

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay that contains the title text. The foreground shows a paved plaza with a pattern of light and dark tiles.

Investment Business in Bermuda

Preface

This publication has been prepared for the assistance of those who require information about the Investment Business Act 2003. It deals in broad terms with the requirements of Bermuda law and it is not intended to be exhaustive but merely to provide information which we hope will be of use to our clients. We recommend that our clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

Copies of the Investment Business Act 2003 and any other legislation referred to herein are available upon request.

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1. INTRODUCTION

The Investment Business Act 2003 (as amended from time to time, the “**IBA**”) came into operation on January 30, 2004. It replaced the Investment Business Act 1998 to effect a new but similar financial services regime in Bermuda and brought Bermuda’s regime more in line with international standards. The IBA is administered by the Bermuda Monetary Authority (the “**BMA**”).

2. REQUIREMENT FOR LICENCE OR REGISTRATION

The IBA requires that any person carrying on investment business in or from Bermuda be licensed or registered under the IBA unless it has been designated as a Non-Registrable Person by the Minister of Finance (the “**Minister**”) by order made under section 13D of the IBA.¹ A person carries on investment business in or from Bermuda for the purposes of the IBA if that person (a) is incorporated or formed in Bermuda and carries on investment business, (b) is incorporated or formed outside Bermuda and carries on investment business in or from Bermuda, or (c) engages in an investment activity the doing of which constitutes the carrying on by such person of investment business in or from Bermuda under an Order made by the Minister after consultation with the BMA.

The following types of service providers carrying on investment business from a place of business in Bermuda are required to apply for a licence or registration, although this list is not exhaustive:

- (a) investment managers;
- (b) investment advisers;
- (c) market makers;
- (d) broker/dealers;
- (e) market intermediaries.

The BMA is required to publish on its website a list of every person licensed or registered under the IBA (referred to herein as “investment providers”) and such particulars of each licence and registration of every investment provider as the BMA may determine.

3. MEANING OF “INVESTMENT BUSINESS”

The IBA contains a wide definition of “investment business” which includes carrying on any of the following activities by way of business:

- (a) Dealing in investments: buying, selling, subscribing for, or underwriting, investments, or offering or agreeing to do so, either as principal or agent. A person will be “dealing” with

¹ A recognized investment exchange is exempt from the requirement to hold a licence or registration under the IBA in respect of any activity which is carried on as a part of the exchange’s business as an investment exchange or which is carried on for the purposes of, or in connection with, the provision of clearing services by the exchange. Similarly, a recognized clearing house is exempt in respect of any investment activity which is carried on for the purposes of, or in connection with, the provision of clearing services by the clearing house.

respect to a particular transaction only if he continuously holds himself out as carrying on that business or the transaction is a result of him continuously soliciting members of the public (i.e. any other person except licensed, registered or Non-Registrable Persons, members of the same group as the relevant person, and persons who are or propose to become, participators with the relevant person in a joint enterprise).

'Dealing' does not include:

- (i) dealing by a company, in its own shares, by a unit trust in its own units, or by a partnership in its own partnership interests; or
 - (ii) accepting or transferring an instrument acknowledging or creating indebtedness in respect of any loan, etc, by a person in respect of an instrument which he has made.
- (b) Arranging deals in investments: making or offering, or agreeing to make:
- (i) arrangements with a view to another person buying, selling, subscribing for, or underwriting a particular investment, being arrangements which bring about or would bring about the transaction in question; or
 - (ii) arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments.

'Arranging' does not include:

- (i) arrangements made by a person with a view to a transaction to which he himself will be a party as principal or agent;
 - (ii) arrangements, the purpose of which is to provide finance to enable a person to buy, sell, subscribe for or underwrite investments;
 - (iii) arrangements for the introduction of persons to licensed or Non-Registrable Persons, or persons whose ordinary business involves him in engaging in an investment activity and who is not unlawfully carrying an investment business in Bermuda, where such introduction is made with a view to the provision of independent advice or independent exercise of discretion in relation to investments; or
 - (iv) arrangements with a view to a person accepting or transferring an instrument creating or acknowledging indebtedness in respect of any loan, etc., which he has made.
- (c) Managing investments: managing or offering, or agreeing to manage, assets belonging to another person where those assets consist of or include investments.
- (d) Investment advice: giving or offering, or agreeing to give, to persons in their capacity as clients or potential clients, advice on the merits of their purchasing, selling, subscribing for

or underwriting an investment, or exercising any right conferred by an investment to acquire, dispose of, underwrite or convert an investment.

- (e) Safeguarding and administering investments: safeguarding and administering, or arranging for the safeguarding and administration, or offering or agreeing to safeguard and administer, or to arrange for the safeguarding and administration of certain assets which may consist of or include investments where such arrangements have been held out as being arrangements under which investments would be safeguarded and administered.

'Safeguarding and administering' does not include: safeguarding and administering investments, or agreeing or offering to do so, by a person under arrangements where another person permitted under the IBA to provide such a service is responsible for and operates such arrangements in the course of carrying on such activities in Bermuda.

- (f) Promotion of investments to the public: promotion to members of the public includes:
- (i) advertising or agreeing to advertise material or information which promotes an investment to members of the public;
 - (ii) issuing or agreeing to issue a prospectus, application form or proposal form in relation to an investment to members of the public; and
 - (iii) distributing, circulating or agreeing to distribute, circulate or make available, material relating to an investment to members of the public,

provided that this investment activity applies to a person or agent only if he continuously solicits members of the public for the purpose of inducing them to enter as principals or agents into transactions.

4. MEANING OF "INVESTMENTS"

The IBA defines "investments" in quite broad terms. In addition to items such as shares, bonds and warrants, the definition also includes such things as options to acquire or dispose of any investment, rights under any contract, the purpose of which is to secure a profit by reference to fluctuations in the value or price of property, and rights under any contract constituting long-term insurance business (as defined in the IBA).

