



**BERMUDA MONETARY AUTHORITY**

**CONSULTATION PAPER**

**REGULATION OF VIRTUAL CURRENCY BUSINESS**

**APRIL 2018**

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*The views of our industry partners and other interested persons on the proposals set out in this paper are invited. Comments and suggestions are welcome and should be sent to the Authority, addressed to [policy@bma.bm](mailto:policy@bma.bm) by **2<sup>nd</sup> May 2018**.*

## Objective

1. The objective of this paper is to provide an outline for the effective regulation of service providers within the virtual currency business industry (virtual currency business service providers or (VCBs)) in Bermuda. For the purposes of this paper, virtual currency is used as defined by the Financial Action Task Force (FATF) in its June 2014 report on Virtual Currencies – Key Definitions and Potential AML/CFT Risks.

*Virtual currency is a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status (i.e., when tendered to a creditor, is a valid and legal offer of payment) in any jurisdiction. It is not issued or guaranteed by any jurisdiction, and fulfils the above functions only by agreement within the community of users of the virtual currency.*

*Virtual currency is distinguished from fiat currency (a.k.a. “real currency,” “real money,” or “national currency”), which is the coin and paper money of a country that is designated as its legal tender; circulates; and is customarily used and accepted as a medium of exchange in the issuing country.*

*It is distinct from e-money, which is a digital representation of fiat currency used to electronically transfer value denominated in fiat currency. E-money is a digital transfer mechanism for fiat currency—i.e., it electronically transfers value that has legal tender status.*

*Digital currency can mean a digital representation of either virtual currency (non-fiat) or e-money (fiat) and thus is often used interchangeably with the term “virtual currency”.*

## Background

2. The issue of VCB regulation has recently been at the forefront of discussion both globally and in Bermuda. The discussion has become linked to the regulatory practices already in place for securities, and the regulatory gap that exists for the relatively new and evolving virtual currency marketplace which involves virtual currency, and other associated activities such as digital wallets and the issuance of digital coins and tokens.
3. Leaders in the emerging virtual currency industry are claiming that the rapid growth of virtual currencies represent new opportunities for the use of the virtual currencies and the enabling technology behind them. According to information on CoinMarketCap's website, the market cap for virtual currencies peaked in December 2017 at \$653 billion. That market cap has since fallen significantly. However, enthusiasts have also stated their belief that the industry will grow to one trillion dollars by the end of 2018 and that virtual currencies represent opportunities to improve on, and develop, new payment systems. Whilst Bermuda is keen to embrace the potential offered by the virtual economy, it is recognised that the sector presents tremendous risk that requires robust prudential and Anti-Money Laundering/Anti-Terrorism Financing (AML/ATF) regulation.
4. In spite of its growing popularity, in many quarters, the virtual currency sector still faces an image problem arising from its use on the dark web, association with recent ransomware attacks, virtual currency thefts, and a number of high profile frauds and other money laundering/terrorism funding cases. It is well-known that the pseudo-anonymity or anonymity associated with some of the technology poses a significant challenge for both law enforcement and regulators. Much of the space remains unregulated.
5. Although VCBs are not currently regulated in most countries, the international focus on AML/ATF obligations has added additional relevance to the local debate given Bermuda's desire to remain a responsible global citizen and a credible financial centre. Bermuda is also scheduled to undergo an international mutual evaluation by the FATF. The FATF is an inter-governmental body which conducts mutual

evaluations of its members' levels of implementation of the FATF Recommendations on an ongoing basis. These are peer reviews, where members from different countries assess another country. A mutual evaluation report provides an in-depth description and analysis of a country's system for preventing criminal abuse of the financial system as well as focused recommendations to the country to further strengthen its system.

6. Mutual evaluations are strict and a country is only deemed compliant if it can prove ongoing compliance to the other members. In other words, the onus is on the assessed country to demonstrate that it has an effective framework to protect the financial system from abuse.
7. FATF's 2015 Guidance reflected the understanding at the time by FATF's members of virtual currencies and of the risks associated with their use. It recognised that not all virtual currencies function the same way or pose the same risks. Also important was FATF's emphasis on employing a risk-based approach to AML/ATF risk involving virtual currencies.
8. Although there are not yet any internationally defined standards relating to the regulation of VCBs, it has been suggested that certain areas of the evolving virtual currency industry should be the focus of regulatory efforts, including the need for effective:
  - a. regulatory supervision over public disclosure requirements;
  - b. AML/ATF;
  - c. fraud prevention;
  - d. valuation (or price) manipulation;
  - e. integrity of owners.

### **Composition of Virtual Currency Sector and Associated Risks**

9. The virtual currency sector is varied in business types, requiring a number of participants for orderly functioning. The various participants, all of which commonly have been associated with inadequate AML/ATF practices, include:

- a. Initial coin offerings (ICOs) issuers: Token issuance is generally used to fund a start-up business. ICO activity has commonly been associated with insufficient investor information, fraud, money laundering, and failed projects;
- b. Virtual currency exchange providers and traders: A facility for exchanging or trading fiat currency for virtual currency, or one virtual currency for another. This activity has commonly been associated with insider trading, price manipulation scandals, money laundering, and computer hacking theft;
- c. Custodial wallet providers: Storage services for virtual currencies. This activity has commonly been associated with computer hacking theft and money laundering. There are also developers of wallets who do not provide custodial services, which are not the focus of the VCBA;
- d. Virtual currency miners: A process to confirm records, generally to a distributed ledger (generally a blockchain), thus allowing completion of transactions. Mining has tended to present an environmental risk on account of the enormous energy required for the mining rigs;

10. While virtual currency can be used for legal purposes, the pseudo-anonymous (or anonymous) nature of transactions is well suited for a number of illegal activities. Observed activities include tax evasion, financing terrorism, money laundering schemes, avoiding sanctions, black market transactions, and enabling ransomware payments.<sup>1</sup>

11. Arguably, many virtual currencies are more transparent than cash because the transactions are recorded on a public distributed ledger, or blockchain. However, traceability is limited given that users are only known by their public address or addresses. Bitcoin is the most popular virtual currency. Oliver Wyman has noted that “Bitcoin users have been tracked through various matching techniques and blockchain analysis combined with transaction ‘metadata’ from Bitcoin address reuse and IP address monitoring.” To combat the detection arising from this law enforcement analysis, another participant has entered the market: tumblers (or mixers). Mixers swap one virtual currency for another with a different transaction

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<sup>1</sup> Oliver Wyman, “Cryptocurrencies and Public Policy Key Questions and Answers”, February 2018

history, effectively reproducing the laundering layering process.<sup>2</sup> This brings anonymity. While Bitcoin remains the most commonly used virtual currency for cybercriminals, mixing activities are becoming more sophisticated, challenging identity detection. Further, “a new generation of Anonymity-Enhanced Virtual currencies (AECs)” have been observed, such as ZCash and Monero.<sup>3</sup> Unlike with Bitcoin, an owner of these virtual currencies may opt for the product to be anonymous via a setting.

12. Accordingly, virtual currencies present a significant challenge for regulators and regulation. In providing guidance to regulators, the FATF recommended in its June 2014 virtual currencies report that regulators, for the time being, focus efforts on convertible virtual currencies (i.e. virtual currencies that can be converted into and out of fiat currencies). The FATF assessed these as having the highest money laundering risk. Further, the FATF recommended:

*.... countries should focus their AML/CFT efforts on higher-risk convertible VCs [virtual currencies]. The risk assessment also suggests that AML/CFT controls should target convertible VC nodes—i.e., points of intersection that provide gateways to the regulated financial system—and not seek to regulate users who obtain VC to purchase goods or services. These nodes include third-party convertible VC exchangers. Where that is the case, they should be regulated under the FATF Recommendations. Thus, countries should consider applying the relevant AML/CFT requirements specified by the international standards to convertible VC exchangers, and any other types of institution that act as nodes where convertible VC activities intersect with the regulated fiat currency financial system. Under the RBA, countries could also consider regulating financial institutions or DNFBP that send, receive, and store VC, but do not provide exchange or cash-in/cash.<sup>4</sup>*

13. The FATF’s guidance has shaped the Authority’s view in the selection of VCB regulatory scope by identifying the participants that meet the FATF’s criteria. All

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<sup>2</sup> Ibid.

<sup>3</sup> Financial Action Task Force

<sup>4</sup> Financial Action Taskforce, “Guidance for a Risk-based Approach, Virtual Currencies”, June 2015

participants mentioned in paragraph 9, except virtual currency miners and developers, meet the FATF criteria, and thus will be brought within regulatory scope. The Authority will cast its regulatory net wide enough to also include service providers holding custodial or power of attorney rights over customer virtual currencies because these activities also appear to meet the FATF criteria.

14. As the sole Bermuda financial services regulator, the Authority is best suited to the task of providing oversight for much of this new industry. In addition to AML/ATF regulation, the Authority has decided to apply prudential regulation to VCBs, given the significant consumer protection issues arising from virtual currencies. In an effort to create an effective regulatory regime, the Authority has attempted to construct a framework that addresses the issues raised in paragraphs 9 and 10 above. ICO regulation in Bermuda as a funding mechanism for one's own business will be undertaken by the Bermuda Government's Registrar of Companies (Government ROC), and so is not covered in this Consultation Paper. But, the Authority will regulate companies that, as a business, conduct ICOs for other companies. Further, while the Authority will undertake the supervision and regulation of AML/ATF for the aforementioned companies that are within scope, a detailed description of AML/ATF requirements will be included in a separate Consultation Paper.

