

April 23, 2012

A BILL

entitled

**TRUSTS (REGULATION OF TRUST BUSINESS) AMENDMENT ACT
2012**

ARRANGEMENT OF SECTIONS

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WHEREAS it is expedient to enhance the powers of the Bermuda Monetary Authority under the Trusts (Regulation of Trust Business) Act 2001 to effectively regulate the trust industry in Bermuda and to meet appropriate international standards; to provide for the imposition of civil penalties, the making of prohibition orders and other disciplinary measures including injunctive relief; and to provide for the giving of notices in relation to exercise of disciplinary measures and for the publication of decisions:

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:

Interpretation

1. In this Part, the “principal Act” means the Trusts (Regulation of Trust Business) Act 2001 and references to “the Act” and “this Act” shall have a corresponding meaning.

Section 2 amended

2. Section 2 of the principal Act is amended by inserting in their alphabetical order the following –

“decision notice” means a notice prepared in accordance with section 33B;

“warning notice” means a notice prepared in accordance with section 33A..

Section 6 amended

3. Section 6 (1) of the principal Act is amended –

(a) in paragraph (ba) by deleting “and” at the end thereof; and

(b) by inserting the following new paragraph after paragraph (c) –

“(d) in exercising its powers –

- (i) under section 28A to impose a civil penalty;
- (ii) under section 28C to censure publicly;
- (iii) under section 28E to make a prohibition order; and
- (iv) under section 33D to publish information about any matter to which a decision notice relates.”.

Commentary: *This clause would amend section 6 of the Act to widen the scope of matters to be covered by the statement of principles. This amendment would require the Authority to issue a statement of principles in accordance with which it proposes to act in relation to the exercise of its powers to impose civil penalties, censure publicly, make prohibition orders, and publish decisions.*

Section 14 amended

- 4. Section 14 of the principal Act is amended by repealing subsection (4).

Section 15 amended

- 5. Section 15 of the principal Act is amended by-
 - (a) repealing subsection (5).
 - (b) in subsection (6) by deleting “(whether or not constituting an offence under subsection (5))”.

Section 18 amended

- 6. Section 18 of the principal Act is amended -
 - (a) in subsection (1), by deleting “written notice of its intention to do so” and substituting “a warning notice under section 33A”;
 - (b) by repealing subsections (2) and (3);
 - (c) in subsection (4), by deleting the tailpiece and substituting “the Authority shall give that person a copy of the warning notice

but the Authority may omit from such copy any matter which does not relate to him.”;

(d) by adding the following subsections:

“(4A) After giving a notice under subsection (1) and taking into account any representations made under section 33A(2), 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.

(4B) Once the Authority has made a decision under subsection (4A) above it shall forthwith provide either a decision notice under section 33B or a notice of discontinuance under section 33C as the case may be.”

(e) by repealing subsections (5) to (12) inclusive.

New heading added

7. The principal Act is amended by inserting the following new part heading after section 28-

“DISCIPLINARY MEASURES”¹

Sections 28A to 28K added

¹ Note for AG: Are these provisions in the right place or should they be moved further down?

8. The principal Act is amended by inserting the following sections after section 28 -

“Power to impose civil penalties for breach of requirements

28A (1) Except as provided in sections 14, 34, and 35, every person who fails to comply with any requirement or contravenes any prohibition imposed by or under this Act shall be liable to a penalty not exceeding \$500,000, as the Authority considers appropriate, for each such failure or contravention.

(2) For the purposes of subsection (1), “appropriate” means effective, proportionate and dissuasive.

(3) The Authority shall not impose a penalty where it is satisfied that the person concerned took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.

***Commentary:** This provision would introduce new disciplinary measures. It would empower the Authority to impose civil penalties for failure to comply with any requirements or contravention of any prohibition imposed by or under this Act. The maximum amount that can be imposed for any breach is \$500,000. It should be noted that this section would not apply to breach of a provision of the Act that otherwise attracts a specified civil penalty such as that for late payment of fees (section 14). In determining what is an “appropriate” level of penalty, the Authority is required to take into account the provisions of subsection (2): the fine must be effective in the sense that it would be of a sufficient amount to make the person concerned take notice, it must be proportionate to the breach, and it must be dissuasive in the sense that it would act as a deterrent.*

Subsection (3) precludes the Authority from imposing a fine if the Authority is satisfied that the person concerned took all reasonable steps and exercised all due diligence to ensure compliance.