However, Part 3 of the First Schedule of the IBA outlines certain activities which are expressly excluded from the definition of investment business. Among these excluded activities are:

- (i) certain activities carried on between members of the same group, firm or joint enterprise;
- (ii) certain activities carried on for the purposes of, or in connection with, the sale of goods or the supply of services;
- (iii) operating employee share or savings schemes;

- (iv) a sale of a body corporate involving the disposal and acquisition of at least fifty per cent of the voting rights, or where the object of the transaction is to acquire day-to-day control of the affairs of the body corporate;
- (v) certain activities carried on by a trustee or personal representative, provided additional remuneration is not received for doing so; and
- (vi) general advice given in a periodical publication or broadcast.

5. NON-REGISTRABLE PERSONS

The Minister may by order designate any person as falling within the class of persons for whom there is no requirement to be licensed or registered under the IBA and such a person shall be regarded by the BMA for the purposes of the IBA as a “Non-Registrable Person”. Currently, Non-Registrable Persons include the following:

- (1) investment funds;
- (2) persons who are licensed under the Digital Asset Business Act 2018 to carry on digital asset business, who carry on investment business ancillary to the digital asset business for which those persons are registered;
- (3) persons who are registered under the Insurance Act 1978 to carry on insurance business, who carry on investment business in connection with the insurance business for which those persons are registered under that Act;
- (4) persons registered under the Insurance Act 1978 as insurance managers, brokers, agents, salesmen, or members of an association of underwriters recognized by the BMA, who carry on investment business in connection with the insurance business for which they are registered under that Act;
- (5) persons registered under the Insurance Act 1978 as insurance marketplace providers who arrange deals in investments in connection with the business for which the person is registered under that Act;
- (6) the Government of Bermuda;
- (7) the BMA; and
- (8) a public authority established under an Act in Bermuda.

6. REGISTERED PERSONS

Any Bermuda formed or incorporated person carrying on investment business that (i) is licensed, authorised or registered by a recognised regulator and (ii) does not maintain a place of business in Bermuda, is required to apply to the BMA to register as a Class A Registered Person.

Any person falling within the class of persons specified by the Minister by order made under section 13(1) of the IBA is required to apply to the BMA to register as a Class B Registered Person. Currently, this applies to the following persons:

- (1) persons, other than market intermediaries, who carry on investment business exclusively with one or more of the following:
 - (a) high income private investors;
 - (b) high net worth private investors;
 - (c) sophisticated private investors;
 - (d) investment funds;
 - (e) bodies corporate, each of which has total assets of not less than five million dollars, where such assets are held solely by the body corporate or held partly by the body corporate and partly by one or more members of a group of which it is a member;
 - (f) unincorporated associations, partnerships or trusts, each of which has total assets of not less than five million dollars, where such assets are held solely by such association, partnership or trust or held partly by it and partly by one or more members of a group of which it is a member; or
 - (g) bodies corporate, all of whose shareholders fall within one or more of the subparagraphs of this paragraph, except subparagraph (d);
 - (h) partnerships, all of whose members fall within one or more of the subparagraphs of this paragraph, except subparagraph (d);
 - (i) trusts, all of whose beneficiaries fall within one or more of the subparagraphs of this paragraph, except subparagraph (d); and
 - (j) limited liability companies, all of whose members fall within one or more of the subparagraphs of this paragraph, except subparagraph (d); and
- (2) persons who carry on investment business with not more than twenty persons at any time, and who do not carry on investment business with, or solicit investment business from, the public.

7. LICENSED PERSONS

A person that proposes to carry on investment business in or from Bermuda that is not a Non-Registrable Person and does not qualify for registration as a Class A Registered Person or a Class B Registered Person must apply for a licence under the IBA. There are two types of licence under the IBA: (i) a standard licence, under which a person is licensed to engage in any or all investment activities; and (ii) a test licence, under which a person is licensed to engage in any or all investment activities for a defined period determined by the BMA subject to such restrictions as the BMA may determine. Except where otherwise provided, references herein to “licensed persons” shall include both persons holding a standard licence and persons holding a test licence. The BMA, where it has made a determination or on the

application of a person (which shall be in such form as the BMA may direct and accompanied by such information as the BMA may require and an application of such amount prescribed by the BMA), may extend the defined period of a test licence for such additional period of time as it deems appropriate.

It is possible for the limitations on a licence to be varied and for a licence to be restricted or revoked. The IBA establishes a right to appeal a decision of the BMA to vary, restrict or revoke a licence to an appeals tribunal appointed by the Minister.

8. LICENCE/REGISTRATION APPLICATIONS

An application for a licence or registration must be made in the form prescribed by the BMA and will include (a) a business plan setting out the nature and scale of the investment business which is to be carried out by the applicant, (b) such fees as may be prescribed and (c) such other information, documents and reports as the BMA may require for the purpose of considering the application. An application for a licence must also include a copy of a notice of the applicant's intention to apply for a licence, which must be published in a local newspaper prior to filing the application.

In considering an application, the BMA must take account of the minimum criteria specified in the Second Schedule of the IBA, and may not grant a licence or registration unless it is satisfied that the minimum criteria are met or capable of being met by the applicant. Even if so satisfied, the BMA always retains discretion not to grant a licence or registration - notably if it sees reason to doubt that the criteria will be met on a continuing basis or if it considers that for any reason there might be significant threats to the interests of clients or potential clients. The minimum criteria include the following requirements:

- (a) that each 'controller' and 'officer' of the applicant be a 'fit and proper' person to hold the particular position which he holds or is to hold;
- (b) that the applicant implements corporate governance policies and processes as the BMA considers appropriate given the nature, size, complexity and risk profile of the applicant;
- (c) that the business of the applicant will be carried out in a prudent manner;²
- (d) that the applicant's position in the structure of any group to which it belongs is not such as to obstruct the conduct of effective consolidated supervision; and
- (e) that the business of the applicant will be carried on with integrity and the professional skills appropriate to the nature and scale of its activities.

