



BERMUDA MONETARY AUTHORITY

CONSULTATION PAPER

**THE TRUSTS (REGULATION OF TRUST BUSINESS)
AMENDMENT ACT 2019**

3 JUNE 2019

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Licensed institutions and other interested parties are invited to submit their views on the proposals set out in this paper. Comments should be sent to the Authority and addressed to policy@bma.bm no later than 21 June 2019

I. INTRODUCTION

1. The Bermuda Monetary Authority (the Authority) has undertaken to enhance its oversight of trust business as part of the ongoing development of Bermuda's regulatory framework. The purpose of this Consultation Paper is to set out the Authority's proposal to amend the Trusts (Regulation of Trust Business) Act 2001 (the Act) as well as the Code of Practice and Statement of Principles issued pursuant to the Act.
2. The Authority also takes this opportunity to make other legislative amendments that are regarded as housekeeping matters.
3. The amendments to the Act (the Bill) will cover the following areas:
 - a. Amend section 4A to require licenced trust businesses to maintain a physical presence in Bermuda
 - b. Remove sections 4A(1)(b) and 4A(2)
 - c. Remove the reference in section 13 to the fee prescribed for inspection of the register
 - d. Amend section 22 so that the Authority must approve the surrender of a licence prior to the surrender coming into effect in order to determine the business has been wound down or transferred appropriately
 - e. Insert in section 47A a provision regarding the segregation and treatment of client funds
 - f. Introduce section 57A the power for the Authority to make rules prescribing statutory returns and to modify prudential standards or requirements for reporting
 - g. Enhance the minimum criteria for licensing to add a requirement to maintain adequate liquidity

II. PROPOSED AMENDMENTS TO THE ACT

Physical Presence

4. Currently, section 4A of the Act defines the carrying on of trust business in Bermuda but does not define the minimum physical presence a licensee must maintain on the Island. The Authority proposes to add the requirement that licenced trustees must demonstrate, and continue to demonstrate, adequate physical presence in the jurisdiction. Sections 4A(1)(b) and 4A(2) will be removed to facilitate this.
5. Every licenced undertaking shall be required to maintain adequate physical presence in Bermuda. In determining whether the licenced undertaking complies with this requirement, the Authority shall consider, inter alia, factors such as

where the strategic and operational decision making of the licenced undertaking occurs; the location where the trust business of the undertaking is carried on; the residence of the directors, controllers or employees of the licenced undertaking and the location of the board of directors, partners or management meetings.

Authority to approve the surrender of a licence

6. The Authority is proposing to amend section 22 so that the Authority must approve the surrender of a licence prior to the surrender coming into effect in order to ensure an orderly wind down or transfer of the business and to protect clients' interests during this process.

Segregation of Funds and Treatment of Client Money

7. The Authority proposes to establish a requirement in the Act for licenced undertakings who are holding client money to segregate all client funds from the funds of the licenced undertaking and have well documented record keeping practices that allow client funds to be clearly identified.

Minimum Criteria for Licensing

8. The Authority proposes to introduce a requirement for a licenced trust business to maintain adequate liquidity to meet its obligations as they fall due, as a factor for consideration when determining if the business is being conducted in a prudent manner.

Other proposed amendments

9. The Authority also proposes to make other amendments to the Act that are general in nature and are intended to improve the application of certain provisions. Other changes are housekeeping in nature and include:
 - a. Remove the reference in section 13 to the fee prescribed for inspection of the register
 - b. Add section 57A to allow the Authority to make rules prescribing statutory returns and exempt an undertaking from complying with any prudential standard or to modify any such standard or requirement

III. PROPOSED AMENDMENTS TO THE ORDER

10. The Authority proposes to amend its oversight regime to require trust businesses who are seeking to be exempted from licensing pursuant to the Act to have to apply for an exemption and to declare annually that they continue to qualify for exemption. This will require the Minister to amend the existing exemption order

process to provide for persons to notify the Authority of their exempted status and to re-notify annually.

IV. PROPOSED AMENDMENTS TO THE CODE OF PRACTICE

11. The Authority is proposing to amend section X of the Code to clarify the manner outlined by the Authority for trust businesses to enhance recruitment practices for all employees both at initial hiring and on an ongoing basis. Licenced undertakings shall produce and update as required, procedures to consider any criminal records, regulatory or public censure, and any professional reprimands or formal censures of employees, or potential employees.
12. The Authority proposes to clarify its expectations as to the manner in which a trust business seeks to avoid or disclose conflicts of interest.
13. Additionally, trust undertakings must demonstrate in their risk management frameworks that they can manage the risks posed by the shareholder controller.
14. Moreover, the Authority proposes to clarify the manner in which policies and procedures are implemented by the licenced trust undertaking to ensure adequate, accurate and accessible recordkeeping practices and systems.
15. The Authority will further outline the matters that boards and senior managers should consider regarding functions delegated by the board or partners and their collective responsibility for ensuring legal and regulatory compliance, particularly with the provisions of the Act. The Authority will confirm that it will not allow the use of corporate directors on the board of a licenced trust business.
16. The Authority proposes to clarify the manner in which trust businesses hold funds on behalf of a client. Specifically, the Act now requires that a trust business must segregate all client funds from the licensee's own funds and must have well documented record keeping practices that allow client funds to be clearly identified and misuse of client funds to be prevented.
17. The Authority proposes to ensure that the advertising and communications practices engaged in by trust businesses are ethical, fair and prudent and not in violation of any local or international laws. No element of any practice should promote the breach of any local or international law and should not risk bringing the reputation of Bermuda as a financial centre into disrepute.
18. Section X of the Code will be enhanced to ensure details of any complaint will be documented in writing, details maintained and that the complaints handling procedure will be shared with clients.