15. It is difficult to raise the VCB topic without also considering the underlying technology (distributed ledger technology, generally a blockchain). In the event Bermuda decides to enact any regulation in this area, it might be necessary to have more than one regulator to cover the entire scope of a proposed technology-driven industry. The Authority believes that it is beyond its regulatory remit to regulate the use of technology in the financial services industry.

## **Regulatory Developments**

16. Much of the virtual currency sector remains unregulated in most jurisdictions so Bermuda will be one of the trailblazers, implementing a dedicated comprehensive virtual currency prudential and AML/ATF regulatory framework. For example, up to October 2017, Canada, United Kingdom and a number of continental European countries had not implemented a prudential regulatory framework for virtual currency exchanges; however, some had subjected exchanges to AML/ATF regulation, or were making plans to achieve this. Japan and the United States regulate virtual currency exchanges as money transmitters. Further, the United States had drafted a Uniform Regulation of Virtual Currency Business Act in 2017 that would appear to capture a wide range of VCBs, but it has not been implemented. Separately, New York has implemented its BitLicense regulatory framework covering businesses that hold customer virtual currencies, such as exchanges and wallet service providers. Switzerland recently rolled out a virtual currency regulatory framework.
17. In identifying the components of its VCB prudential regulatory framework, the Authority reviewed developments in the above and other major jurisdictions, as well as looked to effective regulatory tools in its existing sectors, and selected what it considered to be most appropriate to address the issues, such as those raised in paragraphs 8 and 9.

## **Scope of Proposed Regime**

18. It is intended that VCBs be regulated under a new Virtual Currency Business Act 2018 (VCBA or the Act), underpinned as needed by Rules, Regulations, Codes of Practice, Statements of Principles and Guidance similar to the legislative frameworks in place for other financial services regulated by the Authority.
19. The scope of VCB activities to be included in the VCBA, as mentioned earlier, was informed by the FATF's recommended criteria. The VCBA defines "virtual currency

business” (for which it seeks to regulate) as the provision of the following activities to the general public as a business—

i. Issuing, selling or redeeming virtual coins, tokens or any other form of virtual currency

This includes any business (incorporated or not) that provides these services to other businesses or individuals. This would include an ICO business on behalf of customers, but not ICO activities to fund one’s own company or project. An example of the former that will be subject to the VCBA is a company that operates a facility to assist its clients to launch ICOs. This includes assistance with coin or token design and administering the ICO process. An example of the latter that will not be subject to the VCBA is a company that wishes to issue its own ICO for its online gaming website or other business operations. The latter, as noted above, will be regulated by the Government ROC.

ii. Payment service provider business utilising virtual currency

The term *Payment Service Provider (PSP)* is a term used globally and is defined in the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Amendment Regulations 2010 as: “*a person whose business includes the provision of services for the transfer of funds*”. The intention is to capture businesses involved in the transfer of virtual currency funds.

iii. Operating an electronic exchange whereby virtual currency of any type is exchanged for cash or another virtual currency

Virtual currency exchanges are online exchanges that allow customers to buy and sell virtual currencies. Purchases and sales of virtual currencies can be made using either fiat currency (e.g., buying bitcoin using GBP or USD) or virtual currency (e.g., buying bitcoin using another virtual currency such as ether). In addition to virtual currencies such as bitcoin and ether, virtual currency exchanges may also facilitate the offer of new coins/tokens that are sold pursuant to ICOs/Initial Token Offerings (ITOs).

iv. Provision of virtual currency custodial wallet services

A virtual currency wallet is a software programme that stores private and public keys and interacts with various blockchain to enable users to send and receive digital currency and monitor their balance. Virtual currency itself is not actually “stored” in a wallet. Instead, a private key (secure digital code known only to the user and the wallet) is stored as proof of ownership of a public key (a public digital code connected to a certain amount of currency). By the wallet storing private and public keys, it allows the user to send and receive coins, and also acts as a personal ledger of transactions.

v. Virtual currency services vendor

This category is intended to capture any business providing specific virtual currency-related services to the public. This would include custodial and power of attorney rights over a customer’s virtual currencies.

20. It should be recognised that the description of activities captured within the VCBA are based on general definitions used by other jurisdictions. It is intended only to license those companies or persons who carry out the above activities as a commercial activity, i.e. services provided to independent third parties for profit.

21. Additionally, given the rapidly evolving virtual currency sector, to ensure flexibility and rapid response, the VCBA provides an option for the Minister of Finance, after consultation with the Authority, by order, to be able to amend the Act by adding new activities, or by amending, suspending, or deleting any of the VCB activities caught under the VCBA. An order made under this section is subject to the negative resolution procedure.

22. To assist with keeping abreast of VCB developments, the Authority will appoint a panel to advise it in relation to VCB activities. In particular, the panel may advise on anything referred to it by the Authority.

23. The panel will consist of one or more persons, who in the Authority’s opinion represents the interests of Bermuda financial sectors, and the impact that VCB could have on the non-VCB sectors; one or more persons, who in the Authority’s opinion

have expertise in law relating to the financial systems of Bermuda; one or more persons, who in the Authority's opinion has expertise in any or all of the VCB activities caught under the VCBA; and/or one or more persons, holding such qualifications as the Authority deems appropriate.

24. It is intended that the right to conduct the above-specified activities, would be limited to licensees under the Act, and there would be a prohibition on those activities being conducted by unlicensed persons.

### **Licensing Regime**

25. The licensing process is a very important one. Through this process, the Authority fulfils the gatekeeper role for the financial sector, protecting customers and Bermuda's reputation as a quality financial centre. The licensing regime outlined in the VCBA is intended to be an appropriately proportionate regime, designed to encourage both confidence and innovation in the sector, while affording adequate protection for customers. In anticipation of a variety of businesses seeking to be licensed as VCBs, the Authority will implement a tiered licensing structure, based on criteria such as the applicant's previous experience (given the critical nature of consumer protection) and novelty (i.e. whether the business concept is proven).
26. The Authority will issue two classes of license: Class F which will be a full license and class M which would be a defined period license.
27. It is intended that a Class M license will be an intermediate license type which is designed to facilitate a regulatory sandbox for novelty start-up businesses, particularly those businesses desirous of testing new products and or services (proof of concept). These licenses will have modified requirements and certain restrictions. In an effort to protect consumers, the Authority would issue a class M license in cases where it believes it appropriate to do so regardless of the class of license applied for. The normal robust standards of fitness and propriety will also apply.

28. A class M license is intended to be valid for a specified period, at which point the licensee must cease conducting business, or make application for either an extension to the initial time or transition to a full class F license. The initial period (and any subsequent extensions) will be determined by the Authority on a case by case basis.
29. The class F licensee will be a full license not subject to a specified period. With consumer protection the paramount goal, the class F license would still be subject to restrictions if the Authority deemed it appropriate to do so.
30. The goal of this tiered license structure is to validate novelty start-ups engaging in VCB with a prudential regulatory regime that largely mitigates regulatory uncertainties and provides some flexibility by taking a phased approach to regulation which will assist companies to enter into business to engage in proof of concept or establish a proven track record before eventually graduating to a full license. The class M license, while encouraging innovation, will be restricted to ensure adequate consumer protection. The restrictions will depend upon the business model and associated risks, but will minimally include requirements relating to disclosures to prospective customers that the company has a class M license, limitations on business volume, and other protective measures as the Authority deems appropriate.
31. The VCBA will make provision for the Authority to grant a license (regardless of class) to undertake one or more of the activities in paragraph 19 above. For example, a license could be restricted to the provision of custodial wallet services only.
32. It is intended that the right to conduct the above-specified activities, would be limited to licensees under the Act, and there would be a prohibition on those activities being conducted by unlicensed persons. The Act will identify conducting business without the requisite licence as a criminal offence and provide for penalties for such behaviour.

## Minimum Criteria

33. While hoping to encourage innovation, the Authority appreciates the need to maintain high standards as the gatekeeper for Bermuda's financial sector. Accordingly, prior to issuing either a class M or class F license, the Authority must be satisfied that the applicant would be able to satisfy the Minimum Criteria requirement. The Minimum Criteria applicable in the VCBA is consistent with the Minimum Criteria of all other financial sectors regulated by the Authority. It includes provisions to ensure that a VCB has practices and procedures in place to ensure that the activities are carried out in a prudent manner that both affords adequate consumer protection and does not bring Bermuda into disrepute as a financial centre.

34. The Minimum Criteria requirements will include:

- a. Directors and officers to be fit and proper persons (regard for the probity, competence and soundness of judgement for fulfilling the respective role and whether functioning in the role would likely present a threat to customers and potential customers);
- b. Business to be conducted in a prudent manner (regard for compliance with the VCBA and all applicable laws in Bermuda, such as AML/ATF; codes of practice issued by the Authority; international sanctions in effect in Bermuda; minimum capital requirements; adequate business systems controls and accounting systems);
- c. Integrity and skill (require that officers have a satisfactory level of experience and knowledge consistent with their responsibilities); and
- d. Corporate governance (require the implementation of corporate governance policies and procedures as the Authority considers appropriate given the nature, size, complexity and risk profile of the VCB).