² In determining whether an investment provider is conducting its business in a prudent manner, the BMA shall take into account any failure by the investment provider to comply with the provisions of the IBA, any other law (including the 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 Antiterrorist Financing) Regulations 2008), the Codes of Conduct and international sanctions in force in Bermuda. An investment provider will not be regarded as conducting its business in a prudent manner unless it (among other things) maintains, or as the case may be, will maintain (i) minimum net assets of such amount as the BMA may prescribe, (ii) adequate liquidity, (iii) adequate accounting and other records of its business and adequate systems of control of its business and records and (iv) a policy of insurance to cover risks inherent in the operation of its business of an amount commensurate with the nature and scale of the investment provider's operations.

The BMA published a Statement of Principles and Codes of Conduct, as provided for under the IBA. The Statement of Principles provides guidance on the BMA's approach to interpreting the minimum criteria, in exercising its power to grant, revoke or restrict a licence or registration, and in exercising its power to obtain information, reports and to require production of documents. The Codes of Conduct provide guidance on the duties, requirements, procedures, standards and sound principles to be observed by persons carrying on investment business. The BMA may take into account any failure of an investment provider to comply with any Codes of Conduct issued in determining whether the business of that investment provider is being conducted in a prudent manner as required by the minimum criteria.

The BMA also requires that an applicant submit completed Institutional or Personal Questionnaires as applicable. Questionnaires are required from each shareholder/controller, director and officer (as defined in Section 2 of the IBA) responsible for the applicant's business.

Anti-Money Laundering and Anti-Terrorist Financing policies and procedures should form part of all applications to ensure compliance with the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008. The name, contact details and relevant qualifications for the appointed Reporting Officer should also be provided.

In considering an application for a licence or registration under the IBA, the BMA may:

- (a) carry out any enquiries which it considers appropriate (eg. approaching other regulatory authorities);
- (b) ask the applicant, or any specified representative of the applicant, to attend a meeting with the BMA to answer questions and explain any matter(s) the BMA considers relevant to the application;
- (c) seek additional information from the applicant;
- (d) visit the applicant to review the proposed premises and files pertaining to the business that it is proposed to conduct in the licensed or registered entity;
- (e) request any information furnished by the applicant to be verified in such manner as the BMA may specify; and
- (f) take into account any other information which it considers relevant in relation to the application.

After considering an application, the BMA may grant, refuse or grant a licence or registration subject to conditions. An application may be withdrawn at any time before it is rejected or a licence or registration is granted, but the application fee is not refundable.

The IBA imposes no time limit within which the BMA must reach a decision in respect of an application. In practice, the BMA seeks to deal as promptly as possible with applications. The time required to complete its initial enquiries may vary, however, depending on the nature of the issues which may arise and the difficulty or otherwise in obtaining any additional information which may be necessary. Generally, the BMA would not expect an application to remain outstanding for a period in excess of 3 months, and in most cases the timetable will be appreciably less. It should be noted, however, that applications that

do not fully address the requirements of the BMA, necessitating follow-up requests for supplemental information, will likely take longer to be determined.

9. OBLIGATIONS OF INVESTMENT PROVIDERS UNDER THE IBA

9.1. Display of Licence or Registration

Each investment provider must at all times keep its licence or registration on display in Bermuda at its principal place of business (where applicable), the offices of its appointed senior representative (where applicable) or at its registered office.

9.2. Licensed Persons and Class B Registered Persons – Principal Place of Business

Each Class B Registered Person and each licensed person is required to maintain a place of business in Bermuda, which shall be its principal place of business. For this purpose, “maintain a place of business in Bermuda” means (i) in the case of an individual who is a sole trader, carrying on investment business from premises that person occupies in Bermuda for that purpose, and (ii) in any other case, carrying on investment business from premises it occupies in Bermuda, for that purpose, at which it employs staff and pays salaries and other expenses in connection with that business.

9.3. Class A Registered Persons – Senior Representative

Each Class A Registered Person is required to appoint a senior representative, who must be approved by the BMA to act in such capacity on behalf of the Class A Registered Person and must maintain an office in Bermuda. At the time of registration, a Class A Registered Person must provide written notice to the BMA of the particulars of the senior representative and the location of the senior representative’s office. In the event any such information is altered, the Class A Registered Person must give particulars of the alteration in writing within 14 days of the alteration being made.

A senior representative must forthwith notify the BMA, in such manner as it may direct, on the senior representative reaching a view that there is a likelihood of the registered person for which he acts becoming insolvent or on it coming to his knowledge, or his having reason to believe that one of the following events has occurred:

- (a) failure by a registered person to comply substantially with a condition imposed upon the investment provider by the BMA;
- (b) failure by a registered person to comply with a modified provision, or with a condition, being a provision or condition specified in a direction given to the investment provider by the BMA;
- (c) involvement of a registered person in any criminal proceedings whether in Bermuda or outside Bermuda; or
- (d) the registered person ceasing to be registered in or from within Bermuda.

Within 14 days of such notification, the senior representative must furnish the BMA with a report in writing setting out all the particulars of the case that are available to him.

Without reason acceptable to the BMA, a Class A Registered Person shall not terminate the appointment of its senior representative, and the senior representative shall not cease to act as such, until that person gives 30 days' notice in writing to the BMA of the intention to do so. If a senior representative willfully fails to give such notice to the BMA, he commits an offence.

9.4. Adequate Systems and Records

An investment provider, having regard to the nature, scale and complexity of its business, is required maintain adequate systems of control of the business and records and maintain adequate accounting and other records as will enable the investment provider to discharge the obligations imposed by or under the IBA or other provision of law. An investment provider must maintain accounts for all clients' assets separately from its own, in such a way as to enable such assets, individually and in aggregate, to be identified and reconciled at any time.