This clause would extend the power of the Authority to impose civil fines not only for breaches of the AML/CFT regulations, but also for breaches of the provisions of this Act and other requirements imposed by or under it.

Civil penalties procedures

28B (1) If the Authority proposes to impose a civil penalty, it must give the undertaking concerned a warning notice.

(2) If the Authority decides to impose a civil penalty, it must give the undertaking concerned a decision notice.

Commentary: This clause sets out the procedure for imposing fines. The Authority must give a warning notice first, followed by a decision notice. Proposed sections 33A and 33B make provision for the contents of such notices.

Public censure

28C (1) If the Authority considers that an undertaking has contravened a requirement imposed on it by or under this Act, the Authority may publish a statement to that effect.

(2) After a statement under this section is published, the Authority shall send a copy of it to the undertaking.

Public censure procedure

28D (1) If the Authority proposes to publish a statement in respect of an undertaking under section 28C, it must give the institution a warning notice.

(2) If the Authority decides to publish a statement under section 28C (whether or not in the terms proposed), it must give the undertaking a decision notice.

Commentary: *these clauses make provision for a new disciplinary measure, that is, one where the person concerned would be publicly censured but without any other measures taken against them. An institution would be censured by the publication of a statement by the Authority stating that that it has contravened a requirement of the legislation. Before doing so however, the Authority would be required to follow the procedure set out in sections 28C and 28D. This includes: the issue of a warning notice which would contain a draft of the statement that the Authority proposes to publish, an opportunity for the person concerned to make representations to the Authority, consideration by the Authority of such representations, and the issue of a decision notice if appropriate, setting out particulars of the information to be published and information on their right to appeal.*

These provisions replicate those of sections 53 to 90 of the Investment Business Act 2003 and the intention is to roll this out to apply to all sectors.

Prohibition orders

28E (1) Subsection (2) applies if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by a person who is licensed by the Authority under this Act ('a regulated person').

(2) The Authority may make an order ("a prohibition order") prohibiting the individual from performing a specified function, any function falling within a specified description, or any function.

(3) A prohibition order may relate to—

- (a) a specified regulated activity, any regulated activity falling within a specified description, or all regulated activities;

(b) regulated persons generally, or any person within a specified class of regulated persons.

(4) In exercising its discretion to make a prohibition order under subsection (2), the Authority must have regard (among other things) to such factors, including assessment criteria as the Authority may establish in a statement of principles.

(5) An undertaking must ensure that no function of his, in relation to the carrying on of a regulated activity, is performed by an individual who is prohibited from performing that function by a prohibition order.

(6) The Authority may, on the application of the individual named in a prohibition order, vary or revoke the prohibition order.

(7) The Authority must publish a prohibition order that is in effect, and every variation of such order, in such manner as it considers appropriate to bring the order to the attention of the public.

(8) This section applies to the performance of functions in relation to a regulated activity carried on by a person who is an exempt person in relation to that activity as it applies to the performance of functions in relation to a regulated activity carried on by a regulated person.

(9) Any person who fails to comply with the terms of a prohibition order commits an offence and is liable –

(a) on summary conviction to a fine of \$50,000 or to imprisonment for two years or to both;

(b) on conviction on indictment to a fine of \$200,000 or to imprisonment for four years or to both.

(10) In this section –

“exempt person” means a person who is exempt from the requirement to hold a licence by or under any of the provisions of this Act;

“regulated person” has the meaning given in subsection (1);

“regulated activity” means any activity that is carried on by way of business requiring licensing or other authority under any provision of this Act, regulations rules or orders made thereunder;

“specified” means specified in the prohibition order.

Commentary: *This provision seeks to ban certain officers from performing functions in relation to any regulated activity, that is to say, an activity that is regulated under the Act. This includes functions in relation to an exempt person.*

As this provision is replicated in the other Acts, a particular conduct could give rise to simultaneously banning a person from performing functions in relation to undertakings conducting business in other sectors of the financial services industry. Guidance under this Act would inform affected persons of Authority policy in relation to the amendment or lifting of the ban. The prohibition order will not on the face of it have any qualifications or conditions. Undertakings need not be put on an inquiry as to whether the prohibited person has or has not satisfied any conditions, etc. All they need to know is whether a person is banned from performing a particular function.