35. In determining whether a VCB is in compliance with the Minimum Criteria requirement, the Authority would have regard for applicable Codes of Practice that it will publish. The Codes of Practice will contain detailed requirements in relation to governance and risk management proportionate to the nature, size, complexity, and risk profile of a VCB.

### **Provisions relating to Controllers, Shareholder Controllers, Directors and Officers**

36. The VCBA will provide definitions for controllers, shareholder controllers and officers consistent with these definitions in the Acts of the other financial sectors regulated by the Authority. Given the importance of these roles in “setting the tone at the top” and encouraging a culture of compliance, and regard for the welfare of customers, the VCBA will contain a number of provisions pertaining to these roles. These will include a requirement to notify the Authority upon changes in directors or officers, ability of the Authority to object to and prevent new or increased ownership of shareholder controllers, and ability to remove controllers and officers who are no longer fit and proper to fulfil the role. The VCBA will make provisions for due process prior to the Authority taking final action.

### **Risk Management**

37. It is well known that VCBs may pose high risks to consumers due to their highly speculative and disruptive nature. Several G20 countries along with the International Monetary Fund (IMF), the FATF and others have issued public warnings<sup>5</sup> regarding VCBs and have attributed certain risks to this sector including:

- a. extreme volatility and bubble risk
- b. absence of protection
- c. lack of exit options
- d. lack of price transparency
- e. potential for operational disruptions due to cyber security risk
- f. misleading and incomplete information; and

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<sup>5</sup> <https://www.iosco.org/library/ico-statements/Europe%20-%20ESA%20-%20ESMA,%20EBA%20and%20EIOPA%20warn%20consumers%20on%20the%20risks%20of%20Virtual%20Currencies.pdf>

g. overall limited usability

38. While the Authority recognises the potential offered by the virtual economy, there is also a need to introduce measures to tackle virtual economy-based risk including money laundering and financing of terrorism, fraud, inadequate information disclosures, poor risk management and practices leading to loss of customer assets.

39. In order to address the AML/ATF concerns arising from this new industry, the Authority is of the view that the best way forward is for Bermuda to leverage the existing AML/ATF framework. This includes amending the Proceeds of Crime Act (POCA) 1997 in section 42A in the definition of “AML/ATF regulated financial institution”, to add VCBs as being subject to that Act. Similar amendments would also be required in the Anti-Terrorism (Financial and Other Measures) Act 2004, section 2 in the definition of “AML/ATF regulated financial institution”, paragraph (f) and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 in section 2(1).

40. As noted above, while the Authority believes that Bermuda’s existing AML/ATF legislative framework is adequate for VCBs (just a matter of extending those provisions to this sector), Bermuda will require new VCB AML/ATF guidelines to support the existing legislative framework. The Authority will draft these guidelines, in consultation with the National Anti-Money Laundering Committee (NAMLC) and Bermuda Government, and publish the proposals in a separate Consultation Paper prior to the enactment of the VCBA.

41. In order to assist the public’s ability to make good decisions regarding whether to get involved with a VCB, the Authority will establish obligations for the dissemination of certain key information by all VCB licensed entities. The legislation will require VCBs to disclose the following to potential customers before entering into a business relationship (inter alia):

- a. the class of license it holds (class M or class F)
- b. schedule of fees

- c. whether it has insurance against loss of customer assets arising from theft (including cyber theft)
  - d. normal irrevocability of a transfer or exchange of virtual currency and any exception to irrevocability
  - e. liability for an unauthorised, mistaken, or accidental transfer or exchange
42. The fact that the VCB industry is totally transacted via the internet exposes it to technology related risk such as systems failure and hacking. To mitigate this risk, the Authority will require companies to have a comprehensive crisis management, including cybersecurity, programme that is commensurate to the nature, size, complexity and risk profile of the VCB. It is envisaged that a VCB may need to engage the cybersecurity services of third parties to supplement the strength of its own computer security systems. Where such is outsourced, the VCB will still be held responsible for ensuring that risks are appropriately managed.
43. At a minimum, the VCB's crisis management programme will be required to satisfy five core functions:
- a. identify internal and external risks
  - b. protect licensee electronic systems and the information stored on those systems
  - c. detect system intrusions, and breaches
  - d. respond to detected event to mitigate negative effects; and
  - e. recover from operational disruption to normal course of business
44. Succinctly, the VCBA will require VCBs to establish and maintain an effective cyber security programme to ensure the availability and functionality of the VCB's electronic systems, and to protect both those systems and any sensitive data stored on those systems (including customer assets) from unauthorised access, use, or tampering. The programme will also need to address risks arising from third-party vendors where there is system connectivity, and include policies related to hot and cold customer private key storage.

45. Cyber is only one of the key risks facing VCBs. VCBs will be required to develop policies, processes, and procedures to assess its material risks and self-determine appropriate strategies needed to address the risks in accordance with its risk appetite. The Authority will expect the assessment to occur annually and be reported in the prudential filing. The assessment should be guided by the proportionality principle (i.e. nature, size, complexity and risk profile of the respective VCB). The VCB will also be required to maintain transaction records (originator and beneficiary) and assess the risks arising from its customers. Moreover, the VCBs will be required to have conflicts policies (including the coverage of insider trading) and conduct annual independent controls audits, similar to an AICPA SOC2 assessment, to be reported to the Authority.

### **Custody and Protection of Customer Assets**

46. The VCBA will require VCBs to have in place and maintain a surety bond, trust account, indemnity insurance or another arrangement for the benefit of its customers in such form and amount as is acceptable to the Authority for the protection of its customers.

47. Further, the aforementioned trust account must be maintained with a qualified custodian. A qualified custodian is defined in the VCBA as being “a bank (as such is defined under the Banks and Deposit Companies Act 1999) or an undertaking licensed under the Trusts (Regulation of Trust Business) Act 2001; or any other person recognized by the Authority for such purpose”.

48. Additionally a VCB must maintain books of account and other records such that customer assets are kept segregated from those of the VCB and can be readily identified at any time. In this regard, VCBs will be required to hold all customer funds in a dedicated segregated account clearly identified as customer funds.

## Senior Representative and Principal Office

49. To regulate and supervise appropriately, the Authority recognises the importance of having a VCB representative who is knowledgeable about the VCB, its strategy, risk appetite and overall risk profile resident in Bermuda. Accordingly, the VCBA establishes a requirement for the VCB to appoint a senior representative to be approved by the Authority. The senior representative must be sufficiently knowledgeable about the VCB and the industry more generally. The Authority will expect that VCBs maintain a physical presence in Bermuda that is commensurate with the nature, size, complexity and risk profile of the business. The VCBA will also require the senior representative to report to the Authority, within a specified time period, the following:
- a. that in his/her view there is a likelihood of the VCB becoming insolvent
  - b. failure by the VCB to comply substantially with a condition imposed upon the VCB's license by the Authority
  - c. failure by the VCB to comply with a modified provision, or with a condition, arising from a direction issued by the Authority
  - d. involvement of the VCB in any criminal proceedings whether in Bermuda or abroad
  - e. a material change
  - f. material cyber breach; and
  - g. the VCB has ceased carrying on virtual currency business
50. To further facilitate appropriate supervision and regulation, the VCBA will impose an obligation on VCBs to maintain records in Bermuda as specified in the supporting Rules.

## Prudential Return and Supervision

51. The Authority's supervisory toolkit will include the ability, where the Authority requires, for the Authority to either operate a node on the VCB's platform, e.g. blockchain, (giving the Authority real-time auditability into the platform's operations) or set interoperability requirements so that the platform can provide information to the Authority on an automated basis. The toolkit will also comprise on-site examinations, off-site examinations, prudential visits, and industry monitoring. Off-site examinations will largely be used to guide the scope of on-site

examinations and prudential visits, which collectively will facilitate the determination of supervisory intensity for any given VCB. Accordingly, the VCBA will require VCBs to file with the Authority annual prudential returns, with provisions to empower the Authority, where required in the interest of consumer protection, to modify and require more frequent filings or additions to the filing. The standard prudential return will include the following information:

- a. business strategy and risk appetite
- b. products and services (including transaction volume by virtual currency type in the case of exchanges and traders)
- c. number of customer accounts, and in the aggregate composition of customer balances (both in the aggregate fiat currency/securities and by virtual currency)
- d. geographical profile of clients by account and account balance (i.e. territories where they reside)
- e. risk self-assessment, risk management policies, and independent internal controls audit report
- f. cyber security policies, including policy in relation to customer private key storage
- g. compliance certificate
- h. audited financial statements; and
- i. outsourced functions and partners, including third parties or affiliates performing customer asset storage, cyber security, compliance, asset custody and other key functions.

### **Power to obtain Information and Reports**

52. The VCBA will grant the Authority general powers to require the production of any information or documents as the Authority may reasonably require for the performance of its functions under the Act. The Authority will also have the power to compel the provisions of documents that it may reasonably require for ensuring that the VCB is complying with the provisions of the Act and any code of practice, and for safeguarding the interests of customers and potential customers. This power

would be used for the purposes of on-site and desk-based reviews and will be supported by a power to investigate suspected contraventions of the licensing regime.

53. The VCBA will include as a criminal offence making false or misleading statements to the Authority for which there will be penalties.