V. PROPOSED AMENDMENTS TO THE STATEMENT OF PRINCIPLES

19. Further detail was added in relation to the Authority's expectations that staff are adequately supervised in their dealings with clients and management of client structures and that the business is conducted ethically, honestly and by appropriately skilled staff.
20. The Authority added clarification of the expectations regarding the insurance cover to be held.
21. The Authority added clarification of the expectations regarding adequate liquidity and the assets that would be considered liquid.
22. The Authority proposes to ensure that shareholder controllers of trust businesses are able to demonstrate their source of wealth to the business and to the Authority, both upon the acquisition of shares and on an ongoing basis. This will enhance the fit and proper evaluation of shareholders in order to ensure the financial soundness of the licensee.
23. The Authority confirmed that when assessing whether business is being conducted in a prudent manner it would have regard for the trust business' procedures for overseeing, managing and monitoring all outsourced activities.
24. The Statement of Principles will be updated to remove references to the 2012 Statement of Principles on the Use of Enforcement Powers and replace them with references to the 2018 Enforcement Guide – Statement of Principles & Guidance on the Exercise of Enforcement Powers. Additionally Part 4 and Part 5 were deleted as all information pertaining to these matters can be found in the Enforcement Guide.
25. Housekeeping amendments were made to the Statement of Principles to account for the changes made to the minimum criteria for licensing contained in the First Schedule to the Act in 2014 and bring them in line with other regimes. The key addition was paragraph 1A – Corporate Governance and deletions were required from paragraphs 2.4 and 2.5 for criteria that were removed. In addition, the Authority's expectations regarding insurance cover to be held were amended to account for the nature, scale and complexity of licensees. Finally, all paragraphs were renumbered.

-End-

BERMUDA

TRUSTS (REGULATION OF TRUST BUSINESS) AMENDMENT ACT 2019

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9. Commencement

WHEREAS it is expedient to amend the Trusts (Regulation of Trust Business) Act 2001 to make new provision for the introduction of a requirement for physical presence to be demonstrated in Bermuda by all licensed undertakings; and to amongst other things:- require licensed undertakings holding client funds to segregate such funds from its own funds; introduce a power to enable the Authority to restrict surrender of a license; provide a power to make prudential rules; enhance the minimum criterion for licensing by requiring the maintenance of adequate liquidity; and for purposes connected with and incidental to 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:

Citation

1 This Act, which amends the Trusts (Regulation of Trust Business) Act 2001(the "principal Act"), may be cited as the Trusts (Regulation of Trust Business) Amendment Act 2019.

Amends section 4A

2 Section 4A of the principal Act shall be amended by—

- (a) deleting subsection (1) (b); and
- (b) deleting and replacing subsection (2) as follows—

“(2) Every licensed undertaking shall maintain a physical presence in Bermuda, satisfying the requirements of subsection (2A).

(2A) The trust business of the licensed undertaking must be directed and managed from Bermuda and in determining whether the licensed undertaking complies with this requirement, the Authority shall consider, inter alia, the factors set out in subsection (2B).

(2B) The factors referred to in subsection (2A) are the location—

- (a) where the strategy and operational decisions of the licensed undertaking occurs;
- (b) where the trust business is carried on by the licensed undertaking;
- (c) of the residences of the directors, controllers or employees of the licensed undertaking;
- (d) of where meetings of the board of directors, partners or management of the licensed undertaking occur.”.

Amends section 13

3 Section 13 of the principal Act shall be amended by deleting and replacing subsection (3) as follows—

“(3) The Authority shall compile and maintain in such manner as it thinks fit a register containing, in respect of each license, such particulars as may be prescribed.”.

Amends section 22

4 Section 22 of the principal Act is amended by deleting and replacing subsections (2) and (3) as follows—

“(2) A surrender shall take effect on the date of the giving of approval by the Authority—

- (a) once it is satisfied that all matters relating to the trust business of the licensed undertaking have been prudently administered; or
- (b) the trust business has been transferred to another trustee

(3) The surrender of the license shall be irrevocable unless the Authority by notice in writing allows it to be withdrawn.”.

