



## **EXPLANATORY MEMORANDUM**

### **Banks and Deposit Companies Amendment Act 2012**

### **Trusts (Regulation of Trust Business) Amendment Act 2012**

### **Investment Business Amendment Act 2012**

1. In 2009, a discussion paper entitled “Proposed Enhancements to Insurance Supervision and Enforcement Powers” was released for general consultation outlining a number of proposed powers to be added to the Insurance Act. The paper indicated the Authority’s proposed intention to add these powers to all of the regulatory acts in due course including the Banks and Deposit Companies Act 1999, the Trusts (Regulation of Trust Business) Act 2001, the Investment Business Act 2003 and the Investment Funds Act 2006. This proposal was based on the need to enhance the Authority’s ability to address non-compliance with regulatory requirements.
2. In 2010, a consultation paper entitled “Proposed Enhancements to Enforcement Powers of the Authority”, in broadly similar terms to the discussion paper was circulated, but including the proposal to add the proposed powers to all the regulatory Acts. This paper reiterated the position of the Authority that such powers were needed to bring the Authority closer to equivalence with other international regulators. The papers made a number of proposals and included adding the following powers to each Act:

- a. **Civil Fines:** A proposed power to be able to impose a civil penalty for breaches of requirements under each of the regulatory Acts, as well as a power to fine for failures to file returns etc., on time.
  - b. **The Regulation of Individuals:** A proposed regime for banning individuals from specific functions in relation to regulated activities under each Act.
  - c. **Injunctions:** A proposal for a general power, modelled on section 62 of the Investment Business Act 2003, enabling the Authority to seek injunctions compelling or restraining certain conduct.
  - d. **Publicity of Enforcement Actions:** A proposal that the Authority be expressly authorised to publish any enforcement action taken.
3. The responses to the consultation paper primarily raised concerns about the power to publicise sanctions. This enforcement power is presently in place under the AML regulatory regime and has been used on one occasion.
  4. In addition, when preparing the proposed changes for incorporation into a bill, it was decided that a further power, based on Section 53 of the Investment Business Act 2003, would also be appropriate. This power, which amounts to public censure without further penalty, has been included in the proposal. It was also recognised that this was an opportunity to ensure uniformity between the Acts in terms of investigatory powers and accordingly the inspection powers have been revised.
  5. Further, it was recognised that establishing additional powers would require processes to be developed to provide for uniform levels of procedural fairness across all regulatory powers. Thus, the above Bills provide for the use of warning notices and decision notices before any regulatory action is taken, subject to matters of urgency.
  6. The manner in which the Authority would use these powers will be set out in the statement of principles which will summarise the key criteria to be followed when exercising these powers. As well, the Authority will be issuing guidance on the enforcement process which

will incorporate the new procedures to clarify when an enforcement action is underway and has progressed from a supervisory review.

7. Comments on the draft Bills are invited by **18<sup>th</sup> May 2012** and should be sent to **policy@bma.bm**.

## **THE DRAFT BILLS: SUMMARY OF AMENDMENTS**

### **A. Revised Provisions**

8. Based on the comments received regarding the proposed additional powers the attached Bills have been prepared and may be summarised as follows:

#### ***Civil Fines***

9. This provision enables the Authority to impose a civil fine for failure to lodge annual returns, certificates of compliance and other filings. The current process creates a criminal offence for a failure to lodge annual returns and this is seen as ineffective. The proposal is to provide for an imposition of the fine with the Authority having discretion to consider whether or not to take such an action.

#### ***Prudential and Other Returns: Banks and Deposit Companies Act 1999***

10. The Bill amending the Banks and Deposit Companies Act 1999 includes a new provision to regularise the procedures for making prudential returns by empowering the Authority to prescribe prudential and other returns in Rules made by it. Proposed section 36A would require such returns to be filed within 28 days of the day specified in the Rules. Failure to do so would attract a default fine of \$5,000 for every week or part of a week that an institution is in default.

#### ***Investigations***

11. These provisions broaden the Authority's power to conduct investigations into regulatory matters, including a power to investigate whether an officer is 'fit and proper', (see below). The power to investigate would extend to any regulatory activity. This provision clarifies the Authority's powers to carry out investigations in addition to appointing an inspector.

### ***Restrictions***

12. While the Bills do not directly affect the power to issue restrictions on licenses, they impose procedural obligations to be met before restrictions can be imposed. These provisions clarify that when issuing a restriction the Authority must issue a warning notice and a decision notice. These obligations will apply irrespective of whether it is an enforcement exercise or conducted by supervision.

## **B. New Part ‘Disciplinary Measures’: Civil Penalties, Public Censure, Prohibition Orders and Injunctions**

### ***Civil Penalty Power***

13. Under this power, the Authority may impose a penalty not exceeding \$500,000 as it considers appropriate on a person who fails to comply with any requirement or contravenes any prohibition imposed by or under the Act. This power would not apply to breach of a provision under the relevant Acts that otherwise attract a specified civil penalty such as that for late filing under certain sections of the Act. Significantly, penalties can be imposed for failures to comply with restrictions and a range of failures e.g., to notify of changes to directors, material changes and employing prohibited persons. The provision is similar to that in the Anti-Money Laundering legislation. The manner in which the Authority determines the fine to be imposed will be set in the statement of principles.

