are not limited to, the following:

- (i) any breach of minimum capital adequacy or expectation that a breach may be likely;
- (ii) any change in key personnel ;
- (iii) instances of suits against the company for breach of fiduciary responsibilities; and
- (iv) material changes in the business undertaken, including any proposal to undertake non-trust related business.

The Authority would stress that it expects undertakings to be open and proactive in ensuring that the Authority is kept informed of material developments when, or before, they occur.

Where the Authority finds reason to suspect the completeness or accuracy of information provided to it in its routine supervision, it will consider the use of the statutory powers in the Act enabling it to require additional documents or information. Depending on the seriousness of its concerns, it may also have recourse to other information and intervention powers provided in the Act – for example, the appointment of persons to investigate under section 39.

4.2 Off – Site Supervision

Soon after an undertaking's annual financial statements and compliance certificate have been received and reviewed, the Authority will contact the undertaking to arrange a suitable time/date for an annual discussion. These regular discussions provide an opportunity for the Authority to obtain an update on the development of the institution's business, including both past performance and future strategies. Ad hoc meetings may also be scheduled to discuss important interim developments or concerns.

Topics raised in the annual discussion are likely to include: -

- a) Trends and significant changes observed in annual financial statements, including capital adequacy (and the impact of any connected exposures)
- b) Any planned changes to business strategies
- c) "Management letters" issued by external auditors (where applicable)
- d) Material operational changes, changes in advisors, custodians, key staff members, etc.
- e) Internal controls issues
- f) Anti-Money Laundering issues
- g) Disaster recovery planning
- h) Staff training
- i) Adequacy of procedures manuals

Prudential discussions can take place at the Authority or at the undertaking's own premises. Alternatively, telephone interviews may be used in some instances.

4.3 On – Site Supervision

The purpose of on-site supervision is to enable the Authority to review compliance with policies and procedures (eg record keeping, segregation of assets etc), as well as the processes that management have put into place to monitor and control key risks in the business. On-site supervision involves structured visits to an undertaking's offices when, typically, the Authority interviews a range of management and staff and reviews a selection of individual trust files. A review of compliance with "know your customer" and record keeping requirements, in relation to the Proceeds of Crime Act, forms part of all of the Authority's visits.

On-site visits will usually be scheduled on a three-year rolling basis. However, the frequency of on-site visits will also reflect the Authority's assessment of the degree of risk in the business and the effectiveness of the undertaking's personnel, systems and controls for monitoring risk. Trust undertakings can normally expect to be pre-notified at the beginning of the respective calendar year in which a visit will take place. In exceptional cases (ie where the Authority has material concerns for the interests of clients or about the financial position of the trust undertaking) the Authority may conduct a visit at short or even no notice. There will not usually be a need for a separate off-site supervisory discussion in a year when a trust undertaking is scheduled for an on-site visit.

The Authority will normally write to a licensed undertaking approximately four to six weeks ahead of a visit, requesting pre-visit information and providing more details regarding how the Authority intends to structure the visit. The pre-visit information requested would generally include:

- i) A staff chart for the undertaking with brief job descriptions for key personnel;
- ii) A completed copy of the Authority's questionnaire on the undertaking's compliance with Proceeds of Crime Act;
- iii) Copies of procedures manuals;
- iv) Copies of staff training plans; and
- v) Copies of disaster recovery plans.

While the Act provides powers for the Authority to formally require the production and submission of such information as it may reasonably require, on-site visits are normally conducted without recourse to formal powers.

The Authority has agreed that, in the recourse of its detailed compliance testing reviews of trust files, it will not copy or remove material identifying the names of individual settlors or beneficiaries. The Authority is, in any case, statutorily prohibited from passing such information to other regulators pursuant to section 50 (4) of the Act.

4.4 Consolidated Supervision

Although the Authority licenses specific individuals or entities, it also needs to have regard to relationships with any wider group to which an entity may belong or with other persons closely linked to the trust provider, which may have implications for the licensed undertaking. The Authority reviews these aspects in the course of its routine supervision. Where relevant, the Authority may also agree to take on a wider role of consolidated supervisor in relation to a trust undertaking and related institutions.