

# **TRUSTS (REGULATION OF TRUST BUSINESS) ACT 2001**

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**BERMUDA  
2001 : 22**

## **TRUSTS (REGULATION OF TRUST BUSINESS) ACT 2001**

[Date of Assent: 8 August 2001]

[Operative Date: 25 January 2002]

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WHEREAS it is expedient to make new provision for regulating trust business; for the protection of the interests of clients or potential clients of persons carrying on trust business; and for purposes connected with those matters:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:—

### PRELIMINARY

#### **Short title and commencement**

1. This Act may be cited as the Trusts (Regulation of Trust Business) Act 2001, and shall come into operation on such day as the Minister may appoint by notice published in the Gazette.

#### **Interpretation**

2. In this Act, unless the context requires otherwise—

"accountant" means a person entitled to practise as a public accountant under the Institute of Chartered Accountants of Bermuda Act 1973 ;

"Act" includes regulations and orders made thereunder;

"associate" has the meaning given in section 4(9);

"the Authority" means the Bermuda Monetary Authority established by the Bermuda Monetary Authority Act 1969;

"code of practice" means a code of practice issued by the Authority pursuant to section 7;

"client" in relation to a licensed undertaking, means a trust administered by the undertaking and includes a settlor and a beneficiary under a trust;

"company" means a body corporate wherever incorporated;

"controller" has the meaning given in section 4(3);

"court" means the Supreme Court;

"director" has the meaning given in section 4(2);

"documents" includes information recorded in any form; and in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form;

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"financial statements" in relation to the business of an undertaking which is a company, means the statements specified in subsection (1)(a) and the notes mentioned in subsection (1A) of section 84 of the Companies Act 1981;

"financial year" means the period not exceeding fifty-three weeks at the end of which the balance of an undertaking's accounts is struck or, if no such balance is struck or a period of more than fifty-three weeks is employed for that purpose, then calendar year;

"holding company" has the meaning given in section 86(2) of the Companies Act 1981;

"licence" means a licence issued by the Authority under this Act and "licensee" and "licensed" shall be construed accordingly;

"Minister" means the Minister of Finance;

"minimum criteria" means the minimum criteria for licensing specified in the First Schedule;

"officer", in relation to an undertaking, includes director, secretary or senior executive of the undertaking by whatever name called;

"partnership" means a partnership formed under the Partnership Act 1902;

"related company" has the meaning given in section 3;

"senior executive" has the meaning given in section 4(7);

"share" has the meaning given in section 2 of the Companies Act 1981;

"shareholder controller" has the meaning given in section 4(5);

"subsidiary" has the meaning given in section 86 of the Companies Act 1981;

"trust" has the meaning given in section 2 of the Trusts (Special Provisions) Act 1989;

"trust business" has the meaning given in section 9(3);

"undertaking" means —

- (a) a company;
- (b) a partnership; or
- (c) an individual.

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### **Meaning of "related company"**

3. (1) In this Act, a "related company" in relation to an undertaking or the parent company of such undertaking, means a company (other than a subsidiary company) in which the undertaking or the parent company, as the case may be, holds a qualifying capital interest.

(2) A qualifying capital interest means an interest in relevant shares of the company which the undertaking or parent company holds on a long term basis for the purpose of securing a contribution to its own activities by the exercise of control or influence arising from that interest.

(3) A holding of 20 per cent or more of the nominal value of the relevant shares of a company shall be presumed to be a qualifying capital interest unless the contrary is shown.

(4) Relevant shares means shares comprised in the equity share capital of the company of a class carrying rights to vote in all circumstances at general meetings of the company.

(5) Equity share capital means the issued share capital of a company excluding any part of that capital which, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified amount in a distribution.

### **Meaning of "director", "controller", "senior executive" and "associate"**

4. (1) In this Act "director", "controller", "senior executive" and "associate" shall be construed in accordance with the provisions of this section.

(2) "Director" in relation to an undertaking, includes—

- (a) any person who occupies the position of director, by whatever name called; and
- (b) in the case of a partnership, "director" where it is used in subsections (7) and (8), includes a partner.

(3) "Controller" in relation to an undertaking, means —

- (a) a managing director of the undertaking or of another company of which it is a subsidiary;
- (b) in the case of an undertaking which is a partnership, a partner;
- (c) in the case of an undertaking which is neither a company nor a partnership, a sole proprietor;
- (d) a chief executive of the undertaking or of another company of which it is a subsidiary;

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- (e) a person who satisfies the requirements of this paragraph; and
  - (f) a person in accordance with whose directions or instructions the directors of the undertaking or of another company of which it is a subsidiary or persons who are controllers of the undertaking by virtue of paragraph (e) (or any of them) are accustomed to act.
- (4) A person satisfies the requirements of subsection (3)(e) in relation to an undertaking if, either alone or with any associate or associates—
- (a) he holds 10 per cent or more of the shares in the undertaking or another company of which it is a subsidiary company;
  - (b) he is entitled to exercise or control the exercise of 10 per cent or more of the voting power at any general meeting of the undertaking or another company of which it is such a subsidiary; or
  - (c) he is able to exercise a significant influence over the management of the undertaking or another company of which it is such a subsidiary by virtue of—
    - (i) a holding of shares in; or
    - (ii) an entitlement to exercise, or control the exercise of, the voting power at any general meeting of,  
the undertaking, or as the case may be, the other company concerned.
- (5) A person who is a controller of an undertaking by virtue of subsection (3)(e) is in this Act referred to as a "shareholder controller" of the undertaking; and in this Act "majority shareholder controller" means a shareholder controller in whose case the percentage referred to in the relevant paragraph is 50 or more .
- (6) In subsection (5), "the relevant paragraph" in relation to a shareholder controller means whichever one of paragraphs (a) and (b) of subsection (4) gives the greater percentage in his case.
- (7) "Senior executive", in relation to an undertaking, means a person (other than a chief executive) who, under the immediate authority of a director or chief executive of the undertaking—
- (a) exercises managerial functions; or
  - (b) is responsible for maintaining accounts or other records of the undertaking.

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(8) In this section "chief executive" in relation to an undertaking, means a person who, either alone or jointly with one or more persons, is responsible under the immediate authority of the directors for the conduct of the business of the undertaking.

(9) In this Act "associate" in relation to a person entitled to exercise or control the exercise of voting power in relation to, or holding shares in, a company, means—

(a) if that person is an individual—

- (i) the spouse, child, step-child or parent of that person;
- (ii) the trustees of any settlement under which that person has a life interest in possession;
- (iii) any company of which that person is a director;
- (iv) any person who is an employee or partner of that person;

(b) if that person is a company —

- (i) any director of that company;
- (ii) any subsidiary of that company ;
- (iii) any director or employee of any such subsidiary company;

(c) if that person has with any other person an agreement or arrangement with respect to the acquisition, holding or disposal of shares or other interests in that company or under which they undertake to act together in exercising their voting power in relation to it, that other person.

(10) For the purpose of subsection (9), "settlement" includes any disposition or arrangement under which property is held in trust.

### **Carrying on trust business in Bermuda**

4A. (1) For the purposes of this Act, a person carries on trust business in or from within Bermuda if such person—

- (a) carries on trust business from a place of business maintained by such person in Bermuda;
- (b) satisfies the requirements of this paragraph; or
- (c) discharges in Bermuda the duties of a trustee the discharge of which constitutes the carrying on by such person of trust business in Bermuda under an order made under subsection (3).

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(2) A person satisfies the requirements of paragraph (b) of subsection (1) if such person —

- (a) is a company incorporated or registered in Bermuda; or
- (b) is a partnership registered in Bermuda; and
- (c) is carrying on trust business from a place of business outside of Bermuda.

(3) The Minister acting on the advice of the Authority, may make an order specifying the circumstances in which a person is to be regarded for the purpose of this section as —

- (a) carrying on trust business in Bermuda;
- (b) not carrying on trust business in Bermuda.

(4) An order under subsection (3) may be made so as to apply —

- (a) generally to all duties of a trustee; or
- (b) in relation to a particular duty of a trustee.

(5) An order made under this section is subject to negative resolution procedure.

*[Section 4A inserted by 2002:20 effective 13 August 2002]*

### **Annual reports**

5. The Authority shall as soon as practicable after the end of each of its financial years, make to the Minister and publish in such manner as it thinks appropriate a report on its activities under this Act in that year.

### **Authority's statement of principles**

6. (1) The Authority shall as soon as practicable after the coming into force of this Act, publish in such manner as it thinks fit a statement of principles in accordance with which it is acting or proposing to act—

- (a) in interpreting the minimum criteria and the grounds for revocation specified in section 16;
- (b) in exercising its power to grant, revoke or restrict a licence;
- (ba) in exercising its power under section 11A (2) (a) to grant a permit to the licensee of a limited trust licence to hold trust assets in excess of thirty million dollars; and
- (c) in exercising its power to obtain information, reports and to require production of documents.

