

NEWSLETTER

Regulatory Outlook

BERMUDA | 2024

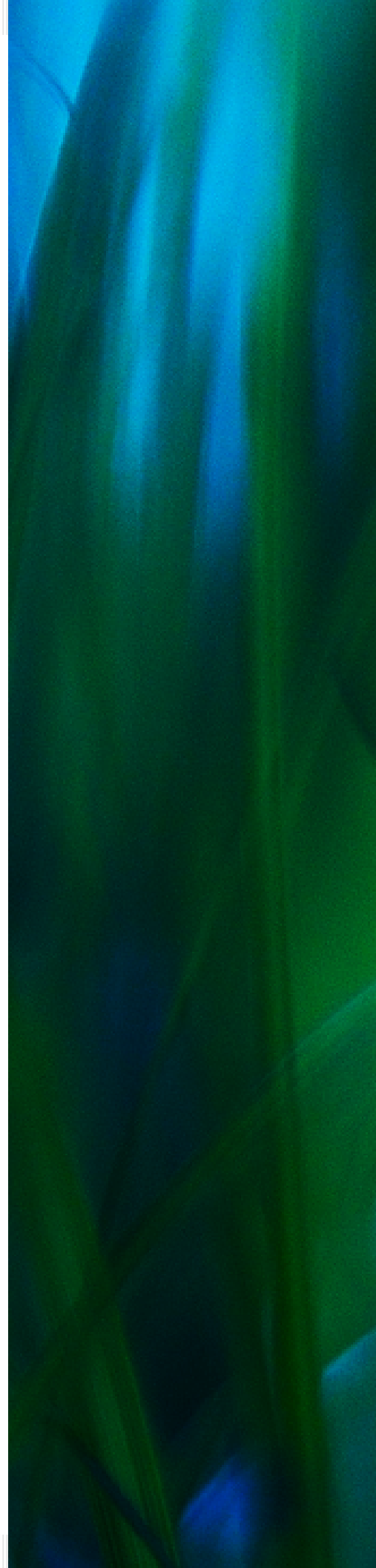
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As we enter 2024 the myriad of regulatory changes can appear overwhelming. We are here to help and have set out below some key changes and issues that can impact Bermuda entities.

Bermuda has introduced a corporate income tax regime for the first time. The Corporate Income Tax Act 2023 became operative on 1 January 2024 in respect of certain administrative and regulatory provisions. The new tax regime will become effective for tax years beginning on or after 1 January 2025. The legislation is complex and will require careful navigation – especially as guidance notes and regulations are produced in the coming year. It is important to note that we expect the new corporate income tax to apply to a relatively small proportion of Bermuda entities as it will apply only to Bermuda entities that form part of multinational enterprises with annual revenue of €750M or more. More publications on this important topic will follow in 2024.



Beneficial Ownership Register

Public registers of beneficial owners have been in the news a lot lately especially in light of the ruling from the European Court of Justice in November 2022 which provided that privacy considerations must be balanced with the need for transparency for anti-money laundering or tax evasion purpose effectively invalidating full access to beneficial ownership registers by any member of the general public. However, the judgement also recognised that, in addition to law enforcement, competent authorities and certain other entities, a person or organisation that demonstrates a “legitimate interest” should also have access to the beneficial ownership register. Bermuda has always had a central register with the Bermuda Monetary Authority (“BMA”) being the repository of details of the beneficial owners of Bermuda entities.

The BMA has always co-operated with onshore regulators in any investigations so the need for transparency for AML and criminal prosecution purposes has always been satisfied. Notwithstanding this, the issue of publicly accessible registers of beneficial ownership is a priority in UK Government discussions with Bermuda. The Bermuda Government has said it is committed to publicly accessible registers within 12 months of the publication of the implementation review of the EU’s fifth Anti-Money Laundering Directive. As relates to central registers, it is now proposed that the responsibility for maintaining the central beneficial ownership register will transfer from the BMA to the Bermuda Register of Companies. This will require a new legislative framework and we understand the aim is to have this in place no later than June 2024. There is still uncertainty as to the extent of any public access to this central register including whether any “legitimate interest” test similar to that being developed by the EU will be applied.

AML/ATF/Sanctions

There were a number of amendments made to the AML regime in 2023 including updates to the main guidance notes and the sector specific guidance notes for trust business, the securities sector, corporate service providers and money service business. In addition the Minister of Legal Affairs and Constitutional Reform issued some AML/ATF advisories about the risks in a number of jurisdictions arising from inadequate systems and controls to combat money laundering and terrorist financing. It was noted that the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 require the Bermuda regulated sector and relevant persons to apply, on a risk sensitive basis, enhanced customer due diligence with customers (i) in instances where a person or a transaction is from or in a country that has been identified as having a higher risk by the Financial Action Task Force or the Caribbean Financial Action Task Force and (ii) where a person or transaction is from or in a country which represents a higher risk of money laundering, corruption, terrorist financing or being subject to international sanctions.

Of significant note is that in April 2023 the National Anti-Money Laundering Committee (“NAMLC”) released the Report on 2020 Money Laundering and Terrorist Financing Risk Assessment. These reviews are done every 3-4 years and are useful to regulators and regulated entities in understanding material money laundering and terrorist financing risks and how best to mitigate such risks.

