

**BERMUDA MONETARY AUTHORITY**

**CONSULTATION PAPER**

**PROPOSED ENHANCEMENT OF  
BERMUDA'S CORPORATE REGISTRATION PROCESS**

December 19, 2008

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## **Glossary**

BMA/Authority	Bermuda Monetary Authority
CRP	Corporate Registration Process
CSP	Corporate Service Provider
e-filing	Electronic Filing of applications
MOF	Ministry of Finance
OGBS	Offshore Group of Banking Supervisors
POCA	Proceeds of Crime legislation
ROC	Registrar of Companies
Companies	References to companies and their incorporation should be read to include partnerships and their establishment, also the issue of permits for overseas companies and partnerships

## **Introduction**

In keeping with its mandate as a leading financial services regulator the Authority continually assesses its framework and operations to ensure that its systems and processes are efficient, competitive and consistent with international best practices. In this regard the Authority in its 2008 Business Plan indicated that it would conduct a review of its corporate registration process.

The primary objective of the review was to identify and propose courses of action for the enhancement of Bermuda's corporate registration system. The aim was to support and maintain Bermuda's position as a domicile of choice for corporate registration while preserving its reputation as a quality international financial centre.

The review commenced in the first quarter of 2008 and involved preliminary consultation with stakeholders. A thorough examination of the current registration system was conducted and extensive research into corporate registration frameworks of peer jurisdictions was undertaken.

This consultation paper sets out the Authority's proposals to improve and enhance the CRP in Bermuda. Stakeholders are invited to respond to the questions raised in this paper with respect thereto. Respondents should be aware that any implementation of any of the proposals outlined in this paper will be subject to the agreement of the MOF, ROC and other relevant authorities.

The Authority welcomes comments from interested parties, which should be submitted to the Authority on or before 31 January 2009 as per the address details set out below:

The Bermuda Monetary Authority

BMA House

43 Victoria Street, Hamilton, HM12

Attention: Assistant Director of Legal Services and Enforcement,

Cyralene Benskin-Murray

## I. BACKGROUND

### Role of the Authority

1. The Authority's role in connection with the incorporation of companies is, on behalf of the Ministry of Finance, to process applications, to establish corporate entities in Bermuda and thereafter make recommendations to the Minister of Finance.<sup>1</sup>
2. The Authority also, on behalf of the Controller of Foreign Exchange and pursuant to its obligations under the Exchange Control Act 1972 and related regulations (the "Exchange Control Act"), where appropriate, grants approval for the issuance and subsequent transfer of Bermuda company securities to those persons deemed to be 'non residents' for exchange control purposes.

### Current process

3. In order for a company to be incorporated in Bermuda, two bodies are generally involved in the corporate authorization process - the Authority and the ROC. The Authority acts as the central repository for applications for incorporation of entities including exempted, local, permit, partnerships and establishment of unit trusts. The Authority vets applications and in particular ultimate beneficial owners, and makes a recommendations to the ROC who has ultimate responsibility to register companies and issue the appropriate certification.
4. In addition to the above process, for restricted activities companies, permit companies and partnerships consent of the Minister of Finance is required in order for a company to be incorporated.
5. The current procedure to incorporate a company in Bermuda requires applicants to submit hard copies of corporate registration documents together with the requisite cheque to the Authority. The Authority reviews those documents and vets applications for accuracy and completeness before conducting due diligence of the owners and in particular the beneficial owners of entities.
6. This vetting includes the required forms, newspaper advertisements and checking to ensure general compliance with MOF policies, including compliance with the 60/40 ownership rules etc. It also includes ensuring

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<sup>1</sup> It is the responsibility of the Authority as agents of the Minister of Finance (the "Minister") under section 21 (d) of the Bermuda Monetary Authority Act 1969, to process applications and make recommendations to the Minister in relation to matters relating, ancillary or consequential in respect thereof; which may occur before or after such incorporation application. (*Bermuda Monetary Authority Act 1969*)

that the proposed activities are not restricted and drafting of requisite partnership and consent forms for the Minister of Finance where necessary.

7. Currently, ninety percent (90%) of incorporation applications are approved within 2 to 24 hours, with entities listed on an appointed stock exchange, and those whose owners are known to the Authority approved within 1 hour. Permission to issue the shares of the new entity is generally given simultaneously by the Authority on behalf of the Controller of Foreign Exchange.
8. Share transfer applications are vetted and where appropriate approved solely by the Authority on behalf of the Controller of Foreign Exchange and do not require approval of any other authority/body.