This section would enable the Authority to make a number of prohibition orders, depending on the circumstances of each particular case and after an assessment of the qualities of the individual concerned. The Authority would be able to prohibit an individual from performing a specified function, for example functions of chief executive, director, senior executive, and risk management. Note that the focus here is on function

and not on office. But note that this is a slight shift from the provisions in the minimum criteria where the focus is on the office. The order would specify the functions or class of functions which the person would be prohibited from engaging in. It would also tie this to either a specified regulated activity, a regulated activity within a specified description or all regulated activities. So for example, a person can be banned from performing functions of a senior officer with –

- *any undertaking;*
- *a named undertaking,*
- *any undertaking of a specified class (e.g. trust company);*

Subsection (4) would require the Authority to have regard to certain matters in exercising its discretion to ban. These include such assessment criteria as might be set out in statement of principles. Such criteria would address each of fitness (competence and skills for the job) and propriety (integrity, reputation).

The requirement that officers and controllers be fit and proper is a common requirement under the regulatory acts and the Authority has published criteria on this in statements of principles issued under the various regulatory acts. It would be important for the Authority to be consistent and ensure that its approach to fitness and propriety under this provision is not at odds with those established under statement of principles for other purposes.

A person who performs or agrees to perform a function in breach of the order would be liable to a civil penalty under section 28A.

Subsection (5) would impose an obligation on regulated persons not to employ persons to perform functions that they are prohibited from performing. A breach of such a provision would attract enforcement powers available to the Authority (which would include a financial penalty). This

would apply not only to the undertaking concerned but to any company licensed by the BMA that employs a person in breach of the prohibition order.

Subsection (6) would enable the Authority, on the application of the person concerned, to vary the prohibition order – or revoke it. It should be noted that the original Order would not have a period of time attached to it because the Authority would not at that time know when the person concerned would become fit and proper. It would be open to the prohibited person to apply to the Authority at any time to seek the revocation or modification of the prohibition order on the basis that the original grounds for the imposition of the order no longer apply. The Authority applying the provisions of section 28H (2) might do so if for example it is satisfied that by virtue of the person obtaining appropriate qualifications and relevant experience, that person is able to satisfy the criteria for fitness and propriety that he had lacked earlier.

Prohibition Orders: procedures

28F (1) If the Authority proposes to make a prohibition order it must give the individual concerned a warning notice.

(2) If the Authority decides to make a prohibition order it must give the individual concerned a decision notice.

Commentary: *This provision would establish a procedure for making prohibition orders. If the Authority proposes to make such an order it would be required to give a warning notice to the person concerned. The notice would set out the proposed terms of the prohibition. If the Authority then decides to make a prohibition order, it would be required to issue a decision notice. Such an order would be subject to an appeal to the tribunal.*

Proposed sections 33A and 33B deal with the contents, etc. of warning notices and decision notices.

Applications relating to prohibition orders: procedures

28G (1) This section applies to an application for the variation or revocation of a prohibition order.

(2) If the Authority decides to grant the application, it must give the applicant written notice of its decision.

(3) If the Authority decides to refuse the application, it must give the applicant a decision notice.

Commentary: *This provision would establish a procedure for the making of applications to vary or revoke an order, requiring the Authority to serve appropriate notices. Depending on the action that the Authority would take, it would be required to issue a decision notice.*

Determination of applications for variation etc.

28H (1) The Authority may grant an application made under section 28G if it is satisfied that the applicant is a fit and proper person to perform the function to which the application relates.

(2) In deciding that question, the Authority may have regard (among other things) to whether the applicant —

- (a) has obtained a qualification;
- (b) has undergone, or is undergoing, training; or
- (c) possesses a level of competence,

required in relation to persons performing functions of the kind to which the application relates.

Commentary: *This provision would permit the Authority to revoke or amend a prohibition order if it is satisfied that a person in respect of whom*

an order had been made is now fit and proper. Subsection (2) sets out the matters that the Authority may take into account in determining an application for variation or revocation of a prohibition order.

Injunctions

Injunctions

28I (1) If, on the application of the Authority, the Court is satisfied —

- (a) that there is a reasonable likelihood that any person will contravene a relevant requirement; or
- (b) that any person has contravened a relevant requirement and that there is a reasonable likelihood that the contravention will continue or be repeated;

the Court may make an order restraining the contravention.