9.5. Duty to Keep Accounting Records

An investment provider must keep and maintain up-to-date accounting records in the English language which shall:

- (a) in respect of the investment provider's business, disclose particulars of:
 - (i) assets held for the investment provider's own account;
 - (ii) liabilities incurred for the investment provider's own account; and
 - (iii) entries of income and expenditure made and an explanation of their nature; and
- (b) in respect of the affairs of the clients of the investment provider, disclose particulars of:
 - (i) all assets held, managed or controlled by the investment provider for the account of clients, both individually respecting each client and collectively respecting all clients;
 - (ii) all liabilities incurred by the investment provider on behalf of clients, both individually respecting each client and collectively respecting all clients;
 - (iii) all transactions effected and carried out on behalf of clients, both individually respecting each client and collectively respecting all clients;
 - (iv) every document evidencing title to a client's asset held by the investment provider;
 - (v) where such document is held by a third party, particulars of such document and the name and address of that person; and
 - (vi) entries of the date on which every document evidencing title to a client's asset came into or left the possession or control of the investment provider.

For the purposes of the above, an investment provider may accept and rely on records kept by a third party where such records are capable of being reconciled with records kept by the investment provider.

An investment provider must permit any client of the investment provider during business hours to inspect, either personally or by his agent, any entry in a record kept by the investment provider of matters relating exclusively to the client as soon as practicable and, in any event, not later than 14 days from the date on which the investment provider receives a request from the client to carry on the inspection.

An investment provider shall keep either at its principal office or registered office (or in the case of a Class A Registered Person, at the office of its senior representative), or in such manner that it can be produced to the BMA within such period as the BMA may specify, the following records for the following periods in respect of all investment business conducted by or through the investment provider:

- (a) entry records which shall include account opening records, verification documentation and written introductions, for a period of at least five years from the date of the closing of the account;
- (b) account ledger records, for a period of five years from the date of the relevant transaction or series of transactions; and
- (c) supporting records, which shall include all records in support of ledger entries, credit and debit slips and cheques, for a period of five years from the date of the relevant transaction or series of transactions.

Information required to be kept by an investment provider under the IBA or the Investment Business Regulations 2003 may be recorded and kept by an investment provider in electronic form or such other form as the investment provider thinks fit, provided it is possible to inspect the information and to produce a copy of it in legible form.

9.6. Annual Financial Statements/Accounts

Each investment provider is required to prepare annual financial statements or accounts in respect of all transactions and balances relating to its investment business in accordance with the IBA. An investment provider that is a company is required to prepare annual financial statements of its business, and shall cause copies of those statements to be laid before the company in general meeting. An investment provider that is not a company is required to prepare annual accounts in such form and containing such particulars as the BMA may prescribe. Not later than four months after the close of its financial year, an investment provider must provide the BMA with a copy of its financial statements or accounts (as applicable) for that year, and, where such statements or accounts have been audited, a report thereon.

9.7. Auditors

Every investment provider (other than a Class B Registered Person) which under the terms of its licence or registration is authorised to hold clients' money is required to appoint annually an approved auditor (being an auditor who is a person entitled to practice as a public accountant and is a member of a professional body approved by the BMA for the purposes of the IBA) to audit the financial statements or accounts (as applicable) of the investment provider. Such audits must be in accordance with the generally accepted accounting standards for Canada, the United Kingdom, the United States of America, International Financial Reporting Standards or such standards as the BMA may recognise and the approved auditor must provide an auditor's report in respect thereof. No person having an interest in any

investment provider otherwise than as a client, and no officer, servant or agent of any investment provider shall be eligible for appointment as an approved auditor for that investment provider, and any person appointed as such auditor to any investment provider who subsequently acquires such interest or becomes an officer, servant or agent of that investment provider shall cease to be an approved auditor. If an investment provider fails to appoint an approved auditor, or at any time, fails to fill a vacancy for such auditor, the BMA may appoint an approved auditor and shall fix the remuneration to be paid by that investment provider to such auditor.

Each investment provider must submit a copy of its auditor's management letter and management's response letter to the BMA upon request made by the BMA. Additionally, each investment provider must notify the BMA in writing of a qualification made by its approved auditor in relation to his audit report within 5 days of receipt of such qualification. An investment provider must forthwith give written notice to the BMA if it proposes to remove an auditor before the expiration of his term of office or proposes to replace an auditor at the expiration of the term of his office with a different auditor.

An auditor of an investment provider must forthwith give written notice to the BMA of any of the following matters:

- (a) his resignation before the expiration of his term of office;
- (b) his intention not to seek to be re-appointed;
- (c) a decision to include a modification of his report on the investment provider's financial statements and in particular, a qualification or denial of his opinion, or the statement of an adverse opinion; and
- (d) any fact or matter of which he becomes aware which is likely to be of material significance for the discharge, in relation to the investment provider of which he is an auditor, of the BMA's functions under the Act.

9.8. Certificate of Compliance

Each investment provider must, within 4 months from the end of its financial year, deliver to the BMA a certificate signed by an officer of the investment provider, certifying that the investment provider has, with respect to the preceding financial year complied (or failed to comply) with the minimum criteria and, where applicable, observed any limitations imposed by the BMA on its licence or registration. Where the investment provider certifies that it has failed to comply with the minimum criteria, it must at that time of delivering the certificate give the BMA particulars of such failure in writing. An investment provider that fails to deliver a certificate within the time specified above shall be liable to a civil penalty not exceeding \$5,000 for each week or part of a week the investment provider is in default.

9.9. Annual Return

Each investment provider is required to prepare annual returns, in such form and containing such information as the BMA may prescribe, which must be signed on behalf of the investment provider. The investment provider must keep a copy of each annual return at its registered office, or principal office, or

office of its senior representative (as applicable) for a period of five years commencing from the date of its preparation.