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(2) If the Authority makes a material change to the principles it shall publish a statement of the change or the revised statement of principles in the same manner as it published the statement under subsection (1).

*[Section 6 amended by 2002:20 effective 13 August 2002]*

### **Codes of practice**

7. (1) The Authority shall as soon as practicable after the coming into force of this Act issue codes of practice in connection with the manner by which licensed undertakings shall carry on trust business.

(2) Without prejudice to the generality of subsection (1), the Authority may issue codes of practice for the purpose of providing guidance as to the duties, requirements and standards to be complied with, and the procedures (whether as to identification, record-keeping, internal reporting and training or otherwise) and sound principles to be observed by persons carrying on trust business.

(3) Before issuing a code of practice, the Authority shall publish a draft of that code in such manner as it thinks fit and shall consider any representations made to it about the draft.

(4) Every licensed undertaking shall in the conduct of its business have regard to any code of practice issued by the Authority.

(5) A failure on the part of a licensed undertaking to comply with the provisions of such a code shall be taken into account by the Authority in determining whether the business is being conducted in a prudent manner as required by paragraph 5 of the minimum criteria.

### **Minister to issue directions to Authority**

8. The Minister may from time to time give to the Authority general policy directions, not inconsistent with the provisions of this Act, as to the performance of its functions under this Act and the Authority shall give effect to such directions.

## LICENSING

### **Restriction on carrying on trust business without a licence**

9. (1) Subject to section 10, a person shall not carry on trust business in or from within Bermuda unless that person is for the time being a licensed undertaking .

(2) A person who contravenes this section is guilty of an offence and liable—

(a) on summary conviction, to a fine of \$25,000 or to imprisonment for one year or to both;

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(b) on conviction on indictment, to a fine of \$100,000 or to imprisonment for five years or to both.

(3) In this section "trust business" means the provision of the services of a trustee as a business, trade, profession or vocation.

### **Exempted persons**

10. (1) Section 9 shall not apply to any person exempted by or under an exemption order.

(2) The Minister acting on the advice of the Authority may by order ("an exemption order") provide for—

- (a) a specified person;
- (b) persons falling within a specified class,

to be exempt from the requirement of section 9.

(3) An exemption order may provide for an exemption to have effect—

- (a) only in specified circumstances;
- (b) subject to restrictions including restrictions on the value of the trust assets that may be held or the number of trusts under management;
- (c) subject to conditions.

(4) "Specified" means specified by the exemption order.

(5) An order made under this section is subject to negative resolution procedure.

### **Trust licence**

11. (1) An application for a licence may be made to the Authority —

- (a) by a company for an unlimited trust licence;
- (b) by a partnership or an individual for a limited trust licence.

(2) Without prejudice to section 15, an unlimited trust licence authorises the licensee to carry on trust business and to solicit business from the public generally.

(3) A limited trust licence is limited in the manner specified in section 11A.

(4) *[Repealed]*

(5) *[Repealed]*

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(6) An application shall be made in such manner as the Authority may direct and shall be accompanied with —

- (a) a business plan setting out the nature and scale of the trust business which is to be carried on by the applicant;
- (b) particulars of the applicant's arrangements for the management of the business;
- (c) such other information and documents as the Authority may reasonably require for the purpose of determining the application; and
- (d) an application fee of such amount as may be prescribed under the Bermuda Monetary Authority Act 1969.

(7) An application may be withdrawn by notice in writing to the Authority at any time before it has determined the application.

*[Section 11 amended by 2002:20 effective 13 August 2002; and by 2002:39 effective 30 December 2002]*

### **Limited trust licences**

11A. (1) A limited trust licence —

- (a) authorises the licensee to hold trust assets to an aggregate value of thirty million dollars or such higher value as permitted by subsections (2) and (3); but
- (b) does not authorise the licensee to act as sole trustee to any trust administered by him.

(2) Trust assets to an aggregate value in excess of thirty million dollars may be held under a limited trust licence in either of the following two cases —

- (a) where permitted by the Authority in any particular case;
- (b) where a licensee delegates to a company holding an unlimited trust licence delegable functions in respect of such assets as would cause the aggregate value to exceed thirty million dollars.

(3) In considering whether to grant a permit under subsection (2)(a), the Authority shall determine whether the licensee is a fit and proper person to hold assets in excess of thirty million dollars; and in making such a determination the Authority shall have regard to whether the licensee has, or has available to him, —

- (a) sufficient knowledge and expertise; and
- (b) financial and other resources of such amount ;

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as would safeguard the interests of its clients or potential clients.

- (4) For the purpose of subsection (1) —
  - (a) the value of the trust assets shall be calculated by reference to the average value of the assets taken over the period of six months preceding the end of the licensee's financial year; and
  - (b) in calculating the value of the assets, no account shall be taken of the following assets —
    - (i) real property situated in Bermuda;
    - (ii) securities denominated in Bermuda dollars;
    - (iii) insurance policies providing for the payment of benefits in Bermuda dollars;
    - (iv) personal property other than that specified in subparagraphs (ii) and (iii) situated in Bermuda.
- (5) In subsection (2) "delegable functions" has the meaning given in section 15B of the Trustee Act 1975.

*[Section 11A inserted by 2002:20 effective 13 August 2002]*

### **Grant and refusal of applications**

12. (1) Subject to this section, the Authority may on an application duly made in accordance with section 11, and after being provided with all such information, documents and reports as it may reasonably require under that section, grant or refuse the application for a licence.

(2) The Authority shall not grant an application unless it is satisfied that the minimum criteria are fulfilled with respect to the applicant.

(3) A licence issued to a partnership shall be issued in the partnership name, and, without prejudice to sections 15 and 16, shall not be affected by any change in the name of the partners.

(4) The Minister acting on the advice of the Authority may by order amend the First Schedule by adding new criteria or by amending or deleting the criteria for the time being specified in the Schedule.

(5) An order made under subsection (4) shall be subject to negative resolution procedure.

### **Display and registration of licence**

13. (1) A licensed undertaking shall at all times keep the licence on display at its principal place of business in Bermuda.

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(2) The Authority shall cause a notice to be published in the Gazette of every licence issued under this Act.

(3) The Authority shall compile and maintain in such manner as it thinks fit a register containing, in respect of each licence, such particulars as may be prescribed; and the register shall, at all reasonable times, be available for inspection at the offices of the Authority by any person upon payment of the fee prescribed under the Bermuda Monetary Authority Act 1969.

*[Section 13 amended by 2002:39 effective 30 December 2002]*

### **Annual licence fee**

14. (1) An undertaking shall pay such fee as may be prescribed under the Bermuda Monetary Authority Act 1969—

- (a) on the grant of a licence; and
- (b) on or before 30 April in every year after the year in which the licence was granted.

(2) *[Deleted]*

(3) Where an undertaking fails to pay the prescribed fee as provided in subsections (1)(a) and (b), it shall pay in addition to such fee a late penalty fee of an amount equal to ten per cent of the fee due for every month or part thereof during which the fee remains unpaid.

(4) The Authority may recover any fee and penalty fee due as a debt owing to it in any court of competent jurisdiction.

*[Section 14 amended by 2002: effective 18 March 2002; and by 2002:39 effective 30 December 2002]*

### **Restriction of licence**

15. (1) Subject to section 18, the Authority may restrict a licence—

- (a) if it is satisfied of the matters specified in paragraph (a), (b), (d) or (e) of section 16 but it appears to it that the circumstances are not such as to justify revocation;
- (b) if it is satisfied that a person has become a controller of an undertaking in contravention of section 24 or has become or remains a controller after being given a notice of objection pursuant to section 25 or 26; or
- (c) in connection with the revocation of a licence—
  - (i) when giving the undertaking notice that it proposes to revoke its licence; or
  - (ii) at any time after such notice has been given to the undertaking; or

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(d) at any time after the undertaking has served a notice surrendering its licence with effect from a later date.

(2) The Authority may restrict a licence by imposing such conditions as it thinks desirable for the protection of the undertaking's clients or potential clients, and may in particular—

(a) require the undertaking to take certain steps or to refrain from adopting or pursuing a particular course of action or to restrict the scope of its business in a particular way;

(b) impose limitations on the acceptance of trust business;

(c) prohibit the undertaking from soliciting trust business either generally or from persons who are not already its clients;

(d) prohibit the undertaking from accepting new trust business;

(e) prohibit the undertaking from entering into any other transactions or class of transactions;

(f) require the removal of any officer or controller ;

(g) specify requirements to be fulfilled otherwise than by action taken by the undertaking.

(3) Any condition imposed under this section may be varied or withdrawn by the Authority.

(4) The Authority may on the application of an undertaking vary any condition imposed on its licence.