(2) If, on the application of the Authority, the Court is satisfied

—

- (a) that any person has contravened a relevant requirement; and
- (b) that there are steps which could be taken for remedying the contravention;

the Court may make an order requiring that person, and any other person who appears to have been knowingly concerned in the contravention, to take such steps as the court may direct to remedy it.

(3) If, on the application of the Authority, the Court is satisfied that any person may have —

- (a) contravened a relevant requirement; or
- (b) been knowingly concerned in the contravention of such a requirement;

the Court may make an order restraining such person from disposing of, or otherwise dealing with, any of his assets which it is satisfied the person is reasonably likely to dispose of or otherwise deal with.

(4) In subsection (2), references to remedying a contravention include references to mitigating its effect.

(5) "Relevant requirement" in relation to an application by the Authority, means a requirement which is imposed by or under this Act.

Commentary: *This provision allows for the issue of injunction orders by the Supreme Court on the application of the Authority. This corresponds to similar provisions on injunction in the Investment Business Act. There are three types of orders that could be applied for and made by the Court. The first is an order restraining a person from contravening any requirement imposed by or under the Act: subsection (1); the second is an order requiring persons to take steps to remedy a contravention of such a requirement (subsection (2)); and the third is an order restraining a person from disposing or otherwise dealing with assets (subsection (3)).*

Section 29 amended

9. Section 29 of the principal Act is amended

(a) in subsection (1) by repealing paragraph (c) and by substituting the following paragraphs after paragraph (b)-

“(c) to impose a civil penalty under section 28A; or

(d) to publish a statement in respect of it pursuant to section 28C;”

(b) by adding the following subsections after subsection (3) –

“(3A) Any person in respect of whom a prohibition order has been made under section 28E may appeal to the tribunal against the decision.

(3B) Any person in respect of whom a decision notice has been issued refusing a revocation or variation of a prohibition order may appeal to the tribunal.”

(c) by repealing subsection (4) and substituting the following –

“The tribunal may suspend the operation of the decision appealed against pending the determination of an appeal in respect of the decision.”.

Commentary: *This clause would amend the grounds of appeal to the appeal tribunal to allow an appeal against a civil penalty imposed under proposed section 28A, against publication of statements under proposed section 28C on public censure, and against the making of prohibition orders under section 28E.*

Sections 33A and 33B added

10. The principal Act is amended by adding the following heading and sections after section 33 –

“NOTICES

Warning notices

33A (1) A warning notice must—

- (a) state the action which the Authority proposes to take;
- (b) be in writing; and
- (c) give reasons for the proposed action.

(2) The warning notice must specify a reasonable period (which may not be less than 14 days) within which the person to whom it is given may make representations to the Authority; and where such

representations are made the Authority shall take them into account in deciding whether to give a decision notice.

(3) The Authority may extend the period specified in the notice.

(4) A warning notice given under section 18(1) proposing action within subsection (1)(a) or (1)(b) of that section must specify the proposed restriction or, as the case may be, the proposed variation.

(5) A warning notice about a proposal to publish a statement given under section 28C must set out the terms of the statement.

(6) A warning notice given under section 28F must set out the terms of the prohibition.

Commentary: *this proposed section provides a procedure for the issue of warning notices under sections 18(1), 28B, 28D and 28F. A warning notice is the initial step in an enforcement action. It is a ‘minded to’ take action type of notice following an investigation into a breach. It would set out the proposed action and the reasons for it. It would also give an indication of whether or not the Authority proposes to publish its decision. The notice would provide a period, not less than 14 days, to enable the institution or person concerned to make representations. The Authority could extend this period on application.*

Decision notices

33B (1) A decision notice must —

- (a) be in writing; and
- (b) give the Authority’s reasons for the decision to take the action to which the notice relates;
- (c) its decision; and
- (d) give an indication of the right to appeal the decision to the appeal tribunal under section 29.

(2) A decision notice shall be given within ninety days beginning with the day on which a warning notice under section 33A was given; and if no notice under subsection (1) is given within that period, the Authority shall be treated as having at the end of that period given a notice of discontinuance under section 33C.

(3) A decision notice about the imposition of a condition under section 20 must set out the terms of the condition

(4) A decision notice about the imposition of a civil penalty under section 28A must state the date of payment.

(5) A decision notice about public censure under section 28C must—

- (a) set out the terms of the statement;
- (b) give details of the manner in which, and the date on which, the statement will be published.

(6) A decision notice about a prohibition order made under section 28F (2) must—

- (a) name the individual to whom the prohibition order applies;
- (b) set out the terms of the order; and
- (c) be given to the individual named in the order.