### ***Public Censure***

14. The Authority may publish a statement in circumstances where it considers that a registered person has contravened a requirement imposed upon it. This power is presently available under the Investment Business Act 2003. Although this proposal was not included in the consultation, the Authority is of the view that similar powers should be available for the regulation of all regulated entities.

15. This power enables the Authority to publish a statement regarding a breach of a statutory requirement. However, the Authority may only exercise this power after following due process which involves giving a warning notice, receiving submissions, considering them

and giving a decision notice which includes the form of the statement. The statement will be, in effect, that the Authority has identified that a specific breach has occurred and describes the breach.

### ***Prohibition Orders***

16. This provision enables the Authority to make a prohibition order. The Authority would be able to prohibit an individual from performing a specified function or functions, for example functions of chief executive, director, senior executive, underwriting, actuarial and risk management in respect of regulated activities. The test for imposing a prohibition order on an individual is ‘fitness and propriety’. Criteria for the test will be set out in the statement of principles, although it must be recognised it is not possible to exhaustively identify what conduct could give rise to action under this provision. Broadly speaking, ‘fitness’ will be determined with regard to competence and skill; “propriety” by integrity and reputation. It is anticipated that there will be close referencing to the relevant code of conduct and other existing principles and guidance. In the current form, the order would not be limited in terms of time; however, a person shall have the right to apply to the Authority to vary or revoke a prohibition order. Factors to be taken into account in considering a variation or revocation of an order would where appropriate, include whether the person undertook training, obtained a qualification or is deemed to possess a level of competence. A breach of a prohibition order will carry a criminal sanction as well as the capacity to seek civil penalty orders, and licensed entities are required not to engage a person who is the subject of a prohibition order. Given the nature of the provision, it is not expected any order would take effect until after the expiry of the appeal period. Before making an order, the Authority must follow the statutory process by giving a warning notice followed by a decision notice after representations have been made.

### ***Injunctions***

17. Each Bill introduces the power vested in the Court to issue an injunction. The provision gives the Authority the power, similar to that in the Investment Business Act 2003, to seek court orders restraining or compelling specific conduct.

### **C. Notices: Due Process and Natural Justice**

18. As noted, each Bill clarifies the process the Authority must follow when exercising the powers to impose restrictions and civil penalties, publish statements of public censure or make prohibition orders. These revised procedural requirements were not discussed as part of the consultation process, but have been included in each Bill to provide a standard approach for taking actions which conform to international standards of natural justice and due process.

#### ***Warning Notice***

19. If the Authority concludes that grounds for the proposed action exist, then it shall issue a warning notice. A person must be given due process and the warning notice provides the first step. The notice must include details of the proposed action and the reasons for it. Following the warning notice, a person is granted the opportunity to make submissions to the Authority and has not less than 14 days in which to do so, prior to the issue of a decision notice.

#### ***Submissions***

20. The Authority must consider any submissions made by a person before coming to its final conclusion and issuing a decision notice.

#### ***Decision Notice***

21. The decision notice will advise the action the Authority has decided to take, if any, the date of effect, the reasons for the decision and if appropriate, shall inform the person of their right to appeal. If no action is to be taken by the Authority, then a notice of discontinuance shall be issued. A decision notice must be issued within 90 days.

#### ***Appeal Tribunal***

22. A decision notice must indicate that the persons or institutions against whom a decision has been made have the right to appeal to the appeal tribunal.

### *Conclusion of Proceedings*

23. Where the Authority decides to discontinue an action, the Authority must give notice.

### **D. Publication of Decision Notice**

24. Under each Bill, the Authority may publish information concerning a decision made but must first inform the person concerned. Information may not be published where an appeal is pending. This is a wide power and is discretionary, i.e. the Authority can decide whether to publish or not in each case. Each Bill does not provide for specific criteria to be used to decide when to publish, but criteria will be set out in the statement of principles. It is anticipated that in cases of serious contravention, public policy will generally dictate that publication of the relevant decision should occur.

25. In certain cases the Authority does not have discretion and must publish its decision, such as in the case of cancelling a registration or issuing a prohibition order. Such publication is necessary to protect the public, or, in the case of the prohibition order, to ensure other potential employers are aware of the order being made.

### **E. Summary/Indictable Offences**

26. Presently breaches of the various regulatory Acts are indictable or summary offences except where expressly stated. With this proposal, all breaches of the Act will be subject to civil penalty or civil fine and only the more serious breaches may be a criminal offence, in particular carrying on regulated business without a licence, misleading the Authority or obstructing the Authority in carrying out its functions.

27. Provisions in each Bill make it clear that if a person is convicted of a criminal offence for breaching a provision of the Act then the person will not be liable for civil penalty.

**F. General**

28. It is anticipated that a further Bill, in respect of identical amendments to the Investment Funds Act 2006 will be produced shortly and exhibited for consultation.