(5) An undertaking which fails to comply with any requirement or contravenes any prohibition imposed on it by a condition under this section shall be guilty of an offence and liable—

(a) on summary conviction to a fine of \$25,000;

(b) on conviction on indictment to a fine of \$75,000.

(6) The fact that a condition imposed under this section has not been complied with (whether or not constituting an offence under subsection (5)) shall, where the restriction has been imposed pursuant to paragraphs (a) or (b) of subsection (1), be a ground for the revocation of the licence in question but shall not invalidate any transaction.

### **Revocation of licence**

16. Subject to section 18, the Authority may revoke the licence of an undertaking if the Authority is satisfied that—

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- (a) any of the minimum criteria is not or has not been fulfilled, or may not be or may not have been fulfilled, in respect of the undertaking;
- (b) the undertaking has failed to comply with any obligation imposed on it by or under this Act or is carrying on business in a manner not authorised by its licence;
- (c) a person has become a majority shareholder controller of the undertaking in contravention of section 24 or has become or remains such a controller after being given a notice of objection pursuant to section 25 or 26;
- (d) the Authority has been provided with false, misleading or inaccurate information by or on behalf of the undertaking or, in connection with an application for a licence, by or on behalf of a person who is or is to be an officer or controller of the undertaking; or
- (e) the interests of the clients or potential clients of the undertaking are in any way threatened.

### **Winding up on petition from the Authority**

17. (1) On a petition presented by the Authority by virtue of this section, the court may wind up an undertaking which is a company in respect of which a licence is revoked, if the court is of the opinion that it is just and equitable that the undertaking be wound up.

(2) Part XIII (Winding Up) of the Companies Act 1981 shall apply to the winding up of an undertaking under this section.

### **Notice of restriction or revocation of licence**

18. (1) Where the Authority proposes to —

- (a) restrict a licence under section 15(1);
- (b) vary a restriction imposed on a licence otherwise than with the agreement of the undertaking concerned; or
- (c) revoke a licence under section 16,

the Authority shall give to the undertaking concerned written notice of its intention to do so.

(2) If the proposed action is within subsection (1)(a) or (1)(b), the notice under that subsection shall specify the proposed restriction or, as the case may be, the proposed variation.

(3) A notice under subsection (1) shall state the ground or grounds on which the Authority intends to act and give particulars of the undertaking's rights under subsection (5).

(4) Where—

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- (a) the ground for a proposal to impose or vary a restriction or for a proposed revocation is that it appears to the Authority that the criterion in paragraph 1 of the First Schedule is not or has not been fulfilled, or may not be or may not have been fulfilled, in the case of any person; or
- (b) a proposed restriction consists of or includes a condition requiring the removal of any person as a controller or an officer,

the Authority shall give that person a copy of the notice mentioned in subsection (1), together with a statement of his rights under subsection (5).

(5) An undertaking which is given notice under subsection (1) and a person who is given a copy of it under subsection (4) may make representations in writing to the Authority within the period of fourteen days beginning with the day on which the notice was given (or such other longer period as the Authority may allow).

(6) After giving a notice under subsection (1) and taking into account any representations made under subsection (5), the Authority shall decide whether—

- (a) to proceed with the action proposed in the notice;
- (b) to take no further action;
- (c) if the proposed action was to revoke the undertaking's licence, to restrict its licence instead; or
- (d) if the proposed action was to restrict the undertaking's licence or to vary the restrictions on a licence, to restrict it or to vary the restrictions in a different manner.

(7) The Authority shall give the undertaking and any such person as is mentioned in subsection (4), written notice of its decision and, except where the decision is to take no further action, the notice shall state the reasons for the decision and give particulars of the rights conferred by subsection (9) and section 29.

(8) A notice under subsection (7) of a decision to restrict a licence, to vary the restrictions on a licence or to revoke a licence shall, subject to sections 29(4) and (5), have the effect of restricting the licence or varying the restriction in the manner specified in the notice or revoking the licence.

(9) Where the decision notified under subsection (7) is to restrict the licence or to vary the restrictions on a licence otherwise than as stated in the notice given under subsection (1), the undertaking may within the period of seven days beginning with the day on which the

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notice was given under subsection (7) make written representations to the Authority with respect to the restrictions and the Authority may, after taking those representations into account, alter the restrictions.

(10) A notice under subsection (7) shall be given within the period of twenty-eight days beginning with the day on which the notice under subsection (1) was given; and if no notice under subsection (7) is given within that period, the Authority shall be treated as having at the end of that period given a notice under that subsection to the effect that no further action is to be taken.

(11) Where the Authority varies a restriction on an undertaking's licence with its agreement or withdraws a restriction consisting of a condition, the variation or withdrawal shall be effected by written notice to the undertaking.

(12) The Authority may omit from the copy given to a person under subsection (4) and from a notice given to him under subsection (7) any matter which does not relate to him.

(13) The Authority shall publish in the Gazette, in such form as it thinks fit, notice of every revocation of a licence under this Act.

### **Restriction in cases of urgency**

19. (1) No notice need be given under section 18 in respect of the imposition or variation of a restriction on an undertaking's licence in any case in which the Authority considers that the restriction should be imposed or varied as a matter of urgency.

(2) In any such case the Authority may by written notice to the undertaking impose or vary the restriction.

(3) Any such notice shall state the reason for which the Authority has acted and particulars of the rights conferred by subsection (5) and section 29.

(4) Section 18(4) shall apply to a notice under subsection (2) imposing or varying a restriction as it applies to a notice under section 18(1) in respect of a proposal to impose or vary a restriction; but the Authority may omit from a copy given to a person by virtue of this subsection any matter which does not relate to him.

(5) An undertaking to which a notice is given under this section of the imposition or variation of a restriction and a person who is given a copy of it by virtue of subsection (4) may within the period of fourteen days beginning with the day on which the notice was given make representations to the Authority.

(6) After giving a notice under subsection (2) imposing or varying a restriction and taking into account any representations made in accordance with subsection (5) the Authority shall decide whether —

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- (a) to confirm or rescind its original decision; or
- (b) to impose a different restriction or to vary the restriction in a different manner.

(7) The Authority shall within the period of twenty-eight days beginning with the day on which the notice was given under subsection (2) give the undertaking concerned written notice of its decision under subsection (6) and, except where the decision is to rescind the original decision, the notice shall state the reason for the decision.

(8) Where the notice under subsection (7) is of a decision to take the action specified in subsection (6)(b), the notice under subsection (7) shall have the effect of imposing the restriction or making the variation specified in the notice and with effect from the date on which it is given.

### **Directions to protect interests of clients**

20. (1) The Authority may give an undertaking directions under this section at any time after its licence is revoked or surrendered.

(2) Directions under this section shall be such as appear to the Authority to be desirable for safeguarding the interests of the undertaking's clients.

(3) No direction shall be given to an undertaking under this section after it has ceased to hold or control trust assets; and any such direction which is in force with respect to an undertaking shall cease to have effect when the undertaking ceases to hold or control any such assets.

(4) An undertaking which fails to comply with any requirement or contravenes any prohibition imposed on it by a direction under this section shall be guilty of an offence and liable —

- (a) on summary conviction to a fine of \$25,000;
- (b) on conviction on indictment to a fine of \$75,000.

### **Notification and confirmation of directions**

21. (1) A direction under section 20 shall be given by notice in writing and may be varied by a further direction; and a direction may be revoked by the Authority by a notice in writing to the undertaking concerned.

(2) A direction under section 20, except one varying a previous direction with the agreement of the undertaking concerned—

- (a) shall state the reasons for which it is given and give particulars of the undertaking's rights under subsection (3) and section 29; and

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(b) without prejudice to section 20(3), shall cease to have effect at the end of the period of twenty-eight days beginning with the day on which it is given unless before the end of that period it is confirmed by a further written notice given by the Authority to the undertaking concerned.

(3) An undertaking to which a direction is given which requires confirmation under subsection (2) may, within the period of fourteen days beginning with the day on which the direction is given, make written representations to the Authority; and the Authority shall take any such representations into account in deciding whether to confirm the direction.

### **Surrender of licence**

22. (1) An undertaking may surrender its licence by written notice to the Authority.

(2) A surrender shall take effect on the giving of the notice or, if a later date is specified in it, on that date; and where a later date is specified in the notice the undertaking may by further written notice to the Authority substitute an earlier date, not being earlier than that on which the first notice was given.

(3) The surrender of a licence shall be irrevocable unless it is expressed to take effect at a later date and before that date the Authority by notice in writing allows it to be withdrawn.

### **Transfer of trusts to new trustees**

23. (1) Notwithstanding anything to the contrary in any declaration of trust, where the Authority is satisfied that in the interests of clients of a licensed undertaking it is necessary for all or any of the trusts managed by the undertaking to be transferred to a new trustee for administration by such trustee, the Authority may petition the court for that purpose.

(2) In any such case, the court, after hearing representations from the Authority or any other person appearing to the court to be affected, may order the transfer of any such trust to a new trustee, and in that connection may make such supplemental or incidental orders or give such directions, as the court thinks fit.