Pursuant to such report, Bermuda’s overall national money laundering threat was raised to “High” from the 2017 rating of “Medium-High”. The increase was not due to any increased threat but rather was reflective of a deeper analysis and understanding of potential money laundering risks for Bermuda. Individual industry sectors were also ranked with only the trust sector being ranked as “high” for inherent ML risk, up from “Medium-High” in 2017.

It should be noted that in 2023 the NAMLC also commenced an ML and TF risk assessment in relation to the digital asset business as well as in relation to legal persons. The results of such assessment will hopefully be issued in early 2024.

For all clients who are “regulated financial institutions”, these changes to the guidance notes and the issuance of the National Risk Assessment should be treated as triggers to have your compliance team review your existing policies and procedures to ensure they reflect the current regime and include the appropriate steps and procedures to mitigate the risk assigned to your sector. The Conyers Regulatory team can assist with such reviews if desired.

Investment Funds

The Investment Funds Amendment Act 2023, the Investment Fund Amendment Rules 2023 and the Investment Fund Offering Document Amendment Rules 2023 each came into operation on 28 September 2023, making various amendments (collectively, the “Amendments”) to the Investment Funds Act 2006, the Investment Fund Rules 2019 and the Investment Fund Offering Document Rules 2019, respectively. While many of the changes were housekeeping in nature and the Amendments as a whole are not expected to materially change the day-to-day operations of most Bermuda funds, the Amendments introduced a number of changes of which operators of Bermuda funds should be aware, including:

- an express requirement to publish/make available to investors copies of an updated offering document forthwith when material changes are made to the fund’s offering document;
- a framework for the imposition of late fees in respect of non-compliance with annual filing and other time-bound requirements;
- deadline extension application provisions in respect of the requirements to prepare financial reports and submit annual compliance filings;
- a requirement that the annual financial report of a Professional Class A Fund, Professional Class B Fund or Professional Closed Fund must contain the fund’s audited financial statements, which is consistent with the requirement that applies to authorised funds (whereas the financial statements included in the annual financial report of a Private Fund may be audited or unaudited);
- a requirement that the approved auditor of an investment fund immediately give written notice to the BMA of certain events (e.g. that the fund is insolvent or is likely to become insolvent or there is evidence to suggest fraud, theft or misappropriation of assets) and provide a report to the BMA as soon as practicable thereafter.

Insurance

Over the course of 2023, there were a number of changes in the insurance sector which are pertinent regulatory considerations for 2024. Certain of those changes are summarized below.

Amendments to the Insurance Act relating to Recovery Plans and IAIGs

The Insurance Act 1978 was amended in May 2023 to empower the BMA to make rules for recovery planning. It is anticipated that when these rules are implemented, the BMA will require certain commercial insurers to develop recovery plans. The amendments also broaden the scope of the BMA's supervisory function by providing the BMA with a framework pursuant to which they may designate a member of an Internationally Active Insurance Group (IAIG) as its 'head of the IAIG' for the purposes of IAIG supervision.

Enhancements to the Regulatory Regime and Fees for Commercial Insurers

The BMA has proposed a number of qualitative and quantitative enhancements to the Bermuda regulatory regime for commercial insurers. The enhancements are aimed at ensuring that the regime is effective, proportionate and aligned with international standards. It is expected that these changes will become effective on 31 March 2024.

The Management of Climate Risks for Commercial Insurers

In March 2023, the BMA published guidance notes for the Management of Climate Risks for Commercial Insurers (the "Guidance Notes"). The Guidance Notes apply to commercial insurers and set out the minimum standards the BMA expects such insurers to incorporate into their climate risk management framework. From year-end 2023 onwards, insurers are expected to undertake an overarching climate risk status assessment with a view to implementing an appropriate framework. According to the Guidance Notes, it is the BMA's expectation that a climate risk management framework should be adopted by commercial insurers and be fully operational by year-end 2025.

Following the Guidance Notes, the BMA published a discussion paper in September 2023 regarding the Disclosure of Climate Change Risks for Commercial Insurers (the "Discussion Paper"). The Discussion Paper sets out the BMA's proposals for the scope of a disclosure framework relating to climate change risks, including phasing in the requirement to publish disclosure reports, starting with Bermuda supervised insurance groups publishing their first disclosure report for year-end 2024. It is anticipated that the Discussion Paper will inform the preparation of a Consultation Paper to be published by the BMA in the near future.

Privacy and Data Protection

With the Government's long awaited announcement that the Personal Information Protection Act 2016 ("PIPA") will come into full force on 1 January 2025, the Office of the Privacy Commissioner (PrivCom) has increased its staff count considerably to demonstrate its supervisory readiness. As part of the preparation, the Personal Information Protection Amendment Act 2023 was passed to harmonise and resolve overlapping provisions and make certain conforming change to PIPA and to the Public Access to Information Act 2010 (PATI).). In addition PrivCom published "[The Guide to PIPA](#)", a useful digital resource for privacy officers and individuals with day-to-day responsibility for privacy and data protection. As the impacts of artificial intelligence, cyberattacks and privacy rights are increasingly front of mind in boardrooms, and with PIPA's commencement date now confirmed, there has been a surge in client demand for personal information and data protection advice. With the clock now officially ticking for organisations that use personal information in Bermuda to ensure that they will be PIPA compliant, Conyers Regulatory is ready to assist whether it be with drafting privacy policies and notices, privacy audits, data transfer protection assessments or helping to clarify individuals' rights.

