

22 July 2022



BMA House
43 Victoria Street
Hamilton HM 12 Bermuda

P.O. Box 2447
Hamilton HM JX Bermuda

Dear Stakeholders,

Re: Feedback on consultation papers addressing investment business regime enhancements

The Bermuda Monetary Authority (Authority or BMA) thanks stakeholders for their continued engagement and support of its key strategic initiatives. The Authority appreciates the feedback received regarding the modernisation of Bermuda's investment business sector regulatory and supervisory framework. The Authority remains committed to working closely with stakeholders to ensure that enhancements to the investment business regime support growth and development of that sector and conformity with international standards.

In furtherance of this initiative, the Authority published a series of Consultation Papers (CP) setting out various aspects of the proposed regime changes, with titles and publication dates as follows:

- 1) *Proposed Enhancements to the Investment Business (Amendment) Bill and Investment Business (Registered and Non-Registrable) Persons Order* (published 10 June 2021);
- 2) *Proposed Enhancements to the Investment Business Regime: Regulations and Rules* (published 17 September 2021);
- 3) *Proposed Enhancements to the Investment Business Regime: Rules and Guidance on Net Asset and Liquidity Requirements, Statutory Return Rules and Statement of Principles* (published 14 October 2021); and
- 4) *Proposed Enhancements to the Investment Business Regime: General Business Conduct and Practice: Code of Conduct and Advertising Code of Conduct* (published 21 February 2022).

Further, the Authority advises stakeholders that following passage of the Investment Business Amendment Act 2021 (Amendment Act) by the House of Assembly and Senate in March 2022, the Amendment Act was assented to by the Governor on 1 April 2022. Following finalisation of the supporting statutory and supervisory instruments, it has been determined that the new regime will be brought into effect on **27 July 2022**. At such time, a 12-month transition period will commence to facilitate regularisation of entities currently exempted from or outside of the regime's scope that will, going forward, be required to be either licensed or registered under the amended framework.

Upon the regime's commencement, the Authority will issue updated guidance for persons who may require additional information on the various requirements and procedures associated with applying to obtain a licence or registration to carry on investment business in or from Bermuda.

RESPONSE TO STAKEHOLDER FEEDBACK

The Authority noted that stakeholders were generally supportive of the proposals outlined in the abovementioned CPs. Responses to summarised **key substantive comments and questions** received during each round of consultation are set out below by theme:

Proposed Enhancements to the Investment Business (Amendment) Bill and Investment Business (Registered and Non-Registrable) Persons Order

1) New classes of persons

a) Class A Registered Persons

- (i) In context of the requirement for each Class A Registered Person to also be regulated by a ‘recognised regulator’ in the foreign jurisdiction(s) in which it operates, and the Authority’s commitment to provide additional information on the criteria for determining ‘recognised regulators’, some persons requested the framework remain accommodative of as many foreign regulators as practicable.

Response: Determinations will be made on a case-by-case basis; however, the starting basis for such determination will generally be ordinary member status within the International Organisation of Securities Commissions, to facilitate the exchanges of information necessary for effective joint supervision. A Bermuda-formed or incorporated person that is regulated in another jurisdiction and is, therefore, potentially eligible to be registered with the Authority as a Class A Registered Person is encouraged to seek early confirmation from the Authority that its overseas regulator is a recognised regulator within this framework.

- (ii) Some respondents enquired whether, similar to the treatment of Class A funds within the Investment Funds Act 2006 (IFA) regime, the Authority would consider extending the definition of Class A Registered Person to permit instances where a Bermuda entity (which itself would not qualify as a Class A Registered Person, but):
- 1) is a member of a group, and;
 - 2) another member of the abovementioned group is registered or licensed by a recognised regulator.

Response: The Authority is not of the view that expanding the definition of Class A Registered Person to include persons that are not themselves either licensed, authorised or registered by a recognised regulator would adequately satisfy the objective of strengthening oversight of Bermuda-formed persons who carry on investment business activities outside of Bermuda, especially in cases where the recognised regulator is not responsible for conducting consolidated supervision of that group.