#### *Perceived Inefficiencies*

9. Anecdotal evidence suggests that the “relay” process described in 3 and 4 above has, in the past, been perceived by some stakeholders as having inherent inefficiencies namely, increase processing time as a result of the involvement of two, and on some occasions, three authorities.
10. Further, a significant portion of the delay in approval of new corporate entities arises from the manual checking and rejection of applications by Authority staff. Incorrect and/or incomplete filings made to the Authority by applicants result in a delay in approval as the Authority awaits amended or further information in order to proceed with the applications. The processing of requests for amendments currently accounts for 20% of the work administered by the Authority.
11. In connection therewith, application fees can only be paid by cheque. A second contributor to the processing time has been the need for the Authority to check the accuracy of payment details, dates and amounts on cheques. When errors are found on cheques the processing of applications are delayed until a correct cheque is received.

## **II. PROPOSALS FOR ENHANCEMENT**

### *Introduction*

12. The Authority proposes to enhance the existing regime through the adoption of an e-filing framework. This enhancement aims, through the leveraging of technology, to reduce the delays attributable to manual checking of paper documents. While the Authority's current speed of registration is already competitive with other peer jurisdictions, the implementation of e-filing is expected to result in greater efficiency in the processing of incorporation and share transfer applications.
13. Under this proposal the Authority would retain responsibility for the CRP in Bermuda. The Authority is of the view that the current CRP regime protects the reputation of Bermuda and with an e-filing enhancement, can permit even more timely registration of corporate entities. In particular the Authority notes that:
  - (i) In a recent stakeholder survey conducted by the Authority over seventy-five percent (75%) of respondents felt that the Authority's company incorporation and authorization processes were efficient and were meeting client needs.
  - (ii) supranational bodies and domestic stakeholders value the 'Know Your Client' (KYC) role conducted by the Authority as an important safeguard to the reputation of the jurisdiction;
  - (iii) the existing CRP can be improved without fundamental change of approach or substantive legislative changes; and
  - (iv) an alternative CRP framework could still require the Authority to retain a role possibly as the central repository of beneficial ownership information.
14. While the Authority proposes to retain and enhance the current system the Authority, in conjunction with the MOF, is open to the views of the market and will consider carefully any comments from Industry.

### *E-Filing Framework*

15. The Authority would permit the electronic submission and approval of applications for incorporation and share issue and transfers. Incomplete applications would be rejected by the system electronically. Applications would be tracked and monitored via built-in "prompting/alerting"

measures and permission or rejection confirmations would also be sent to persons electronically as appropriate.

16. The Authority further proposes concurrently to introduce an additional payment system. The new system would permit persons to pay for incorporation application fees via a “draw-down” system whereby persons open and maintain an account with the Authority which is debited each time an application is submitted. An option to submit a cheque in the required amount would still be available to small CSPs who submit less than 10 applications a year.
17. The introduction of an e-filing framework would provide features and benefits comparable to other corporate registration frameworks examined namely of the following:-
  - **Speed of registration** – the processing time required to incorporate a company would be further reduced with complete applications being determined the same day or within 24 hours at most.
  - **Low reputational risk** – Possible damage to the reputation of Bermuda and/or the Authority would continue to be low. Bermuda’s current reputation would be maintained or enhanced as the Authority, a public body, would remain responsible for vetting of owners.

In addition the Authority anticipates that this framework could be implemented in 2009 because of the following :-

- **Interim period** – the time delay between the finalization of the design of the e-filing framework and its implementation would be relatively short - 12 months or less.
  - **Within Government policy** – No change of Government policy is required to implement e-filing.
  - **Barriers to entry/participation not created** - (staff, technology, etc.) – It is anticipated that there would be limited costs to small CSPs /local persons in utilizing the upgraded e-filing system.
  - **Legislative changes not required** – No legislation or regulation is required to be drafted and /or brought into force in connection with the implementation of e-filing.
18. The Authority is of the view that the efficiency gains from e-filing would allow Bermuda to continue to be competitive.
  19. It should be noted that should this framework be implemented, it is the intention of the Authority to retain this CRP for a minimum of (3) three years, as research has shown that there is no cost benefit to the Authority to retain the regime for a lesser time frame.