## **OBJECTIONS TO SHAREHOLDER CONTROLLERS**

### **Notification of new or increased control**

24. (1) No person shall become a 10 per cent or majority shareholder controller of a licensed undertaking which is a company unless —

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- (a) he has served on the Authority a written notice stating that he intends to become such a controller of the undertaking; and
- (b) either the Authority has, before the end of the period of three months beginning with the date of service of that notice, notified him in writing that there is no objection to his becoming such a controller of the undertaking, or that period has elapsed without the Authority having served him under section 25 a written notice of objection to his becoming such a controller of the undertaking.

(2) Subsection (1) applies also in relation to a person becoming a partner in a licensed undertaking which is a partnership.

(3) A notice under subsection (1)(a) shall contain such information as the Authority may direct and the Authority may after receiving such a notice from any person, by notice in writing require him to provide such additional information or documents as the Authority may reasonably require for deciding whether to serve notice of objection.

(4) Where additional information or documents are required from any person by a notice under subsection (2) the time between the giving of the notice and the receipt of the information or documents shall be added to the period mentioned in subsection (1)(b).

### **Objection to new or increased control**

25. (1) The Authority may serve a notice of objection under this section on a person who has given notice under section 24 unless it is satisfied—

- (a) that the person concerned is a fit and proper person to become a controller of the description in question of the undertaking;
- (b) that the interests of clients and potential clients of the undertaking would not be in any other manner threatened by that person becoming a controller of that description of the undertaking; and
- (c) without prejudice to paragraphs (a) and (b), that, having regard to that person's likely influence on the undertaking as a controller of the description in question the criteria in the First Schedule would continue to be fulfilled in the case of the undertaking or, if any of those criteria is not fulfilled, that that person is likely to undertake adequate remedial action.

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(2) Before serving a notice of objection under this section the Authority shall serve the person concerned with a preliminary written notice stating that the Authority is considering service on that person of a notice of objection and that notice —

(a) shall specify which of the matters mentioned in subsection (1) the Authority is not satisfied about and, subject to subsection (5), the reasons for which it is not satisfied; and

(b) shall give particulars of the rights conferred by subsection (3).

(3) A person served with a notice under subsection (2) may, within a period of twenty-eight days beginning with the day on which the notice is served, make written representations to the Authority; and where such representations are made the Authority shall take them into account in deciding whether to serve a notice of objection.

(4) A notice of objection under this section shall—

(a) specify which of the matters mentioned in subsection (1) the Authority is not satisfied about and, subject to subsection (5), the reasons for which it is not satisfied; and

(b) give particulars of the rights conferred by section 29.

(5) Subsections (2)(a) and (4)(a) shall not require the Authority to specify any reason which would in its opinion involve the disclosure of confidential information the disclosure of which would be prejudicial to a third party.

(6) Where a person required to give a notice under section 24 in relation to becoming a controller of any description becomes a controller of that description without having given the notice, the Authority may serve him with notice of objection under this section at any time within three months after becoming aware of his having done so and may, for the purpose of deciding whether to serve him with such a notice, require him by notice in writing to provide such information or documents as the Authority may reasonably require.

(7) The period mentioned in section 24(1)(b) (with any extension under subsection (4) of that section) and the period mentioned in subsection (6) shall not expire, if it would otherwise do so, until fourteen days after the end of the period within which representations can be made under subsection (3).

### **Objection to existing controller**

26. (1) Where it appears to the Authority that a person who is a controller of any description of a licensed undertaking is not or is no longer a fit and proper person to be such a controller of the undertaking

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it may serve him with a written notice of objection to his being such a controller of the undertaking.

(2) Before serving a notice of objection under this section the Authority shall serve the person concerned with a preliminary written notice stating that the Authority is considering service on that person of a notice of objection and that notice shall —

(a) subject to subsection (5), specify the reasons for which it appears to the Authority that the person in question is not or is no longer a fit and proper person as mentioned in subsection (1); and

(b) give particulars of the rights conferred by subsection (3).

(3) A person served with a notice under subsection (2) may, within a period of twenty-eight days beginning with the day on which the notice is served, make written representations to the Authority; and where such representations are made the Authority shall take them into account in deciding whether to serve a notice of objection.

(4) A notice of objection under this section shall—

(a) subject to subsection (5), specify the reasons for which it appears to the Authority that the person in question is not or is no longer a fit and proper person as mentioned in subsection (1); and

(b) give particulars of the rights conferred by section 29.

(5) Subsections (2)(a) and (4)(a) shall not require the Authority to specify any reason which would in its opinion involve the disclosure of confidential information the disclosure of which would be prejudicial to a third party.

### **Contraventions by controller**

27. (1) Subject to subsection (2), any person who contravenes section 24 by—

(a) failing to give the notice required by subsection (1)(a) of that section; or

(b) becoming a controller of any description to which that section applies before the end of the period mentioned in subsection (1)(b) of that section in a case where the Authority has not served him with a preliminary notice under section 25(2),

shall be guilty of an offence.

(2) A person shall not be guilty of an offence under subsection (1) if he shows that he did not know of the acts or circumstances by

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virtue of which he became a controller of the relevant description; but where any person becomes a controller of any such description without such knowledge and subsequently becomes aware of the fact that he has become such a controller he shall be guilty of an offence unless he gives the Authority written notice of the fact that he has become such a controller within fourteen days of becoming aware of the fact.

- (3) Any person who —
- (a) before the end of the period mentioned in section 24 (1)(b), becomes a controller of any description to which that subsection applies after being served with a preliminary notice under section 25(2);
  - (b) contravenes section 24 by becoming a controller of any description after being served with a notice of objection to his becoming a controller of that description; or
  - (c) having become a controller of any description in contravention of that section (whether before or after being served with such notice of objection) continues to be such a controller after such a notice has been served on him;

shall be guilty of an offence.

(4) A person guilty of an offence under subsection (1) or (2) shall be liable on summary conviction to a fine of \$25,000.

(5) A person guilty of an offence under subsection (3) shall be liable—

- (a) on summary conviction to a fine of \$25,000 and in respect of an offence under paragraph (c) of that subsection, to a fine of \$500 for each day on which the offence has continued;
- (b) on conviction on indictment to a fine of \$50,000 or to imprisonment for two years or to both.

### **Restriction on and sale of shares**

28. (1) The powers conferred by this section shall be exercisable where a person —

- (a) has contravened section 25 by becoming a controller of any description after being served with a notice of objection to his becoming a controller of that description;
- (b) having become a controller of any description in contravention of that section continues to be one after such a notice has been served on him; or

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(c) continues to be a controller of any description after being served under section 26 with notice of objection to his being a controller of that description.

(2) The Authority may by notice in writing served on the person concerned direct that any specified shares to which this section applies shall, until further notice, be subject to one or more of the following restrictions—

(a) any transfer of, or agreement to transfer, those shares or, in the case of unissued shares, any transfer of or an agreement to transfer the right to be issued with them, shall be void;

(b) no voting rights shall be exercisable in respect of the shares;

(c) no further shares shall be issued in right of them or in pursuance of any offer made to their holder; or

(d) except in liquidation, no payment shall be made of any sums due from the undertaking on the shares, whether in respect of capital or otherwise.

(3) The court may, on the application of the Authority, order the sale of any specified shares to which this section applies and, if they are for the time being subject to any restrictions under subsection (2), that they shall cease to be subject to those restrictions.

(4) No order shall be made under subsection (3) in a case where the notice of objection was served under section 25 or 26 —

(a) until the end of the period within which an appeal can be brought against the notice of objection;

(b) if such an appeal is brought, until it has been determined or withdrawn.

(5) Where an order has been made under subsection (3) the court may, on the application of the Authority, make such further order relating to the sale or transfer of the shares as it thinks fit.

(6) Where shares are sold in pursuance of an order under this section the proceeds of sale, less the costs of the sale, shall be paid into court for the benefit of the persons beneficially interested in them; and any such person may apply to the court for the whole or part of the proceeds to be paid to him.

(7) This section applies—

(a) to all the shares in the undertaking of which the person in question is a controller of the relevant description

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which are held by him or any associate of his and were not so held immediately before he became such a controller of the undertaking; and

- (b) where the person in question became a controller of the relevant description as a result of the acquisition by him or any associate of his of shares in another company, to all the shares in that company which are held by him or any associate of his and were not so held before he became such a controller of that undertaking.

(8) A copy of the notice served on the person concerned under subsection (2) shall be served on the undertaking or company to whose shares it relates and, if it relates to shares held by an associate of that person, on that associate.

### **Rights of appeal**

29. (1) An undertaking which is aggrieved by a decision of the Authority —

- (a) to restrict its licence, to restrict it in a particular manner or to vary any restrictions of its licence;
- (b) to revoke its licence; or
- (c) to refuse an application for a licence made under section 60(3)(b),

may appeal against the decision to a tribunal constituted in accordance with section 30.