- (iii) In the context of the application requirements for Class A Registered Persons, the Authority received a suggestion to place reliance on receiving confirmation from an investment provider’s recognised regulator that such person remains in ‘good standing’ with the regulatory requirements in that overseas jurisdiction, in lieu of requesting submission of an up-to-date business plan with an application for registration.

Response: The Authority opted not to adopt this suggestion, as the review of an entity’s (proposed) business plans provides crucial insights on the specific nature, scale and complexity of an entity and, therefore, is a necessary part of the Authority’s determination as to whether it will be able to satisfy its supervisory and regulatory obligations in Bermuda on an ongoing basis.

b) Class B Registered Persons

- (iv) The Authority received a suggestion for persons who are currently exempt, and who will be required to apply to the Authority to be registered as Class B Registered Persons when the regime changes take effect, to be automatically re-designated as Class B Registered Persons without having to apply to the Authority for such registration.

Response: Given the proposed strengthening of information and other requirements vis-à-vis those in place under the current exemption regime, the Authority deems that it would not be appropriate for Class B Registered Persons to be automatically registered under the enhanced framework.

- (v) It was suggested the Authority consider adding ‘Limited Liability Companies’ (LLC), to the schedule of persons to whom Class B Registered Persons may provide investment services to ‘exclusively’, for consistency with the list of ‘qualified participants’ under the IFA framework.

Response: Further to this feedback, the proposed Investment Business (Class B Registered Persons) Order 2022 has been updated to include LLCs, that meet certain criteria, among the set of persons for whom Class B Registered Persons may provide investment services.

c) Non-Registrable Persons (NRP)

- (vi) The Authority received suggestions for augmentation of the list of NRPs in the proposed new Investment Business (Non Registrable Persons) Order 2022 to accommodate additional types of persons and structures, *inter alia*, the general partner of a fund that is a partnership.

Response: The Authority does not see sufficient basis for including these persons on the list of NRPs at this time; however, the Minister may, on the advice of the Authority, augment this list in future.

2) Registration and ongoing requirements for registered persons

- (vii) In paragraphs 44–45, the Authority set out various proposals for how the minimum criteria established in the Second Schedule of the Investment Business Act 2003 (Act) will be applied to Class A and Class B Registered Persons under the revised framework. Several stakeholders requested additional details on the registration and ongoing requirements to which both new classes of registered persons will be subject under the amended regime.

Response: The requirement to register, as well as application requirements for Class A and Class B Registered Persons, are set out in sections 13A and 13B, respectively, of the amended

Act. Application forms, as well as guidance to prospective applicants on making an application for registration, will be available on the Authority's website.

The ongoing obligations for both classes are set out in further detail within the regulations, rules, Statement of Principles (SoP), code and guidance.

The minimum criteria for Class A Registered Persons have been scaled to minimise the compliance burden on those persons (as appropriate) while ensuring that the Authority is able to monitor conformity with applicable sections of the Act and other applicable Bermuda laws. To that effect, Class A Registered Persons will be required to submit an annual return and confirm compliance with the minimum criteria; however, the Authority will also rely on information-sharing mechanisms in place with recognised regulators to monitor compliance with the minimum criteria. Class A Registered Persons will, therefore, not ordinarily be subject to routine on-site inspections by the Authority and will only have to report on net assets (or additional capital) and liquidity, where not already required to do so by a recognised regulator or otherwise required by the Authority. They will, however, have to comply with all applicable anti-money laundering/anti-terrorist financing obligations in Bermuda.

Given the nature of their clientele, the ongoing requirements for Class B Registered Persons will remain proportional and mainly comprise submission of an annual return and confirmation of compliance with the minimum criteria (per section 44 of the Act).

3) *Allowable structures*

- (viii) Among the enhancements proposed by the Authority (in paragraph 30) was the expansion of the meaning of the term 'company' within the Act to explicitly include LLC and Incorporated Segregated Accounts Company (ISAC) structures. Some respondents recommended that the Authority consider permitting additional types of structures for the conduct of investment business in Bermuda.