9.10. Licensed Persons and Class A Registered Persons – Quarterly Return

Each investment provider issued a standard license and each Class A Registered Person required by the BMA to maintain a minimum net asset requirement, or additional capital of a fixed higher amount, must prepare quarterly returns in such form and containing such information as determined by the BMA. Such quarterly returns must be signed on behalf of the investment provider and must be submitted to the BMA within 21 days of the end of each quarter of a calendar year (the “**Submission Date**”). Each investment provider required to prepare quarterly returns must maintain a copy of each quarterly return submitted to the BMA at its registered office, or principal office, or office of its senior representative (as applicable) for a period of five years commencing from the Submission Date.

9.11. Annual Fees

Each investment provider is required to pay a fee (i) on the grant of a licence or registration and (ii) on or before 31 March in every year after the year in which the licence or registration was granted, and different fees may be prescribed having regard to the scope and nature of the business permitted to be conducted under the licence or registration. If an investment provider fails to pay the prescribed fee, it must pay in addition a late penalty fee of an amount equal to ten per cent of the fee due for every month or part thereof during which the fee remains unpaid.

9.12. Notification of Significant Developments

The BMA expects to be notified immediately of any significant developments in relation to an investment provider. Matters that should be reported include, but are not limited to, the following:

- (a) any breach of minimum net assets or liquidity requirements or expectation that a breach may be likely. Where the net assets of an investment provider fall below the minimum amount or below the amount specified by the BMA in Rules or in a directive, the investment provider shall inform the BMA of the event not later than the first business day after the day that the investment provider becomes aware of its occurrence;
- (b) instances of legal action against the investment provider involving the risk of material financial cost or reputational damage;
- (c) requests for information or assistance in relation to ongoing inquiries by a foreign regulatory body;
- (d) material changes in the business undertaken, including any proposal to undertake non-investment-related business; and
- (e) any material cyber incidents.

9.13. Change of Controllers

An investment provider must give written notice to the BMA of the fact that any person has become or ceased to be a “controller” (as defined in the IBA) or “officer” (as defined in the IBA) of the investment provider within 14 days from the day on which the investment provider becomes aware of that fact. An investment provider which fails to give such notice shall be liable to a civil penalty not exceeding \$5,000 for each week or part of a week that it fails to comply with that requirement.

In addition, no person shall become a ten per cent or majority “shareholder controller” (as defined by the IBA) of an investment provider unless: (i) he has served on the BMA written notice of his intention to be a ten per cent or majority shareholder controller; and (ii) a period of ninety days has elapsed from the date of service of that notice without the BMA serving a notice of objection (or earlier if the BMA has notified him in writing that there is no objection). An objection may be made on the basis that the person is not ‘fit and proper’ or if the BMA determines that clients and potential clients may in any other manner be threatened by that person becoming a shareholder controller. Such objections by the BMA are subject to an appeals process.

Where the BMA has determined that a person is no longer fit and proper to be a shareholder controller, it has wide powers to restrict the transfer of his shares, the voting rights attached to those shares and may even order the sale of specified shares.

The BMA may also object to existing controllers of any description (including shareholder controllers, managing directors and chief executives) on the grounds that such controller is no longer ‘fit and proper’. Before issuing a notice of objection, the BMA is required to serve upon the person concerned a preliminary written notice stating that the BMA is considering service of a formal notice of objection. Upon receipt of the preliminary written notice, the person served may, within 28 days beginning on the day on which the notice is served, make written representations to the BMA which shall be taken into account by the BMA in making its final determination.

A person shall be guilty of an offence if he fails to give the required notice or if he becomes a controller before the end of the specified objection period or where he becomes or continues to be a controller after being served with a notice of objection. However a person shall not be guilty of an offence if he shows that he did not know of the acts or circumstances by virtue of which he became a controller of the relevant description (but where any person becomes a controller of any such description without such knowledge and subsequently becomes aware of the fact that he has become such a controller he shall be guilty of an offence unless he gives the BMA written notice of the fact that he has become such a controller within fourteen days of becoming aware of the fact).

9.14. Licensed Investment Providers – Minimum Net Assets

A licensed investment provider will be regarded as conducting its business in a prudent manner if it maintains or, as the case may be, will maintain, minimum net assets of:

- (a) \$100,000 in the case of an investment provider who is an agent;
- (b) \$250,000 in the case of an investment provider who is a principal;

- (c) \$12,000 in the case of an investment provider who is neither an agent nor a principal;

provided that where the BMA makes a determination that the minimum net asset requirement set out above is not appropriate in the case of a particular investment provider³, the BMA shall make such adjustments in accordance with the Investment Business (Prudential Standards) (Standard Licences, Test Licences, and Class A Registered Persons) (Capital, Net Assets and Liquidity) Rules 2022, as it considers appropriate that exceed the minimum net assets set out above.

9.15. Licensed Investment Providers – Minimum Liquid Assets

Where a licensed investment provider acts as a principal or an agent, it must maintain liquid assets equivalent to three months of its annual expenditure⁴. Where a licensed investment provider does not act as a principal or an agent, it must maintain liquid assets equivalent to not less than one month of its annual expenditure.

9.16. Class A Registered Persons – Capital and Liquidity Requirements

A Class A Registered Person who is subject to capital and liquidity requirements imposed by a recognised regulator is required to maintain capital and liquidity of such amounts and in such form and in accordance with any conditions, restrictions or limitations as may be required by the recognised regulator. A Class A Registered Person who is not subject to capital or liquidity requirements for a recognised regulator will be required to satisfy such capital and liquidity requirements as the BMA may determine.