(2) Where —

- (a) the ground or a ground for a decision within subsection (1)(a) or (b) is that mentioned in section 18(4)(a); or
- (b) the effect of a decision within subsection (1)(a) is to require the removal of a person as a controller or officer of an undertaking,

the controller or officer to whom the ground relates or whose removal is required may appeal to a tribunal constituted as aforesaid against the finding that there is such a ground for the decision or, as the case may be, against the decision to require his removal.

(3) Any person on whom notice of objection is served under section 25 or 26 may appeal to a tribunal constituted as aforesaid against the decision of the Authority to serve the notice; but this subsection does not apply to a person in any case in which he has failed to give a notice or become or continued to be a controller in circumstances in which his doing so constitutes an offence under section 27(1), (2) or (3).

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(4) The tribunal may suspend the operation of a restriction or a variation of a restriction pending the determination of an appeal in respect of the decision imposing or varying the restriction.

(5) The revocation of an undertaking's licence pursuant to a decision against which there is a right of appeal under this section shall not have effect—

(a) until the end of the period within which the appeal can be brought; and

(b) if such an appeal is brought, until it is determined or withdrawn.

### **Constitution of tribunals**

30. (1) Where an appeal is brought under section 29 a tribunal to determine the appeal shall be constituted in accordance with this section.

(2) The tribunal shall consist of a chairman, or, in his absence, a deputy chairman and two other members.

(3) The chairman and the deputy chairman shall be appointed by the Minister for a term not exceeding three years, and shall be barristers and attorneys of at least seven years' standing.

(4) The two other members of the tribunal shall be selected by the chairman, or, in his absence, the deputy chairman, from a panel of members appointed by the Minister, who shall be persons appearing to the chairman or, as the case may be, the deputy chairman, to have experience of trust business.

(5) During any period of time when the chairman or deputy chairman is absent from Bermuda or is for any other reason unable to act, the Minister may appoint another person to act in his place for the period of his absence or inability to act.

(6) The Minister shall appoint a panel of not less than nine persons with experience of trust business to serve as members of appeal tribunals.

(7) A person shall not be eligible for appointment as chairman, deputy chairman or member of the tribunal if he is or has at any time during the period of two years ending with the date of his appointment been an officer, servant or agent of the Authority or of any licensed undertaking.

(8) In Part B of the First Schedule to the Government Authorities Fees Act 1971, in its appropriate alphabetical order there shall be inserted—

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"appeal tribunal constituted in accordance with section 30 of the Trusts (Regulation of Trust Business) Act 2001."

### **Determination of appeals**

31. (1) On an appeal under section 29(1) and (2) the question for the determination of the tribunal shall be whether, for the reasons adduced by the appellant, the decision was unlawful or not justified by the evidence on which it was based.

(2) On any such appeal the tribunal may confirm or reverse the decision which is the subject of the appeal but shall not have power to vary it except that —

(a) where the decision was to impose or vary any restriction the tribunal may direct the Authority to impose different restrictions or to vary them in a different way; or

(b) where the decision was to revoke a licence the tribunal may direct the Authority to restrict it instead.

(3) Notice of a tribunal's determination, together with a statement of its reasons, shall be given to the appellant and to the Authority; and, unless the tribunal otherwise directs, the determination shall come into operation when the notice is given to the appellant and to the Authority.

### **Costs, procedure and evidence**

32. (1) A tribunal may give such directions as it thinks fit for the payment of costs or expenses by any party to the appeal.

(2) The Minister may make regulations with respect to appeals and those regulations may in particular make provision—

(a) as to the period within which and the manner in which such appeals are to be brought;

(b) as to the manner in which such appeals are to be conducted, including provision for any hearing to be held in private and as to the persons entitled to appear on behalf of the parties;

(c) as to the procedure to be adopted where appeals are brought both by an undertaking and by a person who is to be a controller or officer of an undertaking, including provision for the hearing of the appeals together and for the mutual disclosure of information;

(d) for requiring an appellant or the Authority to disclose or allow the inspection of documents in his or its custody or under his or its control;

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- (e) for requiring any person, on tender of the necessary expenses of his attendance, to attend and give evidence or produce documents in his custody or under his control and for authorising the administration of oaths to witnesses;
  - (f) for enabling an appellant to withdraw an appeal or the Authority to withdraw its opposition to an appeal and for the consequences of any such withdrawal;
  - (g) for taxing or otherwise settling any costs or expenses which the tribunal directs to be paid and for the enforcement of any such direction;
  - (h) for enabling any preliminary or incidental functions in relation to an appeal to be discharged by the chairman or, as the case may be, the deputy chairman of the tribunal; and
  - (i) as to any other matter connected with such appeals.
- (3) Regulations made under subsection (2) shall be subject to negative resolution procedure.
- (4) A person who, having been required in accordance with regulations made under this section to attend and give evidence, fails without reasonable excuse to attend or give evidence, shall be guilty of an offence and liable on summary conviction to a fine of \$10,000.
- (5) A person who without reasonable excuse alters, suppresses, conceals, destroys or refuses to produce any document which he has been required to produce in accordance with regulations under this section, or which he is liable to be so required to produce, shall be guilty of an offence and liable—
- (a) on summary conviction to a fine of \$25,000 or to imprisonment for six months or to both;
  - (b) on conviction on indictment to a fine of \$50,000 or to imprisonment for two years or to both.

### **Further appeals on a point of law**

33. (1) An undertaking or other person who has appealed to a tribunal may appeal to the court on any question of law arising from the decision of the appeal by the tribunal and an appeal on any such question shall also lie at the instance of the Authority; and if the court is of the opinion that the decision was erroneous in point of law it shall remit the matter to the tribunal for re-hearing and determination by it.
- (2) No appeal to the Court of Appeal shall be brought from a decision under subsection (1) except with leave of that court.

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### INFORMATION

#### **Notification of change of controller or officer**

34. (1) A licensed undertaking shall give written notice to the Authority of the fact that any person has become or ceased to be a controller or officer of the undertaking.

(2) A notice required to be given under subsection (1) shall be given before the end of the period of fourteen days beginning with the day on which the undertaking becomes aware of the relevant facts.

(3) An undertaking which fails to give a notice required by this section shall be guilty of an offence and liable on summary conviction to a fine of \$10,000.

#### **Certificates of Compliance**

35. (1) Every licensed undertaking shall, within four months from the end of its financial year, deliver to the Authority a certificate of compliance, signed by an officer of the undertaking, made up to the end of its financial year, certifying that the undertaking has complied with the minimum criteria, codes of conduct and, in the case of an undertaking which is not a company, the limitations imposed by section 11A.

(2) An undertaking that fails to deliver a certificate as required by subsection (1) or delivers such a certificate after the end of the period specified in subsection (1) commits an offence and is liable on summary conviction to a fine of \$10,000.

*[Section 35 amended by 2002:20 effective 13 August 2002]*

#### **Power to obtain information and reports**

36. (1) The Authority may by notice in writing served on a licensed undertaking—

(a) require the undertaking to provide the Authority (or such person acting on behalf of the Authority as may be specified in the notice), at such time or times or at such intervals or in respect of such period or periods as may be so specified, with such information as the Authority may reasonably require for ensuring that the undertaking is complying with the provisions of this Act and any code of practice, and for safeguarding the interests of clients and potential clients of the undertaking;

(b) require the undertaking to provide the Authority with a report, in such form as may be specified in the notice, by the undertaking's auditor or by an accountant or other person with relevant professional skill on, or on any aspect of, any matter about which the Authority has

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required or could require the undertaking to provide information under paragraph (a).

(2) The person appointed by an undertaking to make any report required under subsection (1)(b) shall forthwith give written notice to the Authority of any fact or matter of which he becomes aware which is likely to be of material significance for the discharge, in relation to the undertaking, of the functions of the Authority under this Act.

(3) Without prejudice to the generality of section 57(1), regulations made under that section shall prescribe the facts or matters which are likely to be of material significance for the discharge of the Authority's functions under this Act.

*[Section 36(2) repealed and amended by 2005:40 Operative Date: Notice in Gazette]*

### **Power to require production of documents**

37. (1) The Authority may by notice in writing served on a licensed undertaking—

- (a) require it to produce, within such time and at such place as may be specified in the notice, such document or documents of such description as may be so specified;
- (b) require it to provide to an officer, servant or agent of the Authority such information, or to produce to him such documents, as he may specify;

being such information or documents as the Authority may reasonably require for ensuring that the undertaking is complying with the provisions of this Act and any code of practice, and for safeguarding the interests of clients and potential clients of the undertaking.