20. The Authority is considering two options available to it to implement the e-filing and “draw-down” payment system. The options are as follows:
- (a) Implement an e-filing regime as soon as practicable;
  - (b) Permit an extended transition period of 6 months or more prior to the full implementation of e-filing;
21. Subsequent consultation with stakeholders will be undertaken in order for the Authority to determine the design and the most cost/time effective implementation of the new e filing system. The Authority will seek to ensure that the system selected is accessible and user friendly for its customers.
22. QUESTIONS
- 22.1 Which of the two options in paragraph 20 do you prefer, if any? Please state reasons.
- 22.2 What are your views with respect to this proposal?

### **III. ALTERNATIVE FRAMEWORK**

#### *Introduction*

23. As part of the review the Authority examined the corporate registration regimes of a number of jurisdictions. In quality peer jurisdictions where CSPs performed company formation and/or management functions CSPs were licensed by a supervisory authority. International best practices for CSP regimes recommend that at a minimum “fitness and propriety” test be implemented for managers of CSPs. In addition the imposition of responsibility for compliance with KYC and other minimum standards including being subject to the oversight of a supervisory authority, would be imposed.
24. The introduction of a licensing framework would require the introduction of a new policy and legislative framework. The licensing framework set out below seeks to ensure that Bermuda maintains a CRP framework which would be in keeping with international best practices and thereby maintains the jurisdiction’s reputation as a quality financial center.
25. The Authority has analyzed the reputational risk element intrinsic in any corporate registration system. The Authority has carried out vetting duties over many decades and has built up a track record of zealously protecting and safeguarding Bermuda’s reputation. Whilst the Authority’s processes and procedures has contributed to its success as “gatekeeper”, a key factor to its success is due to the public nature of the Authority’s role. The Authority is a statutory body mandated by legislation to discharge its duties for the benefit of the public.
26. Any alternate corporate registration system that changes this landscape i.e. transfers the “gatekeeping role” to the private sector will unavoidably trigger the emergence of a risk inherent in shifting from public to a private sector. The private service which acts for commercial purposes as well will be required to service competing interests. The Authority’s role does not give rise to such a conflict. This is a matter which has been considered at length by the Authority, and after much consideration the Authority is of the view that maintaining the status quo and enhancing the current process through e-filing is, at this juncture, the best measure to be adopted by Bermuda.
27. In light of the apparent advantages of the status quo the Authority is looking for respondents to present a compelling case for change as the Authority will otherwise be minded to recommend to the MoF that the status quo (with e-filing) be retained unless there is a clear consensus in the market in favour of adopting a licensing regime.

Licensing Regime

28. CSPs would be required to be licensed by a supervisory authority and contingent upon the services they provide, CSPs would be licensed as a Class 1 or a Class 2 CSP.

**Class 1 License**

A CSP will be required to hold a Class1 license if it provides the following corporate service(s):

- Acts as company formation agent (i.e., arranging the registration/formation or sale, transfer or disposal of companies or providing for the subscribers to a Memorandum of Association) **either exclusively/together with one or more of the following services:**
- Providing a registered office or business address for a company;
- Providing a correspondence or administrative address for a company or any other person;
- Filing statutory forms, resolutions, returns and notices; and
- Accepting service of process and any other notices on behalf of the company.

**Class 2 License**

A CSP will be required to hold a Class 2 license if it provides the services listed below or in the provision of corporate services, it **manages/holds client's assets:**

- Providing for company management services involving the control of the whole or substantial portion of the company assets;
- Acting as or arranging for another person to be an officer of the company;
- Acting as nominee shareholder of the company;
- Acting as director or alternate director of the company;
- Acting or arranging for another person to act as secretary, alternate, assistant or deputy secretary of the company; and

29. In keeping with the recommendations and best practices guidelines promulgated by the OGBS (please refer to Appendix 1), at a minimum, all CSPs could also be given specific obligations which would require them to (a) comply with customers due diligence (KYC), (b) record-keeping requirements, (c) maintain a minimum level of capital commensurate with the risk profile and (d) satisfy fitness and propriety standards vis-à-vis managers and/owners.