(7) A decision notice shall state the day on which it is to take effect.

(8) The Authority may, before it takes the action to which a decision notice (“the original notice”) relates, give the person concerned a further decision notice which relates to different action in respect of the same matter.

(9) The Authority may give a further decision notice as a result of subsection (8) only if the person to whom the original notice was given consents.

(10) If the person to whom a decision notice is given under subsection (1) had the right to refer the matter to which the original decision notice related to the tribunal, he has that right as respects the decision notice under subsection (8).

Commentary: *this provision establishes a procedure for the issue of decision notices under sections 18(1), 28A, 28C, 28F (2) and 28G.*

A decision notice would inform the undertaking or the person concerned, that the Authority has now concluded that it is appropriate to take the action in respect of which a warning notice had been issued. It would set out the particulars of the decision and the reasons for the action. The notice would also give an indication of whether or not the Authority would publish the decision; and would inform the undertaking concerned of its right to appeal to the tribunal.

The Authority would be required to make up its mind within 90 days after warning notice was given and if no decision notice was given within that period, it shall be treated as having discontinued the action.

Subsections (3) to (7) make provision for the contents of decision notices in various cases

Subsection (8) provides for a different action to be taken if, before the direction is given, the Authority decides to take a different action with the consent of the undertaking. This would apply for example in a case where the Authority decides to issue a prohibition order against an officer, but before issuing it, the undertaking and the Authority agree on some other enforcement action arising from the same matter, such as the payment of a fine or public censure etc.

Conclusion of action

Notices of discontinuance

33C (1) Subject to section 33B(2), if the Authority decides not to take the action proposed in a warning notice, it must give a notice of discontinuance to the person to whom the warning notice was given.

(2) A notice of discontinuance must identify the action which is being discontinued.

Commentary: *it may be the case that following the issue of a warning notice, the Authority decides not to proceed with the proposed action. This could happen after consideration of representations or the emergence of new facts. In such cases, the Authority would be required to give the person concerned a notice of discontinuance.*

Publication

Publication

33D (1) Subject to sections 18, 28C and 28E, the Authority may publish such information about a matter to which a decision notice relates as it considers appropriate.

(2) The Authority must not publish a decision under subsection (1)-

(a) before notifying the person concerned; and

(b) pending an appeal under section 29.

Commentary:

Subsection (1) leaves it to the Authority to decide what information should be published about a decision.

Subsection (2) makes provision prohibiting the Authority from publishing a decision unless it has first notified the person concerned, and pending the outcome of an appeal that might have been made.

Section 34 amended

11. (1) Section 34 of the principal Act is amended-

(a) in subsection (3) by deleting “guilty of an offence and liable on summary conviction to a fine of \$10,000” and substituting “liable to a civil penalty calculated in accordance with subsection (4)”.

(b) by adding the following after subsection (3)-

“(4) For each week or part of a week that an undertaking fails to comply with a requirement imposed on it under subsection (1) it shall be liable to a civil penalty not exceeding \$5,000.”

Section 35 amended

12. Section 35 of the principal Act is amended by repealing subsection (2) and substituting the following -

“(2) An undertaking that fails to deliver a certificate as required by subsection (1) within the time specified therein shall be liable to a civil penalty not exceeding \$5,000 for each week or part of a week that the undertaking is in default.”

Section 39 amended

13. Section 39 of the principal Act is amended-

(a) in subsection (4)(a) by deleting “all documents relating to the company concerned” and substituting “such documents, or documents of such description, as may be specified, being documents the production of which may be reasonably required for the investigation” in subparagraph (a) of subsection (4).

- (b) in subsection (4)(b) by deleting the semicolon at the end of the subsection and adding the words “answer such questions relevant to the investigation as the persons appointed under subsection 1 may require; and”
- (c) by adding the following subsection after subsection (6) -
 - “(6A) Unless the Authority otherwise directs, the undertaking under investigation shall pay to the Authority all expenses of, and incidental to, the investigation.”
- (d) by adding the words “in criminal proceedings” at the end of subsection (8).

