

BERMUDA MONETARY AUTHORITY

INVESTMENT FUNDS ACT 2006 FUND ADMINISTRATORS

INFORMATION FOR PROSPECTIVE APPLICANTS

AND

GUIDANCE NOTES

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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 provisions of Part III of the Investment Funds Act 2006 (the “Act”) and the supervisory process applied by the Authority.

2.0 REGULATORY SCOPE

The Act provides for a licensing regime for any company carrying on the business of a fund administrator as defined by the Act, either in or from Bermuda.

Section 2(2) of the Act defines a fund administrator as

“...a person who provides any one or more of the following services to a fund –

- (a) applying the subscription monies received by a fund in accordance with its constitution and its prospectus;
- (b) processing the issue, conversion and redemption of units of a fund;
- (c) applying the income of a fund in accordance with its constitution and its prospectus;
- (d) calculating the net asset value of the units, and their issue, conversion and redemption price;
- (e) maintaining the accounts of a fund;
- (f) distributing to the participants of a fund all dividends or other distributions which may from time to time be declared and paid by it on units in a fund.

The Act is designed to capture companies that are in the business of fund administration namely the provision by way of business of any one or more of the services set out in (a) to (f) above. If a company has been established for the purpose of carrying on fund administration or if it holds itself out as being in the business of fund administration, then it requires a licence under the Act.

Prospective applicants should refer to the applicable provisions of the Act to familiarize themselves with the requirements. If there is any uncertainty in this regard prospective applicants are encouraged to contact the Authority to seek clarification.

3.0 APPLICATIONS

An application for a licence under the Act may be made by a Local or Exempted Company incorporated under the Bermuda Companies Act 1981 (the “Companies Act”) or an Overseas (Permit) Company licensed by the Minister of Finance under the Companies Act to conduct business in Bermuda. As a transitional provision, the Act provides that those conducting fund administration on the date of implementation of the Act may continue to conduct such business for 12 months or, if within that period an application is made for a licence, until that application is disposed of or withdrawn.

An application for a licence must be made in the form directed by the Authority and accompanied by such fees as may be prescribed under the Bermuda Monetary Authority Act 1969 (refer to the “Fees and Penalties” section of the Authority’s website, www.bma.bm). A copy of the Application Form (FA Form 1) can be found in Appendix I and is available in electronic form on the Authority’s web site.

An applicant must submit a business plan setting out the nature and scale of the fund administration business that is to be carried on. The details which are to be included in this business plan are set out in Appendix II, also available in electronic form on the Authority’s web site.

The Authority also requires that an applicant submit completed Institutional and/ or Personal Questionnaires (FA Form 2 and FA Form 3 set out in Appendices III and IV respectively) as applicable. Questionnaires are required from each controller, director and senior executive (as defined in section 2(1) of the Act) responsible for the applicant’s business.

In considering an application for a fund administrator business licence, the Authority may:

- a) carry out any enquiries which it considers appropriate (e.g. 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 matters the Authority considers relevant to the application;
- c) seek additional information from the applicant;
- d) visit the applicant to review the proposed premises and files pertaining to the business that it is proposed to conduct in 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 that it considers relevant in relation to the application.

Before granting a licence the Authority needs to satisfy itself that the minimum criteria have been met or are capable of being met by the applicant. However, even when so satisfied, the Authority retains discretion not to grant a licence - notably if it sees reason to doubt that the criteria will be met on a continuing basis or if it considers that for any reason there might be significant threats to the interests of clients or potential clients.

The Act imposes no time limit within which the Authority must reach a decision in respect of an application. In practice the Authority 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.

4.0 CONTROLLERS & OFFICERS TO BE FIT AND PROPER PERSONS

The Authority reviews the intended roles of each controller, director and senior executive as defined.

In assessing whether a person has the relevant competence, probity, soundness of judgment and diligence, the Authority considers whether the person has had experience of similar responsibilities previously, their record in fulfilling them and, where appropriate, whether the person has suitable qualifications and training.

The Authority also takes into account the person's reputation and character and considers, inter alia, whether the person has a criminal record involving convictions for fraud or other dishonesty. Particular weight is given to whether the person has contravened any provision of investment, banking, insurance, trust, or other legislation designed to protect members of the public against financial loss due to dishonesty, incompetence or malpractice.

Further, the Authority considers whether the person has been involved in any business practices appearing to the Authority to be deceitful or oppressive or improper or which otherwise reflect discredit on his or her method of conducting business. Similarly, failure to conduct past business with integrity and professional skills or having been associated with adverse business practices will reflect negatively on the competence and soundness of judgment of those individuals. For additional guidance, refer to the document "Information Bulletin on Fitness and Propriety" located on the Authority's website.