A higher level of supervision will be required for CSPs that manage or hold clients assets. Therefore Class 2 CSPs would also be required to meet and maintain the minimum licensing criteria requirements similar to those established for other fiduciaries such as trust service providers. Please refer to the Appendix 2 which sets out existing minimum licensing criteria currently established for trust service providers and which could be adopted for corporate service providers with the necessary modifications vis-à-vis capital requirements etc.

30. The Authority's role in the corporate registration process would be terminated with the relevant functions being transferred to licensed CSPs. The responsibility for due diligence review, vetting of beneficial owners applications and subsequent transfer of shares would also be handled by licensed CSPs. It is anticipated at this stage that the current functions discharged by the RoC as they relate to registration of companies would remain unchanged.
31. Further, responsibility for the maintenance of a register of beneficial owners of Bermuda registered securities may be placed on CSPs.
32. This framework would require substantive amendment and enactment of legislation to -

32.1 provide for the licensing of CSPs by a supervisory authority;

32.2 terminate the Authority's role in the CRP as agent of the Minister of Finance;

In addition this framework would require that consideration be given to the repeal of the Exchange Control Act and the substitution of a new framework for regulating the transfer of securities.

33. The introduction of a licensing regime may provide features and benefits comparable to other corporate registration frameworks examined namely:-
- **Speed of registration** – the processing time currently required to incorporate a company would be further reduced as the Authority's involvement would be removed thereby eliminating one step from the process.

- **Limited reputational risk** – A supervisory body would have oversight of CSPs and remedial action could be taken by the relevant authority to redress CSP failures. However, as noted in 26 above, there may be a risk to the reputation of the jurisdiction if the role of ‘gatekeeper’ shifts from that of the Authority to licensed CSPs.

It is however anticipated that the implementation of a licensing regime will require further consultation with stakeholders and as a result the following should be noted:-

- **Interim period** – the time delay between the finalization of the design of a licensing framework and its implementation is expected to exceed 12 months.
- **Changes to Government policy will be required** – Government policy is required to implement a licensing framework.
- **Barriers to entry/participation not created** (staff, technology, etc.) – It is anticipated that there would be limited costs to small CSPs/local persons who provide Class 1 services.
- **Legislative changes are required** – Legislation will need to be drafted and/or brought into force in connection with the implementation of a licensing framework.

#### 34. Questions

- 34.1 Should the Authority adopt an e-filing regime; or should Bermuda move directly to the licensing of CSPs?
- 34.2 What would the resource implications be for service providers should Bermuda decided to further enhance the corporate registration system by implementing (a) e-filing or (b) licensing?
- 34.3. In addition to the frameworks outlined above, are there any other potential enhancements that you feel should be given consideration?

**APPENDIX 1**  
**SUMMARY OF RECOMMENDATIONS**  
**AND BEST PRACTICE**  
**GUIDELINES BY THE OGBS**  
**FOR CORPORATE SERVICE PROVIDERS**

**Section A:** All countries/jurisdictions should require that where Service Providers are responsible for handling/managing funds/assets:

- a) Individuals holding key positions providing the service should be persons of integrity and should exhibit evidence of having (i) no relevant adverse business/professional/personal history; and (ii) having relevant and appropriate level of competence/capability.
- b) Individuals providing service should exhibit evidence that their business will be or is being conducted in accordance with the following requirements: (i) Corporate Governance; (ii) Customer due diligence; (iii) Proper conduct of client business; (iv) Financial Soundness; and (v) Adequate systems and controls in place.
- c) There should be the proper provision for holding, having access to and sharing of information, including ensuring that:-
  - (i) The ultimate beneficial owner and/or controllers of companies are known to the service provider and is properly recorded;
  - (ii) Any change of client control/ownership is promptly monitored; and
  - (iii) There is an adequate, effective and appropriate mechanism in place for information to be made available to all relevant authorities (i.e. regulatory bodies, FIU) and there are no barriers to the appropriate flow of information to these authorities.

**Section B:** All countries/jurisdictions should make proper provision to ensure that:-

- a) The interest of customer/client can be adequately safeguarded when the Service Provider is no longer able to carry on the business for any reason;

- b) External auditors with relevant experience and appropriate qualifications and track record are appointed to carry out full audit of the Service Provider's business in accordance with international standards;
- c) External auditors have the statutory authority/protection to report to the competent authorities any breaches of relevant legislation or other material concerns;
- d) Adequate provisions are in place to ensure that regular independent reviews are conducted of all Service Providers who carry out business in or from the country/jurisdiction to assess compliance with the statement of best practice and national anti-money laundering legislation; and that action can be taken where there is evidence of non-compliance.