***Commentary:** this clause would amend section 39 to more narrowly define the documents to be produced to a person appointed to carry out an investigation on behalf of the Authority and to provide for the recovery of costs of an investigation from the undertaking.*

Section 39A added

14. The principal Act is amended by adding the following section after section 39-

“Investigations of suspected contraventions

39A (1) The Authority may conduct an investigation if it appears to the Authority that-

- (a) a person may have contravened section 9;
- (b) an exempted person may have contravened any restriction or condition of an exemption order made under section 10;
- (c) an undertaking may have failed to comply with any requirements or contravened any prohibition imposed by or under this Act, regulations, rules or orders made thereunder;

- (d) an individual may not be a fit and proper person to perform functions in relation to a regulated activity within the meaning of section 28E(10).

(2) The power conferred by subsection 1(c) may be exercised in relation to a former licensed undertaking but only in relation to –

- (a) business carried on at any time when the undertaking was licensed under this Act; or
- (b) the ownership or control of an undertaking at any time when it was licensed under this Act.

Commentary: *this provision would widen the scope for investigations by the Authority beyond the current scope of investigating non-licensed or exempted trust business. It would include investigations for breaches of any requirements imposed by or under the Act or regulations etc., and investigations into the fitness and propriety of individuals who perform functions in relation to a licensed activity. Further the power to investigate undertakings in relation to business carried on at a time when they were licensed, and in investigations in relation to the ownership and control of former undertakings at a time when they were licensed.*

These powers would be exercised in conjunction with internal policies and procedures for enforcement. Such policies would provide the steps that need to be taken for escalating and referring matters from supervisors to LS&E for investigation and enforcement. The requirement to give notice for the provision of information, documents etc., would put the person concerned on notice that they are under investigation and under compulsion to provide information and answer questions.

Section 40 amended

15. Section 40 of the principal Act is amended by –

(a) deleting the section heading and substituting the following –

“Power to require production of documents”

(b) deleting in subsection (1) the words beginning with “Where the Authority” and ending with “any other person-” and substituting the following –

“The Authority may by notice in writing require the person who is the subject of an investigation under section 39A (“the person under investigation”) or any person connected with the person under investigation – ”;

(c) in subsection (1) (c) by re-lettering paragraph “(c)” as paragraph “(a)” and by deleting “investigating the suspected contravention” and substituting “the investigation”;

(d) in subsection (1)(d) by re-lettering paragraph “(d)” as “(b)”;
and by deleting “by the Authority for that purpose” and substituting “for the investigation”;

(e) in subsection (1)(e) by re-lettering paragraph “(e)” as “(c)”;
and by deleting “for determining whether such a contravention has occurred” and substituting “to the investigation as the Authority may require”;

(f) by inserting the following subsection after subsection (1) –

“(1A) The Authority may by notice in writing require every person who is or was a controller, officer, employee, agent, banker, accountant, auditor or barrister and attorney of an undertaking which is under investigation by virtue of subsection (1) –

(a) to produce to the Authority, within such time and at such place as the Authority may require, such documents, or documents of such description, as may be specified,

being documents the production of which may be reasonably required for the investigation which are in his custody or power;

(b) to attend before the Authority at such time and place as the Authority may require and answer questions relevant to the investigation as the Authority may require; and

(c) to take such actions as the Authority may direct in connection with the investigation.

(g) in subsection (3) by deleting paragraph “c” and substituting “paragraph (a)”;

(h) by inserting the following subsection after subsection (6)-

“(7) For the purposes of this section, a person is connected with the person under investigation if such person is or has at any relevant time been—

(i) a member of the group of the person under investigation;

(ii) a controller of the person under investigation;

(iii) a partner of a partnership of which the person under investigation is a member.”.

Commentary: *This clause would make consequential amendments to existing section 40 (which makes provision for the powers of the Authority when conducting investigations) in light of the new provisions on investigations under proposed new section 39A. But it also enlarges the power to apply it to persons connected with persons under investigation. “Connected persons” is defined in proposed subsection (7).*

Section 41 amended

16. Section 41 of the principal Act is amended –

(a) in subsection (1) by deleting the words beginning with “laid by” and ending with “Authority’s authority-” and substituting “that the Authority is conducting an investigation under section 39A”;

(b) by repealing paragraph (a) of subsection (1);

(c) in paragraph (b) of subsection (1) by-

(i) deleting the words beginning with “that there” and ending with “section 40 and-”

(ii) deleting subparagraph (i) and substituting the following-

“(a) a person has failed to comply with a notice served on him under section 40.”