### **Power of Directions/Conditions/Restrictions/Revocation**

54. In the event the Authority has concerns about a VCB, or there is non-compliance, the VCBA grants the Authority powers to place conditions and restrictions on licenses, as well as revoke licenses. Restrictions provided for in the VCBA include:

- a. require a VCB to take certain steps or to refrain from adopting or pursuing a particular course of action, or to restrict the scope of its business activities in a particular way
- b. impose limitations on the acceptance of virtual currency business
- c. prohibit a VCB from soliciting business either generally or from persons who are not already its customers
- d. prohibit a VCB from entering into any other transactions or class of transactions; and
- e. require removal of any officer or controller

55. The VCBA would also empower the Authority to issue directions to a VCB as appear to the Authority to be desirable for safeguarding the interests of the VCB's customers or potential customers. The Authority is even empowered to revoke a VCB's license. The VCBA provides for due process before the Authority takes final action.

56. The Authority plans to apply its robust VCB regime in a pragmatic way. Accordingly, the VCBA makes provision for the Authority to modify requirements where supervisory intensity needs to increase to address a situation, for example more frequent prudential filing or additions to filed information. The VCBA also

provides for the Authority to exempt (or partially exempt) a VCB from certain requirements where it is pragmatic in the Authority's opinion to do so. An example could be granting a partial exemption from filing where a VCB has not taken on customers or no longer has customers. The VCBA specifies that the Authority shall not grant an exemption or modification unless it is satisfied that it is appropriate to do so having regard to the obligations of the VCB towards its customers.

## **Enforcement**

60. Where a VCB fails to comply with a condition, restriction, direction or certain requirements of the Act, the VCBA provides the Authority with the power to take enforcement action. Such action includes imposing civil penalties (up to \$10,000,000 per breach), public censure (name and shame), prohibition order (banning a person from performing certain functions for a Bermuda regulated entity), and injunction (cease and desist order from the Court). The Authority will issue guidance in the form of a statement of principles to outline how it plans to use these enforcement powers.

## **Consequential Amendments**

61. Given that the VCB activities inherently contain money laundering and terrorist financing risks, the AML/ATF legislation will need to be amended at the earliest opportunity in order to include VCBs as AML/AFT regulated institutions.

## **Conclusion**

62. The Authority is of the view that the VCB prudential proposed in this Consultation Paper is appropriate for the nature of VCB as we know it today. It provides flexibility, and makes provision for modifications where supervisory intensity needs to increase or the Authority is presented with new and evolving business models with varying risk profiles.

63. While the Authority believes that Bermuda's existing AML/ATF legislative framework is appropriate for VCBs, the current guidance supporting the

legislative framework likely is not. Accordingly, prior to the enactment of the VCBA, the Authority plans to draft, in consultation with NAMLC and the Bermuda Government, AML/ATF guidance for the VCB sector and publish in another Consultation Paper.

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# **VIRTUAL CURRENCY (CYBER SECURITY) RULES 2018**

## **BERMUDA**

### **VIRTUAL CURRENCY (CYBERSECURITY) RULES 2018**

**BR / 2018**

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- 1 Citation
- 2 Interpretation
- 3 Annual Cybersecurity Report

The Bermuda Monetary Authority (the Authority), in exercise of the powers conferred by section 7 of the Act, makes the following Rules—

#### **Citation**

- 1 These Rules may be cited as the Virtual Currency (Cybersecurity) Rules 2018

#### **Interpretation**

- 2 In these Rules—

“Act” means the Virtual Currency Business Act 2018;

“Chief Information Security Officer” means the senior executive appointed by the licensed undertaking to oversee and implement its cyber security program and enforce its cyber security policies.

#### **Annual Cybersecurity Report**

- 3 (1) Every licensed undertaking shall annually file with the Authority a written report prepared by its Chief Information Security Officer assessing—

- (a) the availability, functionality and integrity of its electronic systems;
- (b) identified cyber risk arising from any virtual currency business carried on or to be carried on, by the licensed undertaking;
- (c) the cyber security program implemented and proposals for steps for the redress of any inadequacies identified.

- (2) The cyber security program shall include but is not limited to, the audit functions

**VIRTUAL CURRENCY (CYBER SECURITY) RULES 2018**

set forth below—

- (a) penetration testing of its electronic systems and vulnerability assessment of those systems conducted at least on a quarterly basis;
- (b) audit trail systems that—
  - (i) track and maintain data that allows for the complete and accurate reconstruction of all financial transactions and accounting;
  - (ii) protect the integrity of data stored and maintained as part of the audit trail from alteration or tampering;
  - (iii) protect the integrity of hardware from alteration or tampering, including by limiting electronic and physical access permissions to hardware and maintaining logs of physical access to hardware that allows for event reconstruction;
  - (iv) log system events including but not limited to access and alterations made to the audit trail systems;
  - (v) maintain records produced as part of the audit trail.

(3) Every licensed undertaking shall engage a qualified independent party to audit its systems and provide a written opinion to the Authority that the licensed undertaking's controls cyber security program is suitably designed and operating effectively to meet the requirements of these Rules.

Made this                      day of                      2018

Chairman  
The Bermuda Monetary Authority

DRAFT

**BERMUDA**

**VIRTUAL CURRENCY BUSINESS (PRUDENTIAL  
STANDARDS) (ANNUAL RETURN) RULES 2018**

**BR / 2018**

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4	Declaration
	SCHEDULE
	Matters to be Included in Annual Return

The Bermuda Monetary Authority, in exercise of the power conferred by section 7 of the Virtual Currency Business Act 2018, makes the following Rules:

**Citation**

1 These Rules may be cited as the Virtual Currency Business (Prudential Standards) (Annual Return) Rules 2018.

**Interpretation**

2 In these Rules—

“the Act” means the Virtual Currency Business Act 2018;

“financial year” , means the period not exceeding fifty- three weeks at the end of which the balance of the virtual currency business accounts is struck or, if no such balance is struck or if a period in excess of fifty-three weeks is employed, then calendar year;

**Annual return**

3 (1) A licensed undertaking shall file with the Authority an annual return in accordance with the requirements of section 7 of the Act.

(2) The annual return shall contain information in respect of the matters set out in the Schedule, as such matters stood when the annual return is filed.

(3) The annual return shall also be accompanied by a copy of the —

- (a) audited financial statements prepared in accordance with section 31 of the Act;
- (b) business plan for the next financial year;
- (c) certificate of compliance prepared in accordance with section 66 of the Act;
- (d) any applicable Rule or return required to be prepared by a licensed undertaking under section 7.

**Declaration**

4 A licensed undertaking shall, at the time of filing its annual return, file with the Authority a declaration signed by two directors or a director and a senior executive, that to the best of their knowledge and belief, the information in the annual return is fair and accurate.

## **SCHEDULE**

(section 7)

### **MATTERS TO BE INCLUDED IN ANNUAL RETURN**

1. The following information is required in an annual return—
  - (a) name of licensed undertaking and parent company name where different from that of licensed undertaking;
  - (b) in relation to directors provide:
    - (i) official name and any given or used names where appropriate;
    - (ii) type of directors (i.e., whether executive, non- executive, independent);
    - (iii) confirmation of primary residence;
    - (iv) a copy of a circum vitae or professional qualifications and experience;
  - (c) in relation to officers and senior executives provide:
    - (i) official name and any given or used names where appropriate;
    - (ii) confirmation of primary residence;
    - (iii) role or job title
    - (iii) a copy of a circum vitae or professional qualifications and experience
  - (d) details of the virtual currency services provided;
  - (e) organizational and group structure;
  - (f) business strategy and risk appetite;
  - (g) products and services;
  - (h) number of client accounts and in the aggregate composition of client balances (i.e., in aggregate fiat currency, securities, virtual currency and virtual currency type);
  - (i) geographical profile of clients (i.e., aggregate number of client accounts by territory; aggregate client account balances by territories where clients reside; aggregate fiat currency, securities and virtual currency type);
  - (j) risk self-assessment and risk management policies;
  - (k) copies of cyber security program policy and customer private key storage policy;
  - (l) copies of the Proceeds of Crime Anti Money Laundering (Supervision and Enforcement) Act 2008 policies. Where such policies have not changed from the previous year (i.e., there is no amendment from previous submissions); then confirmation of such shall be required to be provided in the declaration.
  - (m) total transaction volume by virtual currency type (i.e., where a licensed undertaking carries on the virtual currency business activities under sections 2 (2) (a), (b) and (c) of the Act;
  - (n) names of outsourcing partners, copies of service level agreements

setting out the roles, duties and functions of outsourced partners; including third parties or affiliates of outsourced partners performing customer asset storage, cyber security, compliance, asset custody and other key functions of the licensed undertaking.

- (o) details of arrangements implemented in accordance with protection of client assets under section 18.