9.17. Licensed Persons and Class A Registered Persons – Notification of Breach of Capital or Liquidity Requirements

A licensed person or Class A Registered Person shall notify the BMA forthwith where: (a) it has breached any capital or liquidity requirement applicable to it; (b) it has reason to believe that it will breach any

³ In determining whether the minimum net asset requirement specified above is not appropriate in the case of a particular investment provider, the BMA may take into consideration whether the investment provider (a) has assumed material principal positions through, among other things, the trading or holding of significant portfolios of securities or derivatives, (b) conducts material non-investment business and (c) intends to offer margin or other lending facilities. Where the BMA makes such a determination in respect of a particular investment provider, it may substitute the minimum net asset requirement specified above for a fixed higher minimum net asset threshold or apply a fluctuating market risk-based minimum capital requirement. Where the BMA has determined that a fluctuating market risk-based minimum capital is appropriate in respect of a particular investment provider, then the minimum net assets required to be maintained by the investment provider shall be 8% of risk weighted assets and not less than \$250,000, and the investment provider shall be required to maintain at least 6% of such risk weighted assets as tier 1 capital (meaning common stock and disclosed reserves) and the remaining 2% of risk weighted assets may be met by tier 2 capital (meaning undisclosed reserves, asset revaluation reserves, hybrid (debt and equity) capital instruments and subordinated debt).

⁴ “Annual expenditure” in this context is based on the most recent annual or annualised financial statement or accounts filed by the investment provider with the BMA and calculated (i) as total revenue less profit before appropriations where the investment provider made a profit in the previous year or (ii) as total revenue plus loss before appropriations where the investment provider made a loss in the previous year. “Liquid assets” includes (but is not limited to): (a) cash and cash equivalents (i.e. cash, term deposits and marketable securities); (b) prepayments, where the period of prepayment is less than three months; (c) amounts accrued or receivable with respect to interest on marketable investments; (d) unsecured receivables, where these are outstanding for less than 30 days; (e) receivables arising from the sale of investments outstanding for less than 30 days from the contractual settlement date; and (f) other receivables arising from investment business outstanding for less than 3 months.

capital or liquidity requirement applicable to it; (c) the liabilities of one or more of its subsidiaries exceed that subsidiary's assets; or (d) the liabilities of its parent company exceed its assets.

9.18. "Adequate Insurance"

Each investment provider is required to effect a policy of insurance to cover risks inherent in the operation of its business of an amount commensurate with the nature, scale and complexity of its operations. Relevant types of insurance include the following:

- errors and omissions/professional indemnity;
- directors and officers liabilities;
- fidelity and forgery;
- loss of property;
- computer crime;
- computer damage;
- business interruption; and
- office contents.

The BMA will review the adequacy of coverage, having regard to the nature, scale and complexity of the business. In judging the adequacy of insurance cover, the BMA looks to be satisfied that the scope and scale of cover in place is such as to provide reasonable assurance of the ability of the investment provider to continue to operate in the event that it should face either major damage to its infrastructure or material claims from clients or third parties for loss and damage sustained. It is in the first instance for those directing the business to assess the level of risk they face in the business and to determine the extent of coverage appropriate for that business. An investment provider will not be regarded as carrying on its business in a prudent manner unless it maintains insurance coverage that is appropriate to the nature, scale and complexity of its operations.

9.19. Contract Notes

An investment provider is required to provide each client with a contract note containing the following particulars not later than one day following the date of each transaction effected and carried out by the investment provider (except that where such particulars are in the possession of a third party who is connected with the transaction, the investment provider shall provide such contract note not later than seven days from the date of receiving such particulars from the third party):

- (a) the name and address of the investment provider, and the capacity in which the investment provider is acting;
- (b) the client's designation and account number;
- (c) the date of the transaction;

- (d) the quantity and description of the securities that are the subject of the transaction;
- (e) the nature of the transaction and the unit price (forward or historic) of the securities;
- (f) the fees, commissions and expenses, if any, charged to the client (directly or indirectly) in connection with the transaction;
- (g) if a purchase, the total cost;
- (h) if a sale, the total proceeds;
- (i) the settlement date;
- (j) if the transaction involves a currency conversion, the relevant rate of exchange.

9.20. Portfolio Statements

An investment provider is required to provide each client with a portfolio statement containing particulars of all transactions effected and carried out on behalf of the client during the period covered by the statement and all assets held for the account of the client by the investment provider as at the date of the statement. The investment provider must provide the first such portfolio statement within a period of six months beginning with the date of the opening of the client's account, and thereafter must provide a quarterly statement unless otherwise requested by, and agreed to in writing with, the client.

9.21. Client Money

The Investment Business (Client Money) Regulations 2004 impose various requirements in relation to client money (as defined therein) held by an investment provider on behalf of its clients in an account with itself, including requirements to pay all client money which it holds or receives into a client bank account and to keep all client money and money belonging to the investment provider segregated.

9.22. Cyber Risk

The BMA has issued the Operational Cyber Risk Management Code of Conduct for Corporate Service Providers, Trust Companies, Money Services Businesses, Investment Businesses and Fund Administration Providers (the "**Cyber Code**"), which establishes duties, standards, procedures and principles for compliance in relation to operational cyber risk management. Among other things, the Cyber Code requires investment providers to implement adequate and sufficient technology risk programmes and to appoint an appropriately qualified member of staff or a similarly experienced outsourced resource to the role of Chief Information Security Officer. As with other Codes of Conduct, failure to comply with the Cyber Code is considered by the Authority in determining whether an investment provider is meeting its obligation to conduct its business in a sound and prudent manner under the IBA.