Inserts section 47A

5 The principal Act is amended by inserting the following after section 47—

“Separation of client funds

47A A licensed undertaking holding client funds shall—

- (a) hold such funds separately from its own funds; or funds held in respect of any other business; and
- (b) maintain such books of account and other records such that client money may be readily identified at any time.”.

Inserts section 57A

6 The principal Act is amended by inserting the following after section 57—

“ANNUAL RETURNS

Prudential and other returns

57A (1) The Authority may make Rules prescribing statutory returns that must be complied with by every licensed undertaking.

(2) Every licensed undertaking shall, not later than 28 days after the relevant day, file with the Authority such returns as the Authority may prescribe in Rules made under this section.

(3) Every licensed undertaking that fails to file a Return within the time specified in subsection (2) shall be liable to a civil penalty not exceeding \$5,000 for each week or part of a week that it is in default.

(4) Sections 6, 7, and 8 of the Statutory Instruments Act 1977 shall not apply to Rules made under this section.

(5) In this section “relevant day” means such day as may be specified in the Rules.

Authority may exempt or modify prudential standards or requirements

57B (1) The Authority may where it has made a determination [or on application from a licensed undertaking] exempt it from the requirement to comply with any prudential standard or requirement applicable to it under this Act or modify any such prudential standard or requirement.

(2) In granting an exemption or modification under this section the Authority may impose such conditions on the exemption or modification as it considers appropriate.

(3) The Authority shall not grant an exemption or modification unless it is satisfied that it is appropriate to do so having regard to the nature, scale and complexity of the licensed undertaking.

(4) The Authority may revoke an exemption or vary any modification granted under this section and shall serve notice on the licensed undertaking of its proposal to revoke its approval and the reason for the proposal.

(5) A licensed undertaking serviced with a notice under subsection (4) may within a period of 28 days from the date of the notice, make written representations to the Authority and where such representations have been made, the Authority shall take them into account in deciding whether to revoke its approval.”.

Amends First Schedule

7 Paragraph 5 “**BUSINESS TO BE CONDUCTED IN A PRUDENT MANNER**” of the First Schedule to the principal Act is amended by inserting the following after sub-paragraph (6)—

“(6A) An undertaking shall not be regarded as conducting its business in a prudent manner unless it maintains or will maintain as the case may be, adequate liquidity; having regard to the relationship between its assets and its actual and contingent liabilities, to the time at which those liabilities will or may fall due and its assets mature, and to any other factors appearing to the Authority to be relevant.”.

Consequential amendments

8 Schedule 1 which makes consequential amendments to the Bermuda Monetary Authority Act 1969 has effect.

Commencement

9 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

AMENDMENTS TO THE BERMUDA MONETARY AUTHORITY ACT 1969

The Bermuda Monetary Authority Act 1969 is amended in the Fourth Schedule by inserting—

- (a) under PART B **“Trusts (Regulation of Trust Business) Act 2001”** after paragraph 2—
 - “3 Application to modify or be exempted from Rules or a return under section 57B \$[]”.
- (b) under PART C **“Trusts (Regulation of Trust Business) Act 2001”** after paragraph 2—
 - “3 Application to modify or be exempted from Rules or a return under section 57B \$[]”.

TRUST (REGULATION OF TRUST BUSINESS) AMENDMENT ACT 2019

EXPLANATORY MEMORANDUM

This Bill makes provision for the enhancement of existing requirements and the introduction of requirements to amongst other things; require licensed undertakings to demonstrate physical presence in Bermuda; require licensed undertakings holding client funds to separate such funds from its own funds; introduce a power to enable the Authority to restrict surrender of a license and make prudential rules; amend the minimum criteria for licensing to require maintenance of adequate liquidity; and for purposes connected with and incidental to those matters.

Clause 1 provides for a citation of the Bill.

Clause 2 seeks to amend section 4A of the principal Act to embed physical presence requirements to be complied with by all licensed undertakings.

Clause 3 seeks to amend section 13 of the principal Act to replace subsection (3) to reflect the current practice of the Authority which is to list all licensed undertakings on the Authority's website.

Clause 4 is proposed to be amended to provide the Authority with the power to object to a notice of surrender under section 22 until all matters relating to client matters have been administered to the satisfaction of the Authority; or the business has been transferred to another trustee.

Clause 5 proposes to insert a new section 47A to introduce a requirement for licensed undertakings to separate client funds from their own funds.

Clause 6 proposes to make provision for the Authority to issue prudential rules and other returns.

Clause 7 makes provision for the First Schedule to impose an obligation on undertakings to maintain adequate liquidity in order to be deemed to be conducting business in a prudent manner, in furtherance of meeting minimum criteria for licensing requirements under the Act.

Clause 8 makes provision for consequential amendments to the Bermuda Monetary Authority Act 1969.

Clause 9 makes provision for the commencement of the provisions of the Bill.