Made this            day of            2018

Chairman  
The Bermuda Monetary Authority

BERMUDA

VIRTUAL CURRENCY BUSINESS ACT 2018

BR/ 2018:

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SCHEDULE 1

Minimum Criteria for Licensing

SCHEDULE 2

Consequential Amendments

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WHEREAS it is expedient to make provision for the Bermuda Monetary Authority to regulate persons carrying on virtual currency business and for the protection of the interests of clients or potential clients of persons carrying on the business of virtual currency business; and for purposes connected with those matters:

Be it enacted by The Queen's Most Excellent Majesty,  
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by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

## PART 1

### PRELIMINARY

#### **Citation**

1 This Act may be cited as the Virtual Currency Business Act 2018.

#### **Interpretation**

2 (1) In this Act, unless the context requires otherwise—

“the Authority” means the Bermuda Monetary Authority established under the Bermuda Monetary Authority Act 1969;

“code of practice” means a code of practice issued by the Authority pursuant to section 6;

“company” means a body corporate wherever incorporated;

“controller” has the meaning given in section 3(3);

“Court” means the Supreme Court;

“custodial wallet provider” means provision of the “services of storing or maintaining virtual currency or a virtual wallet on behalf of a client;

“cyber security event” means any act that results in unauthorized access to, disruption, or misuse of the electronic systems or information stored on such systems of a licensed undertaking;

“decision notice” means a notice prepared in accordance

with section 55;

“distributed ledger technology” means a database system in which—

- (a) information is recorded and consensually shared and synchronised across a network of multiple nodes; and
- (b) all copies of the database are regarded as equally authentic;

“director” has the meaning given in section 3(2);

“documents” includes information recorded in any form; and in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form;

“exchange” means to assume control of virtual currency from or on behalf of a client, to sell, trade, or convert—

(a) virtual currency for fiat currency, bank credit or one or more forms of virtual currency; or

(b) fiat currency or bank credit for one or more forms of virtual currency.

“financial statements”, means the statements specified in subsection (1)(a) and the notes mentioned in subsection (1A) of section 84 of the Companies Act 1981 in relation to a licensed undertaking that is a company;

“financial year” means the period not exceeding 53 weeks at the end of which the balance of an undertaking’s accounts is struck or, if no such balance is struck or a period of more than 53 weeks is employed for that purpose, then calendar year;

“fiat currency” means currency issued by the relevant body in a country or by a government that is designated as legal tender in its country of issuance through amongst other things, government decree, regulation, or law;

“fit and proper person” has the meaning assigned to the term in Schedule 1;

“licence” means a licence issued by the Authority under section 8(2) and "licensee" and "licensed" shall be construed accordingly;

“minimum criteria” means the minimum criteria for licensing specified in Schedule 1;

“Minister” means the Minister of Finance;

“officer”, in relation to an undertaking, means director, secretary or senior executive of the undertaking by whatever name called;

“qualified custodian” shall mean a bank (as such term is defined under the Banks and Deposit Companies Act 1999) or an undertaking licensed under the Trusts (Regulation of Trust Business) Act 2001; or any other person recognized by the Authority for such purpose;

“senior executive” has the meaning given in section 3(6);

“share” has the meaning given in section 2 of the Companies Act 1981;

“shareholder controller” has the meaning given in section 3(4);

“subsidiary” has the meaning given in section 86 of the Companies Act 1981;

“transfer” means to assume control of virtual currency from or

on behalf of a client for the purposes of:

- (a) crediting the virtual currency to the account of another person;
- (b) moving the virtual currency from one account of a client to another account of the same client;
- (c) relinquishing control of virtual currency to another person.

“undertaking” means— (a) a company; (b) a partnership; or (c) an individual;

“virtual currency business” has the meaning given in subsection (2);

“virtual currency” means:

(a) a digital representation of value that:

- (i) is used as a medium of exchange, unit of account, or store of value;
- (ii) is not fiat currency, whether or not denominated in fiat currency;

(b) and does not include:

- (i) a transaction in which an undertaking grants value as part of a rewards program, which value cannot be taken from or exchanged with another undertaking for legal tender, bank credit, or virtual currency; or
- (ii) a digital representation of value issued by or on behalf of the publisher and used within an online game, game platform, or family of games sold by the same publisher or offered on the same game platform

“virtual currency services vendor” means a person that has

control of virtual currency solely under an agreement with a person that, on behalf of another person has the power to execute unilaterally or prevent indefinitely a virtual currency transaction .

“wallet” means a software program that stores private and public keys and interacts with distributed ledger technology to enable users to send, receive and monitor their virtual currency.

“warning notice” means a notice prepared in accordance with section 44.

(2) Subject to section 4(4), in this Act, “virtual currency business” means the business of providing any or all of the following virtual currency business activities to the general public—

- (a) issuing, selling or redeeming virtual coins, tokens or any other form of virtual currency;
- (b) operating as a payment service business utilising virtual currency which includes the provision of services for the transfer of funds;
- (c) operating as an electronic exchange;
- (d) providing custodial wallet services;
- (e) operating as a virtual currency services vendor.

(3) The Minister may, after consultation with the Authority, by order amend subsection (2) by adding new provisions, or by amending suspending, or deleting any of the virtual currency activities set out thereunder.

(4) An order made under this section is subject to the negative resolution procedure.

### **Meaning of "director", "controller", "senior executive" and "associate"**

3 (1) In this Act, “director”, “controller”, “senior executive” and “associate”

shall be construed in accordance with the provisions of this section.

(2) “Director”, in relation to an undertaking—

- (a) includes an alternate director and any person who occupies the position of director, by whatever name called; and
- (b) where it is used in subsections (6) and (7), includes a partner of a partnership.

(3) “Controller”, in relation to an undertaking, means—

- (a) a managing director of the undertaking or of another company of which the undertaking is a subsidiary;
- (b) in the case of an undertaking which is a partnership, a partner;
- (c) in the case of an undertaking which is neither a company nor a partnership, a sole proprietor;
- (d) a chief executive of the undertaking or of another company of which the undertaking is a subsidiary;
- (e) a person who satisfies the requirements of this paragraph;
- (f) a person in accordance with whose directions or instructions the directors of the undertaking or of another company of which the undertaking is a subsidiary or persons who are controllers of the undertaking by virtue of paragraph (e) (or any of them) are accustomed to act.

(4) For the purpose of subsection (3)(e), a person is a shareholder controller in relation to an undertaking if, either alone or with any associate or associates—

- (a) he holds 10% or more of the shares in the undertaking or another company of which it is a subsidiary company;
- (b) he is entitled to exercise or control the exercise of 10% or more of the voting power at any general meeting of the undertaking or another

company of which it is such a subsidiary; or

(c) he is able to exercise a significant influence over the management of the undertaking or another company of which the undertaking is such a subsidiary by virtue of—

(i) a holding of shares in it; or

(ii) an entitlement to exercise, or control the exercise of, the voting power at any general meeting of the undertaking, or as the case may be, the other company concerned.

(5) In this Act, "majority shareholder controller" means a shareholder controller in whose case the percentage referred to in subsection 4(a) or (b) is 50 or more.

(6) "Senior executive", in relation to an undertaking, means a person (other than a chief executive) who, under the immediate authority of a director or chief executive of the undertaking—

(a) exercises managerial functions; or

(b) is responsible for maintaining accounts or other records of the undertaking.

(7) In this section, "chief executive" in relation to an undertaking means a person who, either alone or jointly with one or more persons, is responsible under the immediate authority of the directors for the conduct of the business of the undertaking.

(8) In this Act, "associate" in relation to a person entitled to exercise or control the exercise of voting power in a company, or in relation to a person holding shares in a company, means—

(a) if that person is an individual—

(i) the spouse, child, step-child or parent of that person;

(ii) the trustees of any settlement under which that person has a life

- interest in possession;
- (iii) any company of which that person is a director;
- (iv) any person who is an employee or partner of that person;
- (b) if that person is a company—
  - (i) any director of that company;
  - (ii) any subsidiary of that company;
  - (iii) any director or employee of any such subsidiary company;
- (c) if that person has with any other person an agreement or arrangement with respect to the acquisition, holding or disposal of shares or other interests in that company or under which they undertake to act together in exercising their voting power in relation to it, that other person.

(9) For the purpose of subsection (8), “settlement” includes any disposition or arrangement under which property is held in trust.

### **Carrying on business of virtual currency business in Bermuda**

4 (1) For the purposes of this Act and subject to section 11, a person carries on virtual currency business in Bermuda where—

- (a) it is incorporated or formed in Bermuda and carries on any virtual currency activity set out under section 2 (2);
- (b) is incorporated or formed outside of Bermuda and carries on any virtual business activity set out under section 2 (2) in or from within Bermuda.

(2) Notwithstanding subsection (1), a person shall be regarded as carrying on virtual currency business in or from within Bermuda where such person has been specifically regarded for such purposes in accordance with an order made by

the Minister under subsection (3);

(3) The Minister, acting on the advice of the Authority, may make an order specifying the circumstances in which a person is to be regarded for the purpose of this section as—

- (a) carrying on virtual currency business in Bermuda;
- (b) not carrying on virtual currency business in Bermuda;

(3) An order made under this section is subject to the negative resolution procedure.

(4) This Act shall not apply to any entity owned by the Bermuda government.

#### **Authority's statement of principles and guidance provision**

5 (1) The Authority shall, as soon as practicable after the coming into force of this Act, publish in such manner as it thinks fit a statement of principles in accordance with which it is acting or proposing to act—

- (a) in interpreting the minimum criteria and the grounds for revocation specified in section 24;
- (b) in exercising its power to grant, revoke or restrict a licence;
- (c) in exercising its power to obtain information and reports and to require production of documents;
- (d) in exercising its powers—
  - (i) under sections 39 to impose a civil penalty;
  - (ii) under section 41 to censure publicly;
  - (iii) under section 43 to make a prohibition order; and
  - (iv) under section 56 to publish information about any matter to which a decision notice relates.