Response: Notwithstanding the expansion of the definition of company to include LLCs and ISACs, the Authority does not endorse or encourage the use of any specific legal form or structure for the conduct of investment business. The Authority will continue to take a risk-based approach in assessing the appropriateness of each application to carry on investment business, including taking into account the appropriateness of a structure in relation to the specific business plan proposed and an applicant's ability to satisfy the minimum criteria.

4) *Implications of the expansion of scope and changes to the meaning of 'carrying on business in or from Bermuda'*

- (ix) Certain stakeholders raised concerns regarding the regulatory and cost implications to their current operating models arising from the proposed change to the definition of 'carrying on investment business in or from Bermuda', citing some of the practical challenges that would likely be incurred to comply with the amended Act, even with a 12-month transitional period. As such, they requested that the additional flexibility being sought by the Authority to disapply or modify aspects of the framework, in instances it deems appropriate, be considered to ease specific regulatory obligations, including those related to holding client money.

Response: The Authority recognises that some entities may require additional time to achieve full conformity with aspects of the framework. Where they anticipate or are aware of such challenges, persons are encouraged to notify the Authority as soon as possible.

Regarding this, the Authority will be open to considering applications submitted pursuant to section 10B(1) of the amended Act, to modify and/or disapply requirements applicable under the Act, including those related to client money obligations.

- (x) The Authority proposed (in paragraph 42), in relation to licensed and Class B Registered Persons (other than sole traders), for the definition of ‘maintaining a place of business in Bermuda’ to be satisfied by the maintenance of a registered office in Bermuda, but only where staff and other expenses are incurred at that ‘registered office’.

One respondent pointed out that, where the registered office function is being provided by a third party [such as a corporate service provider or by a Bermuda-based affiliate], staffing and other costs incurred by that office would not likely be ‘in connection with that [investment] business’. They suggested that the additional stipulation relating to expenses should be removed for all but licensed persons within that definition.

Response: The Authority does not deem it necessary or appropriate for the expense-related stipulation to be removed, as by definition, licensed and Class B Registered Persons will be required to maintain a principal place of business in Bermuda.

5) Introduction of the new investment activity, ‘Promotion of Investments to the Public’

- (xi) Respondents were generally supportive of the move to introduce a new activity of ‘Promotion of Investments to the Public’ (hereafter referred to simply as ‘promotion’); however, the Authority received requests for clarification regarding whether specific activities (e.g., placing advertising in newspapers or instances of reverse solicitation by a client) fall within the proposed definition.

Response: The new definition is intended to capture promotional activities (including but not limited to carrying on or agreeing to advertise, issue or distribute materials relating to investments) that are directly targeted at members of the public. (In this context, the amended Act includes an updated definition of ‘members of the public’, which excludes licensed, registered or non-registrable persons; members of the same group as the investment provider that is carrying on such promotion; as well as persons who are, or who propose to participate in a joint enterprise with the investment provider that is carrying on such promotion.)

In assessing whether an activity constitutes promotion, persons should also have regard for Part 3 of the First Schedule of the Act, which expressly carves out a number of ‘excluded activities’ as not falling within the scope of this regime. Where persons remain in doubt about whether an activity meets the definition of promotion, they are encouraged to contact the Authority.

- (xii) One respondent also suggested that the proposed definition of promotion should be modified to remove express reference to persons who have (only) *agreed to* but have not yet undertaken the activities that are captured under the definition of promotion.

Response: Consistent with the definitions of other investment activities under this framework (such as dealing or arranging deals in investments), the Authority deems it appropriate for the definition of ‘promotion’ to also encompass persons ‘agreeing to’ offer services or carry on activities contemplated within the definition. It bears emphasis, however, that the Act establishes that a person will only be considered to be promoting investments where they are carrying on one or more activity that falls within the definition of promotion and where they are performing such activities ‘continuously’.

- (xiii) The proposed definition of promotion (in paragraph 33) specifies that a person will only be considered as doing that activity if they do so ‘continuously’. Respondents sought clarity on the meaning of continuously in that context.