Employment

2023 saw some legislative changes for employers with employees paid on an hourly basis and who earn tips and other gratuities, and saw the decision by the Information Commissioner to deny a PATI request for non-anonymised copies of Employment and Labour Relations Tribunal decisions.

Bermuda employers are now required to provide a minimum hourly wage to employees, pursuant to the Employment (Minimum Hourly Wage Entitlement) Act 2022. On 1 June 2023, the minimum hourly wage was set at \$16.40. The definition of 'employee' for the purposes of this Act is broader than the definition of 'employee' in the Employment Act 2000, but contains certain exclusions. Employers can use gratuities, service charges and commissions – but not tips, being payments given directly to an employee - to make up the \$16.40, but if the amount falls short, the employer must pay the difference. The legislation and related regulations also includes record access and retention obligations. Aggrieved employees can file complaints to designated Inspectors, who can issue enforcement notices, including awards and civil penalties. Failure to comply with the Act is also a criminal offence, carrying potential fines.

Amendments to the Employment Act 2000 will come into force on 1 March 2024 to regulate the management, protection and fair distribution of employee tips and other gratuities for wage earners in Bermuda. These amendments will impose new requirements on employers who have gratuity-earning staff. In particular the amended legislation addresses: the withholding of tips and other gratuities; the pooling and redistribution of tips; the prohibition for employers to share in tips; and requirements for record keeping and access requests. They also contain new obligations in respect of a mandatory policy statement with respect to the management of tips and other gratuities. Contraventions of certain of these obligations can result in civil penalties up to \$10,000.

Further to changes to the Employment Act 2000 in 2021, Employment and Labour Relations Tribunal decisions have been published online since around September 2022. The Employment Tribunal will ask the parties at the outset of a dispute whether they wish for their decision to be anonymised, and will publish their decision accordingly. A request under Bermuda's Public Access to Information Act 2020 ("PATI") for all non-anonymised decisions of the Employment Tribunal since June 2021 was denied by the Information Commissioner in her decision dated 8 September 2023 on the basis that such records fall outside of the scope of PATI.

Trademarks

The Trade Marks Act 2023 received Royal Assent on 13 October 2023. However an enactment date has yet to be set. The Trade Mark Regulations 2023 were also approved but are not yet operative. The new Act closely mirrors the UK Trade Marks Act 1994 (as amended), and will have the effect of modernizing trademarks legislation in Bermuda in accordance with global trends. It anticipates Bermuda joining both the Paris Convention for the Protection of Industrial Property and the Madrid Protocol, which would introduce international registrations, but a target date for joining has yet to be given – admission will require amendment in other areas of law which the Bermuda Government is working on. The new legislation amends the definition of a trade mark to include any sign capable of being represented on the Register in such a manner that clearly determines the subject matter of the protection afforded. This could include sounds and smells and will likely require some investment in Registry system upgrades.

There will be a substantial ‘shift’ in the manner in which trademarks are examined and assessed for registrability, which will necessitate re-training of Registry examiners. Multi-class applications are being introduced, along with certification and collective marks and registrable transactions have been extended to include security interests. The Act provides a detention procedure for the Collector of Customs working with rights owners with regard to suspected infringements and introduces offences for certain actions with regard to unauthorized trade mark use with punishments of up to ten years imprisonment and/or a fine of \$50,000. The duration of an initial registration is to be extended in line with most other jurisdictions from 7 to 10 years and subsequent renewals will be reduced from 14 year terms to 10, with restoration terms for expired marks to be relaxed.

The 60/40 Rule - Changes in Ownership Structure for Local Companies

In July 2023 the Bermuda Government issued a consultation paper which proposed changes to the legislation that requires that a local company or LLC must be sixty percent owned and controlled by Bermudians. The proposals were two-fold: the first was to amend Section 113(1) of the Companies Act and section 9(1) of the LLC Act (setting out who is deemed to be “Bermudian”) to include persons who “belong” to Bermuda as defined in section 11(5) of the Bermuda Constitution; and the second was to amend the 60/40 Rule such that PRC holders would be deemed to be “Bermudian” solely for the purposes of establishing the 60% local ownership threshold. It is anticipated that the legislative changes to effect these proposals will be passed in the first half of 2024. This will be welcome news to PRC holders living in Bermuda.

How can we help?

The Conyers Regulatory Team can advise on all aspects of regulatory matters. Should you have any queries or require further information about anything covered in this alert, please contact a member of the regulatory team or your usual Conyers contact.



Key Contacts

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Please contact Julie McLean, or one of your usual Conyers contacts should you wish to know more about any of the topics covered in the newsletter.

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