**Section C:** Service Providers in all countries/jurisdictions should comply with the statement of best practice. However it is recognized that where Service Providers are not responsible for handling/managing funds/assets and carries on business that might be perceived as lower risk, a lighter touch may be applied, according to the nature and scope of the business activity.

## APPENDIX 2

### CURRENT MINIMUM CRITERIA FOR LICENSING FOR TRUST SERVICE PROVIDERS

#### *Controllers and officers to be fit and proper persons*

1. (1) Every person who is, or is to be, a controller or officer of the undertaking<sup>2</sup> is a fit and proper person to hold the particular position which he holds or is to hold.

(2) In determining whether a person is a fit and proper person to hold any particular position, regard shall be had to his probity, to his competence and soundness of judgment for fulfilling the responsibilities of that position, to the diligence with which he is fulfilling or likely to fulfill those responsibilities and to whether the interests of clients or potential clients of the undertaking are, or are likely to be, in any way threatened by his holding that position.

(3) Without prejudice to the generality of the foregoing provisions, regard may be had to the previous conduct and activities in business or financial matters of the person in question and, in particular, to any evidence that he has:

- (a) Committed an offence involving fraud or other dishonesty or violence;
- (b) Contravened any provision made by or under any enactment appearing to the Authority to be designed for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice by persons concerned in the provision of banking, insurance, investment or other financial services or the management of companies or against financial loss due to the conduct of discharged or undischarged bankrupts;
- (c) Engaged in any business practices appearing to the Authority to be deceitful or oppressive or otherwise improper (whether

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<sup>2</sup> "undertaking" means (a) a company; (b) a partnership; or (c) an individual (*Trusts Regulation of Trust Business Act 2001*)

lawful or not) or which otherwise reflect discredit on his method of conducting business;

- (d) Engaged in or has been associated with any other business practices or otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgment.

*Business to be directed by at least two individuals*

- 2. In the case of an undertaking which is a company or a partnership, at least two individuals must effectively direct the business of the undertaking.
- 3. In any other case, one person may direct the business if so approved by the Authority having regard to the circumstances of the undertaking and the nature and scale of its operations.

*Composition of board of directors*

- 4. In an undertaking which is a company, the directors include such number (if any) of directors without executive responsibility for the management of its business as the Authority considers appropriate having regard to the circumstances of the undertaking and the nature and scale of its operations.

*Business to be conducted in prudent manner*

- 5. (1) The undertaking will conduct its business in a prudent manner.
  - (2) In determining whether an undertaking is conducting its business in a prudent manner, the Authority shall take into account any failure by the undertaking to comply with any provisions of law and any code of practice.
  - (3) An undertaking shall not be regarded as conducting its business in a prudent manner unless it maintains or, as the case may be, will maintain minimum net assets:
    - (a) Amounting to \$250,000 in the case of an undertaking which is a company; and
    - (b) \$25,000 in any other case;or such larger amount as the Authority may require for any particular undertaking.
  - (4) An undertaking shall not be regarded as conducting its business in a prudent manner unless it makes or, as the case may be, will maintain adequate

accounting and other records of its business and adequate systems of control of its business and records.

(5) Those records and systems shall not be regarded as adequate unless they are such as to enable the business of the undertaking to be prudently managed and the undertaking to comply with the duties imposed on it by any provision of law. In determining whether those systems are adequate the Authority shall have regard to the functions and responsibilities in respect of them of any directors of the undertaking as are mentioned in paragraph 4, above.

(6) An undertaking shall not be regarded as conducting its business in a prudent manner unless it has effected a policy of insurance to cover risks inherent in the operation of its business of an amount commensurate with the nature and scale of the undertaking's operations.

#### *Consolidated supervision*

6. The position of the undertaking within the structure of any group to which it may belong or its links with any related companies shall be such that it will not obstruct the conduct of effective consolidated supervision.

#### *Integrity and skill*

7. The business of the undertaking will be carried on with integrity and the professional skills appropriate to the nature and scale of its activities.