(2) If the Authority makes a material change to the principles, it shall publish

a statement of the change or the revised statement of principles in the same manner as it published the statement under subsection (1).

(3) The Authority may from time to time give guidance on the application of this Act and rules or regulations made under it.

### **Codes of practice**

6 (1) The Authority may issue codes of practice in connection with the manner by which licensed undertakings shall carry on virtual currency business.

(2) Without prejudice to the generality of subsection (1), the Authority may issue codes of practice for the purpose of providing guidance as to the duties, requirements and standards to be complied with, and the procedures (whether as to identification, recordkeeping, internal reporting and training or otherwise) and sound principles to be observed by persons carrying on virtual currency business.

(3) Before issuing a code of practice, the Authority shall publish a draft of that Code in such manner as it thinks fit and shall consider any representations made to it about the draft.

(4) Every licensed undertaking shall in the conduct of its business have regard to any code of practice issued by the Authority.

(5) A failure on the part of a licensed undertaking to comply with the provisions of such a code shall be taken into account by the Authority in determining whether the business is being conducted in a prudent manner as required by paragraph 2 of Schedule 1 (Minimum Criteria for Licensing).

### **Prudential and other returns**

7 (1) The Authority may make Rules prescribing prudential standards in relation to—

(a) disclosures to clients;

- (b) risk management;
- (c) custody of client assets;
- (d) cybersecurity;
- (e) financial statements;
- (f) statutory returns

which shall be complied with by all licensed undertakings.

(2) The Authority may in such Rules or statutory returns prescribe standards that impose different requirements to be complied with by licensed undertakings in different situations or in respect of different activities.

(3) Audited financial statements and accounts shall be in a prescribed form and different forms of return may be prescribed for undertakings holding different classes of license.

(4) Not later than four months after the close of its financial year every licensed undertaking shall file with the Authority any applicable Rule or statutory return required to be prepared by it under this section.

(5) Every licensed undertaking shall keep a copy of the most recent Rule or return filed with the Authority at its head office for a period of not less than five years beginning with its filing date under subsection (4).

(6) Every licensed undertaking that fails to file audited financial statements, accounts, any applicable Rule or statutory return within the time specified in subsection (4) shall be liable to a civil penalty not exceeding \$5,000 for each week or part of a week that it is in default.

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

**Authority may exempt or modify prudential standards or requirements or take necessary actions**

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

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

(3) The Authority shall not grant an exemption or modification unless it is satisfied that it is appropriate to do so having regard to the obligations of the licensed undertaking towards its clients.

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

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

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

(7) Without prejudice to its powers under subsection (1), the Authority where it has made a determination, may take any action necessary or desirable to protect the public, clients or potential clients of the licensed undertaking.

(8) Before taking any such action under subsection (7), the Authority shall serve notice on the license undertaking giving its reasons therefor.

(9) A licensed undertaking served with a notice under subsection (8) may, within a period of 28 days from the date of the notice, make written representations to the Authority; and where such representations are made, the Authority shall take them into account in deciding whether to take the proposed action.

(10) The Authority shall notify a license undertaking of any actions it has taken.

(11) The circumstances referred to in subsection (7) are such circumstances as would cause the Authority to conclude that due to the nature, scale and complexity and risk profile of the licensed undertaking, such action is necessary and in the interest of the public or is required to be taken for the protection of clients or potential clients .

### **Advisory Panel**

9 (1) The Authority may appoint a panel to advise it in relation to the effect of virtual currency business on—

- (a) persons licensed or registered under the Insurance Act 1978; Banks Deposit Companies Act 1999; Trusts (Regulation of Trust Business) Act 2001; Investment Business Act 2003; Investment Funds Act 2006; Credit Unions Act 2010; Corporate Service Business Provider Act 2012 and Money Service Business Act 2016.
- (b) persons who conduct business with licensed or registered persons under subsection (a);
- (c) the economy of Bermuda; and
- (d) virtual currency business regulation.

(2) In particular, the panel may advise the Authority about anything referred to it by the Authority.

(3) The panel shall be appointed by the Authority and consist of—

- (a) one or more persons, who in the Authority's opinion represents the interests of those persons under subsection 9 (1) (a);
- (b) one or more persons, who in the Authority's opinion have expertise in law relating to the financial systems of Bermuda;
- (c) one or more persons, who in the Authority's opinion has expertise in any or all of the virtual currency business activities set out under

- section 2 (2); or
- (d) one or more persons, holding such qualifications as the Authority deems appropriate.

## **PART 2**

### **LICENSING**

#### **Restriction on carrying on virtual currency business without a licence**

10 (1) Subject to section 11, a person shall not carry on virtual currency business in or from within Bermuda unless that person is for the time being a licensed undertaking in one of the classes specified in subsection (2).

(2) The Authority may license an undertaking to carry on one or more of the following virtual currency business activities for the period specified in the licence—

- (a) issuing, selling or redeeming virtual coins, tokens or any other form of virtual currency;
- (b) operating as a payment service business utilising virtual currency which includes the provision of services for the transfer of funds;
- (c) operating as an electronic exchange;
- (d) providing custodial wallet services;
- (e) operating as a virtual currency services vendor.

(3) A person who contravenes this section is guilty of an offence and liable—

- (a) on summary conviction, to a fine of \$25,000 or to imprisonment for one year or to both such fine and imprisonment;
- (b) on conviction on indictment, to a fine of \$100,000 or to imprisonment for five years or to both such fine and imprisonment.

## **Exemption order**

11 (1) Section 10 shall not apply to any person exempted by or under an exemption order issued in terms of this section.

(2) The Minister acting on the advice of the Authority may issue an exemption order, which shall provide for—

- (a) a specified person;
- (b) persons falling within a specified class, to be exempt from the requirement of section 10.

(3) An exemption order may provide for an exemption to have effect—

- (a) in respect of all virtual currency business activities under section 2(2);
- (b) only in respect of one or more of such virtual currency business activities;
- (c) in respect of specified circumstances.

(4) An exemption order may be subject to conditions.

(5) The following activities shall not constitute virtual currency business for the purposes of section 10 (1)—

- (a) contributing connectivity software or computing power to a decentralized virtual currency, or to a protocol governing transfer of the digital representation of value;
- (b) providing data storage or security services for a virtual currency business and is not otherwise engaged in virtual currency business activity on behalf of other persons;
- (c) the provision of any virtual currency business activity by an undertaking solely for the purposes of its business operations or the business operations of any subsidiary of it.

(6) In subsection (3) (c), “specified” means specified by the exemption order.

(7) An order made under this section is subject to the negative resolution procedure.

### **Virtual currency business licence**

12 (1) An application for a virtual currency business licence may be made to the Authority.

(2) An application shall state the class of virtual currency business licence required.

(3) The classes of virtual currency business licences referred to in subsection (2) which may be applied for under this Act are a—

(a) class F licence, under which a person shall be licensed to provide any or all of the virtual currency business activities under the definition of virtual currency business; or

(b) class M licence, under which a person shall be licensed to provide any or all of the virtual currency business activities under the definition of virtual currency business for a defined period determined by the Authority.

(4) The Authority, where it has made a determination or on the application of a licensed undertaking; may extend the defined period of a class M license for such additional period of time as it deems appropriate.

(5) An application in respect of an extension to the defined period of a class M licence in accordance with subsection (6) shall be in such form as the Authority may direct; accompanied by such information as the Authority may require and the application fee of such amount prescribed by the Authority under the Bermuda Monetary Authority Act 1969.

(6) An application shall be made in such manner as the Authority may direct

and shall be accompanied by—

- (a) a business plan setting out the nature and scale of the virtual currency business activity which is to be carried on by the applicant;
- (b) particulars of the applicant's arrangements for the management of the business;
- (c) policies and procedures to be adopted by the applicant to meet the obligations under this Act and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008;
- (d) such other information and documents as the Authority may reasonably require for the purpose of determining the application; and
- (e) an application fee which shall be an amount determined by the Authority commensurate to the nature, scale and complexity of the virtual currency business to be carried on by the undertaking and as may be prescribed under the Bermuda Monetary Authority Act 1969.

(7) An application may be withdrawn by notice in writing to the Authority at any time before it has determined the application.

### **Grant and refusal of applications**

13 (1) Subject to this section, the Authority may on an application duly made in accordance with section 12, and after being provided with all such information, documents and reports as it may reasonably require under that section, grant or refuse the application for a licence.

(2) The Authority shall not grant an application unless it is satisfied that the minimum criteria set out in Schedule 1 are fulfilled with respect to the applicant.

(3) A licence issued under this section may be subject to such limitations on the scope of the virtual currency business activity or the manner of operating the virtual

currency business as the Authority may determine to be appropriate having regard to the nature and scale of the proposed business.

(4) The Authority may where it has made a determination or on application made by a licensed undertaking, vary or remove any limitation imposed on the scope of its licence.

(5) A licence issued to a partnership shall be issued in the partnership name, and shall not be affected by any change in the name of the partners.

(6) The Minister, acting on the advice of the Authority, may by order amend Schedule 1 by adding new criteria or by amending or deleting the criteria for the time being specified in the Schedule.

### **Determination of class of licence**

14 (1) Notwithstanding an application submitted by an undertaking under section 12, the Authority may determine whether an undertaking proposing to carry on virtual currency business shall be issued a different class of licence.