9.23. Outsourcing

The BMA has issued the Outsourcing Guidance Notes for Banks, Deposit Companies, the Bermuda Stock Exchange, Corporate Service Providers, Trust Companies, Money Service Businesses, Investment Businesses, Fund Administrators and the Credit Union (the "**Outsourcing Guidance Notes**"), which requires the BMA-regulated entities to which it relates to have in place adequate policies

and procedures to manage and monitor existing activities that have been outsourced, as well as to assess the risks arising from outsourcing new activities. Among other things, the Outsourcing Guidance Notes provide that an investment provider's management should have in place policies and procedures for the management of outsourcing and that an investment provider seeking to enter into new material outsourcing (as defined in the Outsourcing Guidance Notes) must provide prior notification to the BMA, which then has 20 working days to object if deemed appropriate.

10. BMA SUPERVISION OF INVESTMENT PROVIDERS

10.1. BMA Powers of Investigation

Where the BMA believes that it is reasonably required in the interests of an investment provider's clients or potential clients, it may appoint one or more competent persons to investigate and report on the affairs of the investment provider. The BMA has power to require any controller, officer, employee, agent, auditor, accountant or barrister and attorney of an investment provider which is under investigation to produce such documents or information in that person's possession, custody or power which may be reasonably required for the purposes of the investigation. The BMA also has power, in certain circumstances, to enter the premises of an investment provider which is under investigation.

Additionally, the BMA has wide-ranging powers under the IBA to require an investment provider, a member of its group or partnership, or a controller of that investment provider, to provide such information or documents as the BMA may reasonably require for the performance of its functions under the IBA, including the provision of a report by the investment provider's auditor or other person with relevant professional skill.

10.2. Prudential Visits

Regular prudential meetings provide an opportunity for the BMA to discuss with senior management the development of the investment provider's business, including past performance and future strategies for the business. Meetings are normally scheduled triennially but may be more frequent when the BMA judges it necessary. Ad hoc meetings will also take place to discuss important interim developments or concerns.

While the agenda of each prudential meeting is tailored to focus on the specific circumstances of each investment provider, in general, matters discussed at prudential meetings are likely to include:

- (a) business model and strategy (including any planned changes to business strategies);
- (b) management and administration (including matters relating to the fit and proper criterion);
- (c) corporate governance (including material operational changes, changes in investment advisers, managers, custodians, administrators and key staff members);
- (d) internal controls, including:
 - (i) outcomes of periodic reviews of risk management and compliance frameworks;
 - (ii) staff training;

- (iii) internal audit programme;
- (iv) disaster recovery planning; and
- (v) anti-money laundering procedures and compliance;
- (e) financial soundness, including:
 - (i) financial reporting and financial statements (audited where applicable);
 - (ii) adequacy of net assets/capital and liquidity requirements; and
 - (iii) indebtedness between the investment provider and other members of the group to which it may belong;

Prudential discussions can take place at the BMA, at the investment provider's own premises or, in the case of a Class A Registered Person, at the office of its senior representative. The BMA will not ordinarily include Class B Registered Persons in scope for its prudential visit programme, and will only do so in exceptional cases (i.e. where the BMA has material concerns).

10.3. On-Site Supervision

The BMA has the power to request an on-site meeting at the offices of the investment provider. The purpose of on-site supervision is to enable the BMA to review compliance with policies and procedures, as well as the processes that management has put into place to monitor and control key risks in the business. On-site supervision involves structured visits to an investment provider's offices where, typically, the BMA interviewing a range of management and staff and reviews a sample of client files. On-site visits will usually be scheduled on a rolling basis; however, the frequency of on-site visits will also reflect the BMA's assessment of the degree of risk in the business and the effectiveness of the investment provider's personnel, systems and controls for monitoring risk. In exceptional cases (i.e. where the BMA has material concerns, the BMA may conduct a visit at short, or event without, notice. There will not usually be a need for a separate off-site prudential discussion in a year when an investment provider is scheduled for an on-site visit unless significant recommendations emanate from the on-site visit. Where possible, the BMA's prudential and AML/ATF supervision teams will conduct simultaneous on-site visits as opposed to stand-alone reviews.

The BMA will normally write to an investment provider approximately 8 to 10 weeks ahead of a visit, requesting pre-visit information and providing more details regarding how the BMA intends to structure the visit. The pre-visit information requested is specific to the scope of each on-site visit, but would generally include business plan, management reports, and policies and procedures relating to the investment provider's corporate governance, compliance and risk management practices.

While the IBA provides powers for the BMA to formally require the production and submission of such information as it may reasonably require, on-site visits are normally conducted without recourse to formal powers.

10.4. Restriction on Disclosure of Information

The IBA provides for restriction on the disclosure of non-public information by the BMA and other persons receiving information relating to the business or affairs of any other person. One exception to this restriction is the provision for information-sharing gateways between the BMA and regulatory bodies of other jurisdictions.

11. OFFENCES

Any person that fails to comply with any requirement or contravenes any provision by or under the IBA shall be liable to a civil penalty and/or public censure. The BMA shall not impose a civil penalty where it is satisfied that the person concerned took all reasonable steps and exercised all due diligence to ensure the requirements of the IBA would be complied with. If the BMA proposes to impose a civil penalty or make a public censure, it must first give the person concerned a warning notice. The BMA's decision to make a public statement may be appealed to the appeals tribunal. If the BMA determines that an individual is not a fit and proper person to perform his function or carry out certain activities on behalf of the investment provider, it may make a prohibition order in respect of the regulated person or activity.

The BMA may seek a court order to wind up a company or dissolve a partnership which has carried on investment business in contravention of the IBA. The BMA may also apply to the Bermuda courts for an injunction to restrain an investment provider from contravening any relevant requirement of the IBA (including to prevent the investment provider from disposing of, or otherwise dealing with, any assets of his which it is satisfied he is reasonably likely to dispose of or otherwise deal with). It may also seek a court order to require the restitution of profits to persons which have, for example, suffered a loss as a result of a contravention of a relevant requirement.