(2) Where, by virtue of subsection (1), the Authority or any officer, servant or agent of the Authority has power to require the production of any documents from an undertaking, the Authority or that officer, servant or agent shall have the like power to require the production of those documents from any person who appears to be in possession of them; but where any person from whom such production is required claims a lien on documents produced by him, the production shall be without prejudice to the lien.

(3) The power under this section to require an undertaking or other person to produce any documents includes power—

- (a) if the documents are produced, to take copies of them or extracts from them and to require that undertaking or person, or any other person who is a present or past controller or officer of, or is or was at any time employed by or acting as an employee of, the undertaking in question, to provide an explanation of any of them; and

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(b) if the documents are not produced, to require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

(4) If it appears to the Authority to be desirable in the interests of the clients or potential clients of a licensed undertaking which is a company to do so, it may also exercise the powers conferred by section 36 and subsection (1) of this section in relation to any company which is or has at any relevant time been—

(a) a parent company, subsidiary company or related company of that undertaking;

(b) a subsidiary company of a parent company of that undertaking;

(c) a parent company of a subsidiary company of that undertaking; or

(d) a company in the case of which a shareholder controller of that undertaking, either alone or with any associate or associates, holds 50 per cent or more of the shares or is entitled to exercise, or control the exercise of more than 50 per cent of the voting power at a general meeting.

(5) The Authority may by notice in writing served on any person who is or is to be a controller or officer of a licensed undertaking require him to provide the Authority, within such time as may be specified in the notice, with such information or documents as the Authority may reasonably require for determining whether he is a fit and proper person to hold the particular position which he holds or is to hold.

(6) Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both.

(7) Nothing in this section shall require the disclosure or production by a person of information or documents which he would be entitled to refuse to disclose or produce on the grounds of legal professional privilege in proceedings in Bermuda.

### **Right of entry to obtain information and documents**

38. (1) Any officer, servant or agent of the Authority may, on producing if required evidence of his authority, enter any premises occupied by a person on whom a notice has been served under sections 36(1) and 37(1) for the purpose of obtaining there the information or documents required by that notice and of exercising the powers conferred by section 37(3).

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(2) Any person who intentionally obstructs a person exercising rights conferred by this section shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both.

### INVESTIGATIONS

#### **Investigations on behalf of the Authority**

39. (1) If it appears to the Authority desirable to do so in the interests of the clients or potential clients of a licensed undertaking the Authority may appoint one or more competent persons to investigate and report to the Authority on—

- (a) the nature, conduct or state of the undertaking's business or any particular aspect of it; or
- (b) the ownership or control of the undertaking;

and the Authority shall give written notice of any such appointment to the undertaking concerned.

(2) If a person appointed under subsection (1) thinks it necessary for the purposes of his investigation, he may also investigate the business of any company which is or has at any relevant time been—

- (a) a parent company, subsidiary company or related company of the undertaking under investigation;
- (b) a subsidiary company or related company of a parent company of that undertaking;
- (c) a parent company of a subsidiary company of that undertaking; or
- (d) a company in the case of which a shareholder controller of that undertaking, either alone or with any associate or associates, holds 50 per cent or more of the shares or is entitled to exercise, or control the exercise of more than 50 per cent of the voting power at a general meeting.

(3) Where a person appointed under subsection (1) decides to investigate the business of any company by virtue of subsection (2) he shall give it written notice to that effect.

(4) It shall be the duty of every person who is or was a controller, officer, employee, agent, banker, auditor or barrister and attorney of an undertaking which is under investigation (whether by virtue of subsection (1) or (2)), or any person appointed to make a report in respect of that undertaking under section 36(1)(b)—

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- (a) to produce to the persons appointed under subsection (1), within such time and at such place as they may require, all documents relating to the company concerned which are in his custody or power;
- (b) to attend before the persons so appointed at such time and place as they may require; and
- (c) otherwise to give those persons all assistance in connection with the investigation which he is reasonably able to give;

and those persons may take copies of or extracts from any documents produced to them under paragraph (a).

(5) For the purpose of exercising his powers under this section, a person appointed under subsection (1) may enter any premises occupied by an undertaking which is being investigated by him under this section; but he shall not do so without prior notice in writing .

(6) A person exercising powers by virtue of an appointment under this section shall, if so required, produce evidence of his authority.

(7) Any person who—

- (a) without reasonable excuse fails to produce any documents which it is his duty to produce under subsection (4) ;
- (b) without reasonable excuse fails to attend before the persons appointed under subsection (1) when required to do so;
- (c) without reasonable excuse fails to answer any question which is put to him by persons so appointed with respect to an undertaking which is under investigation or a company which is being investigated by virtue of subsection (2); or
- (d) intentionally obstructs a person in the exercise of the rights conferred by subsection (5),

shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both.

(8) A statement made by a person in compliance with a requirement imposed by virtue of this section shall not be used in evidence against him.

(9) Nothing in this section shall require the disclosure or production by a person of information or documents which he would be entitled to refuse to disclose or produce on the grounds of legal professional privilege in proceedings in Bermuda.

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### **Investigation of suspected contraventions**

40. (1) Where the Authority has reasonable grounds for suspecting that—

- (a) a person has contravened section 9; or
- (b) an exempted person has contravened any restriction or condition of an exemption order made under section 10;

the Authority or any duly authorised officer, servant or agent of the Authority may by notice in writing require that or any other person—

- (c) to provide, at such place as may be specified in the notice and either forthwith or at such time as may be so specified, such information as the Authority may reasonably require for the purpose of investigating the suspected contravention;
- (d) to produce, at such place as may be specified in the notice and either forthwith or at such time as may be so specified, such documents, or documents of such description, as may be specified, being documents the production of which may be reasonably required by the Authority for that purpose;
- (e) to attend at such place and time as may be specified in the notice and answer questions relevant for determining whether such a contravention has occurred.

(2) The Authority or a duly authorised officer, servant or agent of the Authority may take copies of or extracts from any documents produced under this section.

(3) Any officer, servant or agent of the Authority may, on producing if required evidence of his authority, enter any premises occupied by a person on whom a notice has been served under subsection (1) for the purpose of obtaining there the information or documents required by the notice, putting the questions referred to in paragraph (c) of that subsection or exercising the powers conferred by subsection (2).

(4) Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section or intentionally obstructs a person in the exercise of the rights conferred by subsection (3) shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both.

(5) A statement made by a person in compliance with a requirement imposed by virtue of this section shall not be used in evidence against him.

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(6) Nothing in this section shall require the disclosure or production by a person of information or documents which he would be entitled to refuse to disclose or produce on the grounds of legal professional privilege in proceedings in Bermuda.

### **Powers of entry**

41. (1) A magistrate may issue a warrant under this section if satisfied on information on oath laid by an officer of the Authority or laid under the Authority's authority —

- (a) for the purpose of obtaining in any premises occupied by a licensed undertaking such documents as are specified in the authority (being such documents as the Authority may reasonably require for the purposes of its functions under the Act), but the Magistrate shall not issue a warrant unless he is satisfied that on information on oath laid by such officer or authority that there are reasonable grounds to believe that if such warrant were not issued documents to which it would relate would be removed, tampered with or destroyed; or
- (b) that there are reasonable grounds for suspecting that a person is guilty of such a contravention as is mentioned in section 40 and—
  - (i) that that person has failed to comply with a notice served on him under that section;
  - (ii) that there are reasonable grounds for suspecting the completeness of any information provided or documents produced by him in response to such a notice; or
  - (iii) that there are reasonable grounds for suspecting that if a notice were served on him under that section it would not be complied with or that any documents to which it would relate would be removed, tampered with or destroyed.

(2) A warrant under this section shall authorise any police officer not below the rank of inspector, together with any other person named in the warrant and any other police officers—

- (a) to enter any premises occupied by the person mentioned in subsection (1) which are specified in the warrant, using such force as is reasonably necessary for the purpose;
- (b) to search the premises and take possession of any documents appearing to be such documents as are mentioned in subsections (1)(a) and (b) or to take, in

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relation to any such documents, any other steps which may appear to be necessary for preserving them or preventing interference with them;

- (c) to take copies of or extracts from any such documents;
- (d) to require any person named in the warrant to answer questions relevant for determining whether that person is guilty of any such contravention as is mentioned in section 40.

(3) A warrant under this section shall continue in force until the end of the period of one month beginning with the day on which it is issued.

(4) Any documents of which possession is taken under this section may be retained—

- (a) for a period of three months; or
- (b) if within that period proceedings to which the documents are relevant are commenced against any person for any such contravention as is mentioned in section 40, until the conclusion of those proceedings.

(5) Any person who intentionally obstructs the exercise of any right conferred by a warrant issued under this section or fails without reasonable excuse to comply with any requirement imposed in accordance with subsection (2)(d) shall be guilty of an offence and liable—

- (a) on summary conviction, to a fine of \$25,000 or to imprisonment for six months or to both;
- (b) on conviction on indictment, to a fine of \$50,000 or to imprisonment for two years or to both.