Response: In addition to promotion, the Act refers to persons carrying out the investment activity of ‘Dealing in Investments’ continuously. The Authority will clarify in guidance that, in assessing whether an investment activity is being carried on ‘continuously’, it pays regard to, *inter alia*, whether such activity is being conducted with relative frequency, as opposed to in a manner that may be considered ‘one-off’ or exceptional. Notwithstanding the foregoing, in making such determination, there may, at times, be a need to apply judgment, and in doing so, the Authority will take several factors into consideration, such as the nature of the business, the scale of the activity and the length of the period over which it is conducted.

6) Changes to the definition of ‘Contracts For Differences’ (CFD)

- (xiv) As part of its consultation, the Authority sought feedback on a proposal (in paragraph 36) to expand the definition of the investment category of CFD, in response to enquiries received on whether that definition includes spot trading of foreign exchange. While generally supportive of the Authority’s intention to address foreign exchange trading within the definition of CFD, one respondent suggested that the Authority should seek to align the language in the new definition with that used in other frameworks, such as MiFID II, and requested consideration for all (including non-commercial) transactions involving physical settlement of foreign exchange that satisfy criteria similar to that established under MiFID II, to also be excluded from the definition of CFD.

Response: After considering the feedback received on this proposal, the Authority has determined that the existing definition remains appropriate and is sufficiently clear. The Authority will, therefore, not advance the proposal to amend the definition of CFD in the Act.

7) Intersection between the investment business and digital assets frameworks

- (xv) Some respondents suggested expanding the list of investments in Part 1 of the First Schedule to include digital assets.

Response: The Authority does not deem it appropriate to incorporate digital assets—the doing of business with which is regulated separately under the Digital Assets Business Act 2018 (DABA)—within the list of investments under the investment business framework.

- (xvi) During consultation, the Authority advised that it would, in due course, provide details on its criteria for determining when entities licensed under DABA that are seeking to also

carry on investment business will be considered as doing so in a manner deemed ‘ancillary’, and, therefore, eligible for treatment as a Non-Registered Person (NRP) under this framework. Several respondents requested clarification on the meaning of ‘ancillary’.

Response: Details of the meaning of ‘ancillary’ are set out in *Guidance for Entities Seeking Exemption from Dual Licensing Due to Ancillary Nature of Activities*, which is published on the Authority’s website. In general, an activity will be deemed as ‘ancillary’ where gross revenues generated from that activity do not surpass 25% of overall gross revenues (generated by the entity’s licensed DABA business, as well as from activities falling within the ambit of this Act, but excluding other non-licensable activities).

- (xvii) It was further requested that, where an investment activity is being carried on using digital asset derivatives in a manner inconsistent with the definition of ‘ancillary’, such activities be regulated solely under the IBA, thereby eliminating the need for persons to also obtain a licence under the DABA.

Response: The Authority will expressly clarify in guidance that the regulation of digital asset derivatives (as defined under section 2 of the DABA) falls exclusively within the purview of the DABA and, therefore, outside of the scope of the IBA. To that effect, persons carrying on business involving digital asset derivatives are required to obtain a licence under the DABA to carry on such activities unless otherwise exempted by the Authority.

8) Clarification of new financial statement and audit requirements

- (xviii) For persons holding client money, the Authority proposed (in paragraph 49) strengthening its ability to determine the robustness of client money arrangements by introducing a requirement for review of controls around holding of such monies. A few respondents requested additional details on the nature of such review of controls, expressing particular concern about the potentially high cost and time burden of external reviews.

Response: The Investment Business (Client Money) Regulations 2004, as amended, provides further information regarding the requirement for review of client money controls. Those regulations require each investment provider holding client money to implement controls based on the ‘nature, scale and complexity of its business and requires reviews of those controls to be conducted on an annual basis by a ‘qualified person’.

To minimise the cost and overall burden of compliance with this new requirement, the regulations further specify that a ‘qualified person’ in that context may be that investment provider’s internal auditor, approved auditor or a person approved by the Authority in writing to perform that review.