(2) The matters the Authority may take into account in its determination under subsection (1), are the—

- (a) interests of those clients or potential clients and of the public generally; and
- (b) obligations the Authority is of the view should be imposed on the undertaking due to the nature of the virtual currency business activities it intends to carry on.

### **Display and registration of licence**

15 (1) A licensed undertaking shall at all times keep the licence on display at its principal place of business in Bermuda.

(2) The Authority shall publish a list of every licenced undertaking and the class of licence issued to it on its website.

### **Fees**

16 (1) A licensed undertaking shall pay such fee as may be determined by the Authority and prescribed under the Bermuda Monetary Authority Act 1969—

- (a) on the grant of a licence under section 12;
- (b) annually, before the 31<sup>st</sup> of March in every year following the year in which it was licensed under section 12; of such amount;
- (c) at the time of making an application under section 8 in relation to exemption from or modification of, prudential rules or requirements;
- (d) at the time of making an application for an extension of a defined licence period under section 12 (5);
- (e) at the time of making an application for variance of a direction under section 29 (4).

(2) Annual fees payable by all licensed undertakings in accordance with subsection (1) (b) shall apply to the twelve-month period ending on 31<sup>st</sup> of December of that year.

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

(4) The Authority, if satisfied that payment of the annual fee in whole or in part is inappropriate after taking into account the diminution in the level of virtual currency business activity, may—

- (a) defer payment of all or part of the annual fee otherwise due, to such date in the future as it considers appropriate; or
- (b) remit all or part of the annual fee otherwise due, on such terms and conditions as it considers appropriate.

### **Separate accounts**

17 A licensed undertaking holding client assets shall keep its accounts in respect of such assets separate from any accounts kept in respect of any other business.

### **Custody and protection of client assets**

18 (1) A licensed undertaking holding client assets shall maintain a surety bond or trust account, or indemnity insurance for the benefit of its clients in such form and amount as is acceptable to the Authority for the protection of its clients or such other arrangements as the Authority may approve.

(2) To the extent a licensed undertaking maintains a trust account in accordance with this section; such trust account must be maintained with a qualified custodian.

(3) A licensed undertaking that has control of one or more virtual currencies for one or more clients must maintain in its control a sufficient amount of each type of virtual currency in order to meet its obligations to clients.

(4) For the purposes of this section, “virtual currency” referred to is that which is —

- (a) held by the licensed undertaking for the client entitled to the virtual currency;
- (b) not property or virtual currency of the licensed undertaking; and
- (c) is not subject to the claims of creditors of the licensed undertaking.

### **Senior representative**

19 (1) Every licensed undertaking shall appoint a senior representative that satisfies the requirements of (2).

(2) The senior representative shall be a person approved by the Authority to act in such capacity on behalf of the licensed undertaking.

(3) The approved senior representative shall maintain an office in Bermuda.

(4) At the time of licensing, the licensed undertaking shall provide written notice to the Authority of the—

- (a) location of the senior representative’s office;
- (b) particulars of the senior representative.

(5) If any information required by notification in accordance with subsection (4) is

altered, the licensed undertaking shall give particulars of the alteration in writing within fourteen days of the date the alteration was made.

(6) Without reason acceptable to the Authority—

(a) a licensed undertaking shall not terminate the appointment of its senior representative; and

(b) a senior representative shall not cease to act as such, until it or he gives thirty days' notice in writing to the Authority of the intention to do so.

(7) If a senior representative wilfully fails to give notice required in accordance with subsection (6) to the Authority he commits an offence.

### **Senior representative to report certain events**

20 (1) A senior representative shall forthwith notify the Authority, in such manner as it may direct,—

(a) on his reaching a view that there is a likelihood of the licensed undertaking for which he acts becoming insolvent; or

(b) on its coming to his knowledge, or his having reason to believe, that an event to which this section applies has occurred.

(2) Within fourteen days of such notification, the senior representative shall furnish the Authority with a report in writing setting out all the particulars of the case that are available to him.

(3) As respects any senior representative, this section applies to the following events, being events in which the licensed undertaking for which he acts as senior representative is involved, that is to say—

(a) failure by the licensed undertaking to comply substantially with a condition imposed upon the licensed undertaking by the Authority;

(b) failure by the licensed undertaking to comply with a modified provision, or with a condition, being a provision or condition specified in a direction given to the licensed undertaking by the Authority;

(c) involvement of the licensed undertaking in any criminal proceedings

whether in Bermuda or abroad;

- (d) the licensed undertaking ceasing to carry on virtual currency business in or from within Bermuda;
- (e) a material change to the business of the licensed undertaking;
- (f) a cyber security event.

### **Head office**

21 (1) Every licensed undertaking shall maintain a head office in Bermuda, satisfying the requirements of subsection (2).

(2) The virtual currency business of the licensed undertaking must be directed and managed from Bermuda and, in determining whether the licensed undertaking complies with this requirement, the Authority shall consider, inter alia, the factors set out in subsection (3).

(3) The factors referred to in subsection (2) are—

- (a) where the strategy, risk management and operational decision making of the licensed undertaking occurs;
- (b) whether the presence of senior executives who are responsible for, and involved in, the decision making related to the virtual currency business of the licensed undertaking are located in Bermuda;
- (c) where meetings of the board of directors of the licensed undertaking occur.

(4) Notwithstanding the considerations set out in subsection (3), the Authority may also have regard to the following matters—

- (a) the location where management of the licensed undertaking meets to effect policy decisions of the licensed undertaking;
- (b) the residence of the officers or employees of the licensed undertaking; or
- (c) the residence of one or more directors of the licensed undertaking in Bermuda.

### **Material change to business**

22 (1) Each licensed undertaking must make an application in order to obtain the Authority's prior written approval for—

- (a) any plan or proposal to introduce or offer a new product, service, or activity, or to make a material change to an existing product, service, or where applicable virtual currency business activity.
- (b) amalgamation with or acquisition of another firm;
- (c) sale of a subsidiary;
- (d) acquisition of controlling interest in an undertaking;
  
- (e) outsourcing of the functions of the virtual currency business;
- (f) change to the most recent business plan submitted to the Authority.

(2) An application under this section shall be in such form, shall contain such information and shall be accompanied by such documents as the Authority may require.

### **Restriction of licence**

23 (1) Subject to section 26, the Authority may restrict a licence—

- (a) if it is satisfied of the matters specified in paragraph (a), (b), (d) or (e) of section 24, but it appears to the Authority that the circumstances are not such as to justify revocation;
- (b) if it is satisfied that a person has become a controller of a licensed undertaking in contravention of section 34 or has become or remains a controller after being given a notice of objection pursuant to section 36 or 37;

(c) in connection with the revocation of a licence—

(i) when giving the licensed undertaking notice that it proposes to revoke its licence; or

(ii) at any time after such notice has been given to the licensed undertaking; or

(d) at any time after the licensed undertaking has served a notice surrendering its licence with effect from a later date.

(2) The Authority may restrict a licence by imposing such conditions as it thinks desirable for the protection of the licensed undertaking's clients or potential clients, and may in particular—

(a) require the licensed undertaking to take certain steps or to refrain from adopting or pursuing a particular course of action or to restrict the scope of its business activities in a particular way;

(b) impose limitations on the acceptance of virtual currency business;

(c) prohibit the licensed undertaking from soliciting virtual currency business either generally or from persons who are not already its clients;

(d) prohibit the licensed undertaking from accepting new virtual currency business;

(e) prohibit the licensed undertaking from entering into any other transactions or class of transactions;

(f) require the removal of any officer or controller;

(g) specify requirements to be fulfilled otherwise than by action taken by the licensed undertaking;

(3) Any condition imposed under this section may be varied or withdrawn by the Authority.

(4) The Authority may where it has made a determination on its own or on the

application of a licensed undertaking, vary any condition imposed on its licence.

(5) The fact that a condition imposed under this section has not been complied with shall, where the restriction has been imposed pursuant to paragraphs (a) or (b) of subsection (1), be a ground for the revocation of the licence in question but shall not invalidate any transaction.

### **Revocation of licence**

24 Subject to section 25, the Authority may revoke the licence of a licensed undertaking if the Authority is satisfied that—

- (a) any of the minimum criteria is not or has not been fulfilled, or may not be or may not have been fulfilled, in respect of the licensed undertaking;
- (b) the licensed undertaking has failed to comply with any obligation imposed on it by or under this Act or is carrying on business in a manner not authorised by its licence;
- (c) a person has become a majority shareholder controller of the licensed undertaking in contravention of section 33 or has become or remains such a controller after being given a notice of objection pursuant to sections 35 or 36;
- (d) the Authority has been provided with false, misleading or inaccurate information by or on behalf of the licensed undertaking or, in connection with an application for a licence, by or on behalf of a person who is or is to be an officer or controller of the undertaking; or
- (e) the interests of the clients or potential clients of the licensed undertaking are in anyway threatened;
- (f) the fixed period of a class M license has expired.

### **Winding up on petition from the Authority**

25 (1) On a petition presented by the Authority by virtue of this section, the Court may wind up a licensed undertaking which is a company in respect of which a licence is revoked, if the Court is of the opinion that it is just and equitable that the undertaking be wound up.