### **Obstruction of investigations**

42. (1) A person who knows or suspects that an investigation is being or is likely to be carried out—

- (a) into a suspected contravention of section 9, or a term or condition of an exemption order made under section 10; or
- (b) under section 39,

shall be guilty of an offence if he falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents which he knows or suspects are or would be relevant to such an investigation unless he proves that he had

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no intention of concealing facts disclosed by the documents from persons carrying out such an investigation.

(2) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine of \$25,000 or to imprisonment for six months or to both;

(b) on conviction on indictment, to a fine of \$50,000 or to imprisonment for two years or to both.

### ACCOUNTS AND AUDIT

#### **Duty to prepare annual accounts**

43. (1) Notwithstanding anything to the contrary in any other Act, every licensed undertaking shall prepare annual accounts as required by this section.

(2) An undertaking which is a company shall prepare annual financial statements of its business, and shall cause copies of those statements to be laid before the undertaking in general meeting.

(3) Such an undertaking shall cause the financial statements of its business to be audited annually and shall at each of its offices in Bermuda keep a copy of its most recent audited financial statements together with the auditor's report on the financial statements.

(4) An undertaking which is not a company shall prepare annual accounts in such form and containing such particulars as the Minister may prescribe.

(5) An undertaking shall provide the Authority with a copy of the audited financial statements and report or its accounts as the case may be, not later than four months after the close of each financial year of the undertaking.

(6) An undertaking which fails to—

(a) prepare annual financial statements as required by subsection (2) or accounts as required by subsection (4);

(b) cause financial statements to be audited annually as required by subsection (3);

(c) keep a copy of its financial statements and report at its offices as required by subsection (3); or

(d) provide the Authority with a copy of the financial statements and report or the accounts as the case may be, within the time specified in subsection (5),

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shall be guilty of an offence and liable on summary conviction to a fine of \$50,000.

### **Appointment of auditors**

44. (1) Every licensed undertaking which is a company shall appoint annually an approved auditor to audit the financial statements of the undertaking.

(2) If a licensed undertaking fails to appoint an approved auditor under subsection (1) or, at any time, fails to fill a vacancy for such auditor, the Authority may appoint an approved auditor and shall fix the remuneration to be paid by that undertaking to such auditor.

(3) A licensed undertaking shall forthwith give written notice to the Authority if it—

(a) proposes to remove an auditor before the expiration of his term of office; or

(b) proposes to replace an auditor at the expiration of the term of his office with a different auditor.

(4) An undertaking which fails to comply with this section shall be guilty of an offence and shall be liable on summary conviction to a fine of \$25,000.

(5) For the purposes of this section "approved auditor" means a person who is a member of a professional body for the time being declared by the Minister by notice published in the Gazette to be approved for the purposes of this Act.

(6) No person having an interest in any undertaking otherwise than as a client, and no officer, servant or agent of any undertaking shall be eligible for appointment as an approved auditor for that undertaking; and any person appointed as such auditor to any undertaking who subsequently acquires such interest or becomes an officer, servant or agent of that undertaking shall cease to be an approved auditor.

### **Auditor and accountant to communicate certain matters to**

#### **Authority**

45. (1) An auditor of a licensed undertaking shall in the circumstances specified in subsection (2) forthwith give written notice to the Authority of those matters.

(2) The circumstances referred to in subsection (1) are—

(a) his resignation before the expiration of his term of office;

(b) his intention not to seek to be re-appointed;

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(c) a decision to include a modification of his report on the undertaking's financial statements and in particular, a qualification or denial of his opinion, or the statement of an adverse opinion;

(2A) An auditor of a licensed undertaking, or an accountant of a licensed undertaking which is not a company, shall forthwith give written notice to the Authority of any fact or matter of which he becomes aware which is likely to be of material significance for the discharge, in relation to the undertaking, of the functions of the Authority under this Act.

(2B) Without prejudice to the generality of section 57(1), regulations made under that section shall prescribe the facts or matters which are likely to be of material significance for the discharge of the Authority's functions under this Act.

(3) *[Repealed]*

(4) An auditor who fails to comply with subsection (1) shall be guilty of an offence and shall be liable on summary conviction to a fine of \$25,000.

*[Section 45 amended by 2005:40 Operative Date: Notice in Gazette]*

### **Auditor's report**

46. (1) An approved auditor of a licensed undertaking which is a company shall make a report to the undertaking's members on all annual financial statements of the undertaking of which copies are to be laid before the undertaking in general meeting during his tenure of office.

(2) The auditor shall conduct his audit and prepare his report pursuant to the provisions of section 90 of the Companies Act 1981.

### **Communication with Authority**

47. (1) No duty to which—

(a) an auditor or accountant of a licensed undertaking;

(b) a person appointed to make a report under section 36(1)(b),

may be subject shall be regarded as contravened by reason of his communicating in good faith to the Authority, whether or not in response to a request made by the Authority, any information or opinion on a matter to which this section applies and which is relevant to any function of the Authority under this Act.

(2) In relation to an auditor or accountant of an undertaking this section applies to any matter of which he becomes aware in his

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capacity as auditor or accountant, as the case may be, and which relates to the business or affairs of the undertaking or any associated company.

(3) In relation to a person appointed to make a report under section 36(1)(b) this section applies to any matter of which he becomes aware in his capacity as the person making the report and which—

- (a) relates to the business or affairs of the undertaking in relation to which his report is made or any associated company of that undertaking;
- (b) if by virtue of section 37(4) the report relates to an associated company of an undertaking, to the business or affairs of that company.

(4) In this section "associated company", in relation to an undertaking, means any such company as is mentioned in section 37(4).

### RESTRICTION ON DISCLOSURE OF INFORMATION

#### **Restricted information**

48. (1) Except as provided by sections 49, 50 and 51—

- (a) no person who under or for the purposes of this Act receives information relating to the business or other affairs of any person; and
- (b) no person who obtains such information directly or indirectly from a person who has received it as aforesaid,

shall disclose the information without the consent of the person to whom it relates and (if different) the person from whom it was received as aforesaid.

(2) This section does not apply to information which at the time of the disclosure is or has already been made available to the public from other sources or to information in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.

(3) Any person who discloses information in contravention of this section commits an offence and is liable —

- (a) on summary conviction to a fine of \$50,000 and to imprisonment for two years or to both;
- (b) on conviction on indictment to a fine of \$100,000 or to imprisonment for five years or to both.

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### **Disclosure for facilitating the discharge of functions of the Authority**

49. (1) Section 48 does not preclude the disclosure of information in any case in which disclosure is for the purpose of enabling or assisting the Authority to discharge —

- (a) its functions under this Act; and
- (b) its functions under the Bermuda Monetary Authority Act 1969.

(2) Without prejudice to the generality of subsection (1), section 48 does not preclude the disclosure of information by the Authority to the auditor or accountant of a licensed undertaking, or the person appointed to make a report under section 36(1)(b) if it appears to the Authority that disclosing the information would enable or assist the Authority to discharge the functions mentioned in that subsection or would otherwise be in the interests of the clients or potential clients.

### **Disclosure for facilitating the discharge of functions by other authorities**

50. (1) Except as provided in subsection (4), section 48 does not preclude the disclosure of information to the Minister or other authority in Bermuda in any case in which the disclosure is for the purpose of enabling or assisting him to discharge his regulatory functions.

(2) Except as provided in subsection (4), section 48 does not preclude the disclosure of information for the purpose of enabling or assisting an authority in a country or territory outside Bermuda to exercise functions corresponding to the functions of the Authority under this Act.

(3) Subsection (2) does not apply in relation to disclosures to an authority unless the Authority is satisfied that the authority is subject to restrictions on further disclosure at least equivalent to those imposed by sections 48, 49 and this section.

(4) Subsections (1) and (2) do not apply in relation to the disclosure of information on settlors and beneficiaries of any trust administered by an undertaking.

- (5) Section 48 does not preclude the disclosure of information—
- (a) for the purpose of enabling or assisting a person to do anything which he is required to do in pursuance of a requirement imposed under section 36(1)(b);
  - (b) with a view to the undertaking of, or otherwise for the purposes of, any criminal proceedings, whether under this Act or any other Act;

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(c) in connection with any other proceedings arising out of this Act.

(6) Section 48 does not preclude the disclosure by the Authority to the Director of Public Prosecutions or a police officer not below the rank of inspector of information obtained pursuant to section 39, 40 or 41 or of information in the possession of the Authority as to any suspected contravention in relation to which the powers conferred by those sections are exercisable.

(6A) Section 48 does not preclude the disclosure of information to the Institute of Chartered Accountants of Bermuda for the purpose of instituting disciplinary proceedings for a breach of any duty imposed on its members under this Act.

(7) Information which is disclosed to a person in pursuance of this section shall not be used otherwise than for the purpose mentioned in this section.