- (xix) There was a request for clarification regarding whether the Authority would contemplate requests for extension of deadlines for submission of audited financial statements within the powers being sought (under new section 10B of the Act) to modify or dis-apply various framework requirements upon application by an investment provider.

Response: The Authority will be able to consider and determine applications to, among other things, extend the deadline for submission of audited financial statements.

9) Requirements for display of licences and registrations

- (xx) Paragraph 52(iii) outlined proposals to extend the requirement for displaying (licence) certificates to registered persons. Several respondents suggested that, in lieu of a requirement for display of physical certificates of licence or registration, reliance should instead be placed on a list maintained on the Authority's website and perhaps further supplemented by an obligation for an investment provider to disclose its regulated status on letterheads and in correspondence.

Response: The Authority views it as important for the framework to preserve varied avenues for investment providers' clients and the general public to ascertain and/or verify the regulated status of an investment provider. As such, the requirement will be retained for an investment provider to keep on display a physical certificate of licence or registration in Bermuda at its principal place of business, the offices of its senior representative or at its registered office. Additionally, the Authority will maintain a list of investment providers and their particulars on its website.

Proposed Enhancements to the Investment Business Regime: Rules and Guidance on Net Asset and Liquidity Requirements, Statutory Return Rules and Statement of Principles

10) General requests for additional details

- (xxi) While expressing overall support for the proposed changes, some respondents requested additional details to aid assessment of the likely impact(s) of changes for persons previously outside of the regime's scope who, going forward, would be required to register as either Class A or Class B Registered Persons.

Response: Since consulting initially on the broad framework enhancements, the Authority has provided additional details on the proposed modernisations through its consultation with an industry working group, and the public at large, on proposed amendments to the various statutory and supervisory instruments, including regulations, rules, SoP, codes and guidance.

The Authority has carefully considered the feedback it has received throughout the various rounds of consultation and has amended a number of initially consulted proposals in line with the responses received. As such, the soon-to-be-implemented framework is reflective of much of the feedback received during the consultation process.

Proposed Enhancements to the Investment Business Regime: General Business Conduct and Practice: Code of Conduct and Advertising Code of Conduct (Code)

11) Obligations to sophisticated clients (including investment funds) under the Code

- (xxii) The Authority received several queries regarding client segmentation within the Code, including a request for the definition of 'client' to be modified to explicitly exclude investment funds, thereby distinguishing between firms' obligations when they are carrying

on investment business with sophisticated and institutional clients (including investment funds) as against other clients.

Response: The Authority did not see it fit to adopt the approach suggested at this time, as investment providers are expected to comply with all applicable sections of the Code, bearing in mind proportionality, in carrying on investment business with clients. Where aspects of the Code more narrowly apply to specific investment providers, the scope of persons to whom those obligations apply is expressly stated (including in Section XII, which applies to investment providers who carry on business involving CFDs, with retail clients).

12) Over-The-Counter (OTC) leveraged products

- (xxiii) Feedback received on the new Section XII within the Code, which introduces enhanced requirements for investment providers carrying on business involving OTC leveraged products (including CFDs) with retail clients, included a request for the Authority to increase the new margin limits that were proposed.

Response: Following consideration of feedback and subsequent discussions with stakeholders, the Authority has opted not to prescribe leverage limits within the Code at this time. The Authority will, however, closely monitor investment providers' CFD trading activities with retail clients, including through a review of quarterly reporting on the nature and quantum of that CFD business. To capture this information, a new 'Schedule III – Supplemental Quarterly Return: Investment Providers Carrying on Investment Business Involving Contracts for Differences with Retail Clients' has been introduced as part of the quarterly statutory return. Alongside these changes, the Authority will continue to review its supervisory powers under the Act as well as its approach to the supervision of investment providers carrying on business involving OTC leveraged products (including CFDs) with retail clients.

- (xxiv) As part of its consultation of the Code, the Authority solicited feedback regarding whether stakeholders would be supportive of a general prohibition on acceptance of credit card payments as funding for the purchase and/or trading of OTC leveraged products for retail clients.

Response: Respondents did not express strong support either for or against such a prohibition.