12. UNSOLICITED CALLS

As well as prohibiting the carrying on of investment business in or from Bermuda without being licensed, registered or a Non-Registerable Person, the IBA also prohibits persons from entering into an investment agreement with an individual in the course of or in consequence of an unsolicited call. Contracts entered into as the result of an unsolicited call shall not be enforceable against the person on whom the call was made and that person shall be entitled to recover any money or other property paid or transferred by him under the agreement, together with compensation for any loss sustained by him as a result of having parted with it.

13. SUPERVISION OF UNLICENSED AND UNREGISTERED PERSONS

Under the IBA, the BMA has several methods of regulating unlicensed and unregistered persons, including powers of investigation and the ability to seek various types of court order.

If the BMA has reasonable grounds for suspecting that a person is carrying on investment business in contravention of the requirement to be licensed or registered, it may, by written notice, require that person or any other person to provide such information, and/or produce documents which may reasonably be required for the purpose of investigating the suspected contravention. In such circumstances, the BMA may also require the person under investigation or any other person who is connected to the person under investigation to attend an interview and answer questions relevant for determining whether such

contravention has occurred. Officers, servants or agents of the BMA may, with a warrant, also enter premises for the purposes of seeking information or documents, asking questions or making copies of documents.

The BMA may also seek orders to restrain or remedy such contraventions, or to restrain the disposal of assets or to require the restitution of profits to persons which have, for example, suffered loss as a result of the contravention.

14. ENFORCEABILITY OF AGREEMENTS MADE IN CONTRAVENTION OF THE IBA

Pursuant to Section 15 of the IBA, an agreement entered into by a person in the course of carrying on investment business in contravention of the requirement to be licensed, registered or designated as a Non-Licensed Person under the IBA shall be enforceable by all parties to that agreement.

15. OVERSEAS FUNDS

Investment funds are subject to regulation under the Investment Funds Act 2006, as amended (the "**IFA**"), which prohibits the operation of an investment fund in or from Bermuda unless the investment fund is registered or authorised under the IFA or, in the case of an investment fund incorporated or established in a jurisdiction outside Bermuda (an "**Overseas Investment Fund**"), designated under the IFA. As an Overseas Investment Fund is required to apply to the BMA for designation as an overseas fund in order to carry on promotion or be managed in or from Bermuda, investment providers that manage or promote investment funds should be aware that the IFA may be relevant whether or not those funds are established in Bermuda. For more information relating to the regulation of investment funds under the IFA, please see Conyers' publication titled "Investment Funds in Bermuda" or ask your Conyers contact for more information.

16. AML/ATF AND SANCTIONS

The Proceeds of Crime Act 1997 ("**POCA**") contains provisions which deal with money laundering offences and other offences relating to the proceeds of criminal conduct. POCA is primarily aimed at preventing funds derived from the commission of offences relating to the proceeds of drug trafficking and/or serious crimes etc. from being laundered or legitimised. In addition to creating offences relating to money laundering (or the provision of assistance in such activities), POCA also confers expansive information gathering powers on the Bermuda Police Department relating to investigations into drug trafficking and whether a person has benefited from criminal conduct.

Pursuant to POCA, the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (the "**POCA Regulations**") were enacted. The POCA Regulations apply only to 'regulated financial institutions' as defined therein, which includes any person that carries on investment business within the meaning set out above.

As regulated financial institutions, investment providers are required to comply with the POCA Regulations as interpreted by the Guidance Notes on the prevention of money laundering and terrorist financing. Regulated institutions are required to adopt anti-money laundering ("**AML**") and anti-terrorist financing ("**ATF**") policies and procedures and ensure that their employees are periodically trained on the POCA Regulations, related guidance and the applicable policies and procedures in order to ensure

compliance with the duties imposed thereunder. Regulated financial institutions must also take steps to implement the required identification procedures, record keeping procedures, training procedures and procedures for the recognition and reporting of suspicious transactions. Further, regulated institutions are required to appoint a compliance officer to oversee compliance and a reporting officer to whom reports should be made and who shall have responsibility to make reports to the Financial Intelligence Agency when suspicious circumstances require.

Investment providers are also "relevant institutions" for the purposes of Bermuda's sanctions regime, and are similarly subject to certain reporting and other obligations thereunder.

Please ask your contact at Conyers for more information regarding AML/ATF and sanctions requirements.

17. ECONOMIC SUBSTANCE

Under the Economic Substance Act 2018 and related regulations (collectively, the "ESA"), each entity resident in Bermuda that carries on as a business a "relevant activity" is required to comply with the economic substance requirements under the ESA (the "ESA Regime"), unless resident for tax purposes in a jurisdiction outside Bermuda that is acceptable to the Registrar⁵ and that is not on the EU list of non-cooperative jurisdictions for tax purposes. Among the relevant activities is "fund management", which is defined as managing investments for an investment fund (as that term is defined in the IFA) in accordance with the IBA. Prior to January 1, 2022, only entities engaged in "fund management" and licensed under the IBA were viewed as in scope and required to comply with the ESA Regime. On and after January 1, 2022 any entity resident in Bermuda and undertaking "fund management" is viewed as in scope and must comply with the ESA Regime regardless of licensing status under the IBA, unless resident for tax purposes in an acceptable jurisdiction. In addition to compliance with the ESA Regime, an in-scope entity will need to file an economic substance declaration with the Registrar of Companies in Bermuda on an annual basis, providing certain prescribed information in relation to the previous financial year. Please ask your contact at Conyers for more information regarding the ESA and economic substance requirements.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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⁵ An entity will not be deemed by the Registrar to be resident for tax purposes in a jurisdiction if that jurisdiction does not have a corporate tax regime and/or residency for tax purposes in such jurisdiction does not result in the entity being subject to the equivalent economic substance requirements in that jurisdiction. The Registrar has advised that such jurisdictions may include Anguilla, Bahamas, Bahrain, Barbados, British Virgin Islands, Cayman Islands, Turks and Caicos Islands and the United Arab Emirates.