*[Section 50(6A) inserted by 2005:40 Operative Date: Notice in Gazette]*

### **Information supplied to the Authority by relevant overseas authority**

51. (1) Section 48 applies to information which has been supplied to the Authority for the purposes of any relevant functions by the relevant supervisory authority in a country or territory outside Bermuda.

(2) Information supplied to the Authority as mentioned in subsection (1) shall not be disclosed except as provided by section 48 or

—  
(a) for the purpose of enabling or assisting the Authority to discharge its functions under this Act; or

(b) with a view to the undertaking of, or otherwise for the purpose of, criminal proceedings, whether under this Act or any other Act.

(3) In this section—

"relevant functions" in relation to the Authority means its functions under this Act;

"relevant supervisory authority" means the authority discharging in that country or territory functions corresponding to those of the Authority under this Act.

*[Section 51 amended by 2002:20 effective 13 August 2002]*

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### MISCELLANEOUS AND SUPPLEMENTAL

#### **False documents or information**

52. (1) Any person who, for any purposes of this Act—
- (a) issues a document, or supplies information, which is false or misleading in a material respect; or
  - (b) signs a document which is false or misleading in a material respect; or
  - (c) takes part in the preparation or issue of a document, or the supplying of information, which is false in a material respect,

commits an offence and is liable —

- (i) on summary conviction to a fine of \$25,000 or to imprisonment for two years or to both;
  - (ii) on conviction on indictment to a fine of \$50,000 or to imprisonment for four years or to both.
- (2) It shall be a defence for a person charged with an offence under subsection (1) to prove—
- (a) if an individual, that he had no knowledge of the falsity or misleading character of the document or information, and took every reasonable precaution to ensure its accuracy; and
  - (b) if not an individual, that every person acting on his behalf had no such knowledge, and took every such reasonable precaution, as aforesaid.

#### **Offences by companies**

53. (1) Where an offence under this Act committed by a company is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, any officer of the company, or any person who was purporting to act in any such capacity, he, as well as the company, shall be guilty of that offence and be liable to be proceeded against and punished accordingly unless such person shows that he took all reasonable steps to avoid the commission of an offence.

(2) Where the affairs of a company are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the company.

#### **Restriction on use of word "trust"**

54. (1) No person carrying on business in or from Bermuda shall use any name which indicates or may reasonably be understood to

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indicate (whether in English or in any other language) that it is carrying on trust business unless it is a licensed undertaking or is exempted under section 10.

(2) Any person using a name in contravention of subsection (1) commits an offence and is liable on summary conviction to a fine of \$5,000.

### **Notices**

55. (1) This section has effect in relation to any notice, direction or other document required or authorised by or under this Act to be given to or served on any person other than the Authority.

(2) Any such document may be given to or served on the person in question —

(a) by delivering it to him;

(b) by leaving it at his principal place of business; or

(c) by sending it to him at that address by facsimile or other similar means which produce a document containing the text of the communication.

(3) Any such document may in the case of a company be given to or served —

(a) by delivering it to the company's principal place of business or registered office in Bermuda; or

(b) by sending it by registered post addressed to the company's principal place of business.

### **Service of notice on Authority**

56. (1) No notice required by this Act to be given or served on the Authority shall be regarded as given or served until it is received.

(2) Subject to subsection (1), such notice may be given by facsimile or other similar means which produce a document containing the text of the communication.

### **Regulations**

57. (1) The Minister acting on the advice of the Authority, may make regulations prescribing anything which may be prescribed under this Act and generally for the implementation of this Act, and may prescribe penalties not exceeding \$10,000 for any breach of the regulations.

(2) Regulations made under this section are subject to negative resolution procedure.

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### **Repeal**

58. The Trust Companies Act 1991 is repealed ("the repealed enactment").

### **Consequential amendments**

59. The Second Schedule, which makes consequential amendments, has effect.

### **Transitional**

60. (1) This section applies to a company which on the commencement of this Act is a company carrying on trust business under a licence issued by the Minister under the repealed enactment.

(2) On the commencement of this Act the Authority shall issue to a company to which this section applies an unlimited licence, and thereupon the provisions of this Act shall apply to the company as if such licence were issued pursuant to an application made under section 11.

(2a) A company shall not be liable to pay the fee prescribed by virtue of section 14(1) on the issue of its licence under subsection (2), but shall be liable to pay the fee prescribed thereby on or before 30 April 2002 and annually thereafter, and the provisions of sections 14(3) and (4) shall apply in relation to failure to pay such fee.

(3) An individual who, or a partnership which, on the commencement of this Act is carrying on trust business may continue to carry on trust business without a licence under this Act —

- (a) during the period of twelve months beginning with that date; and
- (b) if within that period application is made for a licence, until that application is finally disposed of or withdrawn, and if the application is refused and an appeal is brought against the refusal, until it has been determined or withdrawn.

*[Section 60 amended by 2002:2 effective 18 March 2002; and by 2002:20 effective 13 August 2002]*

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### **FIRST SCHEDULE (section 12(2))**

#### **MINIMUM CRITERIA FOR LICENSING**

##### *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 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 judgement 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 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 judgement.

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### *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 conducts, or, in the case of an undertaking which is not yet carrying on trust business, 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 the provisions of this Act, other 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 or under this Act or other provision of law; and in determining whether those systems are adequate the Authority shall have regard to the functions and responsibilities in

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respect of them of any such directors of the undertaking as are mentioned in paragraph 4 .

(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.

(7) Subparagraphs (2) to (6) are without prejudice to the generality of subparagraph (1).

### *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 is or, in the case of an undertaking which is not yet carrying on trust business, will be carried on with integrity and the professional skills appropriate to the nature and scale of its activities.

## **SECOND SCHEDULE (section 59)**

### **CONSEQUENTIAL AMENDMENTS**

#### *1. BERMUDA MONETARY AUTHORITY ACT 1969*

The Third Schedule is amended by deleting "Trust Company as defined in the Trust Companies Act 1991" and substituting "Undertaking licensed under the Trusts (Regulation of Trust Business) Act 2001".

#### *2. ADMINISTRATION OF ESTATES ACT 1974*

Section 1(1) is amended by deleting paragraph (a) of the definition of "Trust Corporation" and substituting the following —

- "(a) a corporation either appointed by the Court in any particular case to be a trustee or holding an unlimited trust licence issued under the Trusts (Regulation of Trusts Business) Act 2001;"

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### *3. TRUSTEE ACT 1975*

Section 1 is amended by deleting paragraph (a) of the definition of "trust corporation" and substituting the following —

- "(a) a corporation either appointed by the Court in any particular case to be a trustee or holding an unlimited trust licence issued under the Trusts (Regulation of Trusts Business) Act 2001;"

### *4. TAXES MANAGEMENT ACT 1976*

Section 44(7) is repealed and the following subsection is substituted—

- " (7) Nothing in this section shall authorise the Collector or any public officer to inspect any book, record or other document in the possession of a bank or deposit company of a kind referred to in section 13(4) or an undertaking licensed under the Trusts (Regulation of Trust Business) Act 2001, for the purpose of obtaining information as to the business affairs of any customer of such bank, deposit company or undertaking, except on the authority of an order of the Supreme Court or a judge."

### *5. FOREIGN CURRENCY PURCHASE TAX ACT 1975*

The Second Schedule is amended by deleting paragraph 1(g) and substituting the following—

- "(g) a company holding an unlimited trust licence issued under the Trusts (Regulation of Trust Business) Act 2001;"

### *6. COMPANIES ACT 1981*

(1) Section 120(2) is amended by deleting "where a local company is licensed under the Trust Companies Act 1981" and substituting "where a local company holds an unlimited trust licence issued under the Trusts (Regulation of Trust Business) Act 2001;"

(2) Section 129A (4) is amended by deleting paragraph (b) and substituting the following—

- "(b) trust business as defined in the Trusts (Regulation of Trust Business) Act 2001 if—
- (i) the exempted company holds an unlimited trust licence issued under the Trusts (Regulation of Trust Business) Act 2001; and
  - (ii) the settlor of the trust which is managed or administered in Bermuda by the exempted company is not ordinarily

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resident in Bermuda at the date of creation of the settlement."

### *7. PROCEEDS OF CRIME (MONEY LAUNDERING REGULATIONS) 1998*

Regulation 2 is amended by deleting paragraph (2)(iii) and substituting the following—

"(iii) any person carrying on trust business (as defined in the Trusts (Regulation of Trust Business) Act 2001) in or from within Bermuda;"

### *8. NATIONAL PENSION SCHEME (OCCUPATIONAL PENSIONS) ACT 1998*

Section 2(1) is amended by deleting paragraph (c) of the definition of "financial institution" and substituting the following—

"(c) a local trust company holding an unlimited trust licence issued under the Trusts (Regulation of Trust Business) Act 2001; or".

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[Amended by:

2002 : 2

2002 : 20

2002 : 39]