(iii) by re-lettering subparagraphs (ii) and (iii) as “(b)” and “(c)”;

(d) in subsection (2)-

(i) in paragraph (a) by deleting “the person mentioned in subsection (1)” and substituting “the person under investigation”.

(ii) in paragraph (b), by deleting “(1)(a) and (b)” and substituting “(1)(b)”;

(e) in subsection (4) by deleting subparagraph (b) and substituting the following-

“(b) until the conclusion of proceedings, if within the period of three months referred to in paragraph (a) proceedings to which the documents are relevant are commenced against any person for any such contravention as is mentioned in section 39A.”

Commentary: Like the earlier clause, this clause makes consequential amendments to section 41 in light of the new provisions on investigations proposed in new section 40A.

Section 43 amended

17. Section 43 of the principal Act is amended by repealing subsection (6).

Section 44 amended

18. Section 44 of the principal Act is amended by repealing subsection (4).

Section 56A added

19. The principal Act is amended by inserting the following after section 56-

“Civil debt and Civil Penalties

56A (1) When a person is convicted of an offence under this Act, such person shall not also be liable to a civil penalty imposed by or under section 28A in relation to the same matter.

(2) A civil penalty levied pursuant to this Act may be recovered by the Authority as a civil debt.”

Commentary: This provides a mechanism for the recovery of civil penalties imposed under the Act. The BMA would be able to claim the amount owing by way of civil proceedings in court. The clause also directs that where a person is convicted of a criminal charge, no civil penalty can be imposed relative to the same matter.

Consequential amendments

20. Schedules I and II (which make consequential amendments) have effect.

Commentary: *This provision seeks to make amendments that are consequential to the introduction of civil penalties for breaches and obligations that, under current provisions, attract criminal penalties.*

Commencement

21. This Act shall come into operation on such day as the Minister may appoint by notice published in the Gazette and the Minister may appoint different days for different provisions.

SCHEDULE I

(Section 20)

1. The following provisions of the principal Act are repealed –
 - (a) section 14(4)
 - (b) section 15(5)
2. The Schedule to the Act (Minimum Criteria for Registration) is amended by repealing paragraph 5(2) and substituting the following—
 - “(2) In determining whether a registered person is conducting its business in a prudent manner, the Authority shall take into account any failure by the registered person to comply with the provisions of—
 - (a) this Act;
 - (b) any other law, including provisions of the law pertaining to anti-money laundering and anti-financing of terrorism as provided in the Proceeds of Crime Act 1997, the Anti-Terrorism (Financial and Other Measures) Act 2004 and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008;
 - (c) the code of conduct; and
 - (d) international sanctions in force in Bermuda.

SCHEDULE II

(Section 20)

AMENDMENT TO THE TRUST BUSINESS APPEAL REGULATIONS 2004

Amends Paragraph 3

1 Paragraph 3 of the Trust Business Appeal Tribunal Regulations 2004 (the “principal Regulations”) is amended—

- (a) in subparagraph (a) by deleting “serves notice in writing on the appellant of its decision.” and inserting “gives a decision notice to the appellant.”;
- (b) in subparagraph (c) by deleting “serves notice in writing on the appellant of its decision.” and inserting “gives a decision notice to the appellant.”.

Schedule Amended

2 Paragraph (2)(a) of the Schedule to the principal Regulations is amended by deleting “18 (4)”.

3 The following paragraphs are inserted after paragraph 4 of the principal Regulations—

“5 In the case of an appeal against a decision of the Authority to impose a civil penalty—

- (a) a copy of the warning notice given under section 28B(1) of the Act;
- (b) a copy of the decision notice given under section 28B(2) of the Act; and
- (c) a copy of any written representations made in accordance with section 33A(2) thereof.

6 In the case of an appeal against a decision of the Authority to publish a statement in respect of an undertaking—

- (a) a copy of the warning notice given under section 28D(1) of the Act;
- (b) a copy of the decision notice given under section 28D(2) of the Act; and
- (c) a copy of any written representations made in accordance with section 33B(2) thereof.

7 In the case of an appeal against a decision of the Authority to make a prohibition order—

- (a) a copy of the warning notice given under section 28F(1) of the Act;
- (b) a copy of the decision notice given under section 28F(2) of the Act; and
- (c) a copy of any written representations made in accordance with section 33A(2) thereof.

8 In the case of an appeal against a decision of the Authority to refuse to revoke or vary a prohibition order a copy of the decision notice given under section 28G(3) thereof.”