A licensed company is required to give written notice to the Authority of any change of director, senior executive and controller. Regulation 46(2) provides that notice shall be given within a period of fourteen days after the day on which the company becomes aware of the relevant fact. The Authority conducts a complete review of such persons to determine whether they are fit and proper for their roles. A company that fails to give the required notice is guilty of an offence and liable upon summary conviction to a fine of \$10,000.

5.0 BUSINESS TO BE CONDUCTED IN A PRUDENT MANNER

Paragraph 2(1) of the Schedule provides that a licensed company must conduct its business, in a prudent manner. Any failure by a licensed company to comply with the provisions of the Act or other provisions of law will be taken into account in determining whether the company is conducting its business in a prudent manner.

Pursuant to Section 49, Part III of the Investment Funds Act 2006, the Authority may issue codes of conduct as to the duties, requirements and standards to be complied with, and the procedures and sound principles to be observed by persons carrying on the business of fund administration. Failure on the part of a licensed fund administrator to comply with the provisions of such codes would also be taken into account by the Authority in determining whether the business is being conducted in a prudent manner as required by the Act. No such code has been issued as yet.

Paragraph 2(3) of the Schedule makes it clear that, unless a licensed company maintains minimum net assets of \$50,000, it shall not be regarded as conducting its business in a prudent manner. Licensed fund administrators are expected to closely monitor their net asset position and to alert the Authority in the event of a breach or expected breach.

The Authority also reviews the accounting and other records as well as the systems of control in place within a licensed company in order to ensure that the minimum licensing criteria are complied with. A licensed fund administrator should organise and control its operations in a responsible manner and ensure that it has in place well-defined procedures to enable the company to comply with all regulatory requirements. Employed staff must be suitable, adequately trained and properly supervised.

As a regulated institution, a licensed fund administrator is also required to comply with the Proceeds of Crime Act 1997 and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (the “AML/ ATF Regulations”). As such, it must be constantly vigilant in deterring criminals from making use of its services for the purpose of money laundering and terrorist financing.

The duty of vigilance includes verification; recognition and reporting of suspicious transactions; keeping of “know your client records” and delivering the appropriate anti money laundering training to all staff. The licensed company must ensure that its procedures enable it to determine and verify the true identity of clients and participants in investment funds administered. Copies of photo identification such as a driver’s licence or passport should be retained in compliance with the Proceeds of Crime Act 1997 and relevant guidance notes and codes.

Licensed fund administrators may face a range of potentially major financial risks in their business and paragraph 2(5) of the Schedule stipulates that a licensed company must hold adequate insurance coverage in order to meet the criterion of conducting business in a prudent manner. Relevant types of insurance include the following: errors and omissions/professional indemnity; directors’ and officers’ liabilities; fidelity and forgery; loss of property; computer crime; computer damage; business interruption; office contents. The Authority will review the adequacy of cover in place, having regard to the scale, composition and complexity of the business.

6.0 SUPERVISORY PROCESS

Supervision is intended to assist the Authority to assess the ongoing financial viability of a fund administrator, the fitness and propriety of its management, the prudent conduct of its business and its compliance with the Act.

The Authority’s supervision of fund administration businesses involves regular meetings with the senior management of licensed firms, together with scrutiny of financial and statistical information in connection with the institution’s business activities and periodic compliance visits to the institution’s premises. A review of compliance with “know your customer” and record keeping requirements, in relation to the AML/ ATF Regulations 2008, forms part of all of the Authority’s routine visits.

These visits are normally conducted by agreement and at a mutually agreed time. However, in exceptional cases where the Authority has material concerns for the interests of investors or about the financial position of the fund administrator, the Authority may conduct a visit at short notice or even without notice. The Authority expects institutions to be proactive in alerting it to compliance or other material issues. The Authority also expects licensed institutions to cooperate fully in providing it with all relevant information and documents without its having routine recourse to legal powers as provided under the Section 60 of the Act.

6.1 Reporting Requirements

The Act requires that, on an annual basis, each fund administrator submit a Statement to the Authority confirming that it has complied with the requirements of Part III of the Act or indicating any failure to do so. A company that fails to provide the Statement as required by section 47(a) or give the particulars as required by section 47 (b) is guilty of an offence and is liable on summary conviction to a fine of \$10,000. A copy of the compliance certificate Form 4 appears at Appendix V and is also available in electronic form on the Authority's web site.

Annual financial statements are required from fund administrators annually. Statements must be submitted to the Authority within 4 months of each financial year end.

The Authority expects the Fund Administrator at all times to liaise openly and in the spirit of co-operation with the Authority. This includes notifying the Authority of any proposal to extend its business lines, make significant changes to key aspects of its operations, systems of controls, as well as any breaches in the requirements and expected standards of behaviour.