(2) Part XIII (Winding Up) of the Companies Act 1981 shall apply to the winding up of a licensed undertaking under this section.

### **Notice of restriction or revocation of licence**

26 (1) Where the Authority proposes to—

- (a) restrict a licence under section 23(1);
- (b) vary a restriction imposed on a licence otherwise than with the agreement of the licensed undertaking concerned; or
- (c) revoke a licence under section 24, (a) to (f).

the Authority shall give to the licensed undertaking concerned a warning notice under section 53.

(2) Where—

- (a) the ground for a proposal to impose or vary a restriction or for a proposed revocation is that it appears to the Authority that the criterion in paragraph 1 of the Schedule 1 is not or has not been fulfilled, or may not be or may not have been fulfilled, in the case of any person; or
- (b) a proposed restriction consists of or includes a condition requiring the removal of any person as a controller or an officer,

the Authority shall give that person a copy of the warning notice but the Authority may omit from such copy any matter which does not relate to him.

(3) After giving a notice under subsection (1) and taking into account any representations made under section 53(2), the Authority shall decide whether—

- (a) to proceed with the action proposed in the notice;
- (b) to take no further action;
- (c) if the proposed action was to revoke the undertaking's licence, to restrict its licence instead; or
- (d) if the proposed action was to restrict the undertaking's licence or to vary the restrictions on a licence, to restrict it or to vary the restrictions in a different manner.

(4) Once the Authority has made a decision under subsection (3), it shall forthwith provide either a decision notice under section 54 or a notice of discontinuance under section 55, as the case may be.

(5) The Authority shall publish in the Gazette, in such form as it thinks fit, notice of every revocation of a licence under the Act.

### **Restriction in cases of urgency**

27 (1) No notice need be given under section 26 in respect of the imposition or variation of a restriction on a licensed undertaking's licence in any case in which the Authority considers that the restriction should be imposed or varied as a matter of urgency.

(2) In any such case, the Authority may by written notice to the licensed undertaking impose or vary the restriction.

(3) Any such notice shall state the reason for which the Authority has acted and particulars of the rights conferred by subsection (5) and section 48.

(4) Section 23(2) shall apply to a notice under subsection (2) imposing or varying a restriction as it applies to a notice under section 23(1) in respect of a proposal to impose or vary a restriction; but the Authority may omit from a copy given to a person by virtue of this subsection any matter which does not relate to him.

(5) A licensed undertaking to which a notice is given under this section of the

imposition or variation of a restriction and a person who is given a copy of it by virtue of subsection (4) may within the period of 14 days beginning with the day on which the notice was given make representations to the Authority.

(6) After giving a notice under subsection (2) imposing or varying a restriction and taking into account any representations made in accordance with subsection (5), the Authority shall decide whether—

(a) to confirm or rescind its original decision; or

(b) to impose a different restriction or to vary the restriction in a different manner.

(7) The Authority shall within the period of 28 days beginning with the day on which the notice was given under subsection (2) give the licensed undertaking concerned written notice of its decision under subsection (6) and, except where the decision is to rescind the original decision, the notice shall state the reason for the decision.

(8) Where the notice under subsection (7) is of a decision to take the action specified in subsection (6)(b), the notice under subsection (7) shall have the effect of imposing the restriction or making the variation specified in the notice with effect from the date on which it is given.

### **Directions to protect interests of clients**

28 (1) The Authority may give a licensed undertaking directions under this section at any time if it appears to the Authority that a licensed undertaking is in breach of any provision of this Act, regulations or rules applicable to it.

(2) Directions under this section shall be such as appear to the Authority to be desirable for safeguarding the interests of the licensed undertaking's clients or proposed clients.

(3) A licensed undertaking which fails to comply with any requirement or contravenes any prohibition imposed on it by a direction under this section shall be guilty of an offence and liable—

- (a) on summary conviction, to a fine of \$25,000;
- (b) on conviction on indictment, to a fine of \$75,000.

### **Notification and confirmation of directions**

29 (1) A direction under section 28 shall be given by notice in writing and may be varied by a further direction; and a direction may be revoked by the Authority by a notice in writing to the licensed undertaking concerned.

(2) A direction under section 28(1), except one varying a previous direction shall—

- (a) state the reasons for which it is given and give particulars of the licensed undertaking's rights under subsection (3) and section 48 where appropriate ; and
- (b) cease to have effect at the end of any period which may be set out by the Authority in the notice.

(3) A licensed undertaking to which a direction is given which under subsection (2) may, within the period of 14 days beginning with the day on which the direction is given, make written representations to the Authority; and the Authority shall take any such representations into account in deciding whether to confirm the direction.

### **Surrender of licence**

30 (1) A licensed undertaking with the prior approval of the Authority may surrender its licence by written notice to the Authority.

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

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

## **PART 3**

## AUDITED ACCOUNTS

### **Duty to prepare annual audited financial statements and accounts**

31 (1) Every licensed undertaking shall prepare annual audited financial statements or accounts as required by this section in respect of all transactions and balances relating to its business.

(2) Financial statements must be prepared by an approved auditor.

(3) Prior to appointment of an auditor, a licensed undertaking shall submit written particulars of such person to the Authority for approval.

(4) Financial statements of licensed undertakings shall be audited by the approved auditor in accordance with generally accepted auditing standards for Canada, the United Kingdom, the United States of America or such standards as the Authority may recognise and the approved auditor shall be required to provide an auditor's report in respect thereof.

(5) Not later than four months after the close of its financial year every licensed undertaking shall file a copy of its audited financial statements and auditor's report or accounts with the Authority.

(6) A licensed undertaking shall keep a copy of the most recent audited financial statements together with a copy of the auditor's report thereon or accounts as the case may be, at its head office for a period of not less than five years beginning with its filing date under subsection (5).

(7) Notwithstanding subsection (1), the Authority may require a licensed undertaking to prepare financial statements or accounts in such manner as it may direct.

### **Appointment of auditors**

32 (1) Every licensed undertaking shall annually appoint an approved auditor to audit its financial statements.

(2) If a licensed undertaking fails to appoint an approved auditor as required by subsection (1) or, at any time, fails to fill a vacancy for such auditor, the Authority may appoint an approved auditor and shall fix the remuneration to be paid by that virtual currency business to such auditor.

(3) A licensed undertaking shall forthwith give written notice to the Authority if it—

- (a) proposes to remove an auditor before the expiration of his term of office; or
- (b) proposes to replace an auditor at the expiration of the term of his office with a different auditor.

(4) A licensed undertaking which fails to comply with this section shall be guilty of an offence and shall be liable on summary conviction to a fine of \$25,000.

(5) For the purposes of this Part, “approved auditor” means an auditor who is a person entitled to practise as a public accountant and is a member of a professional body approved by the Authority for the purposes of this Act.

(6) No person having an interest in any licensed undertaking otherwise than as a client, and no officer, servant or agent of any virtual currency business shall be eligible for appointment as an approved auditor for that licensed undertaking; and any person appointed as such auditor to any licensed undertaking who subsequently acquires such interest or becomes an officer, servant or agent of that licensed undertaking shall cease to be an approved auditor.

#### **Auditor to communicate certain matters to Authority**

33 (1) An auditor of a licensed undertaking shall in the circumstances specified in subsection (2) forthwith give written notice to the Authority of those matters.

(2) The circumstances referred to in subsection (1) are—

- (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 licensed undertaking's financial statements and, in particular, a qualification or denial of his opinion, or the statement of an adverse opinion.

(3) An auditor of a licensed undertaking shall forthwith give written notice to the Authority of any fact or matter of which he becomes aware which is likely to be of material significance for the discharge, in relation to the licensed undertaking of which he is an auditor, of the Authority's functions under this Act.

(4) An auditor who fails to comply with subsection (1) shall be guilty of an offence and shall be liable on summary conviction to a fine of \$25,000.

## **PART 4**

### **OBJECTIONS TO SHAREHOLDER CONTROLLERS**

#### **Notification of new or increased control**

34 (1) No person shall become a 10% shareholder controller or a majority shareholder controller of a licensed undertaking which is a company unless—

(a) he has served on the Authority a written notice stating that he intends to become such a controller of the licensed undertaking; and

(b) either the Authority has, before the end of the period of three months beginning with the date of service of that notice, notified him in writing that there is no objection to his becoming such a controller of the licensed undertaking, or that period has elapsed without the Authority having served him under section 29 a written notice of objection to his becoming such a controller of the licensed undertaking.

(2) Subsection (1) applies also in relation to a person becoming a partner in a licensed undertaking which is a partnership.

(3) A notice under subsection (1)(a) shall contain such information as the

Authority may direct and the Authority may, after receiving such a notice from any person, by notice in writing require him to provide such additional information or documents as the Authority may reasonably require for deciding whether to serve notice of objection.

(4) Where additional information or documents are required from any person by a notice under subsection (3), the time between the giving of the notice and the receipt of the information or documents shall be added to the period mentioned in subsection (1)(b).

### **Objection to new or increased control**

35 (1) The Authority may serve a notice of objection under this section on a person who has given notice under section 34 unless it is satisfied—

- (a) that the person concerned is a fit and proper person to become a controller of the description in question of the licensed undertaking;
- (b) that the interests of clients and potential clients of the licensed undertaking would not be in any manner threatened by that person becoming a controller of that description of the licensed undertaking; and
- (c) without prejudice to paragraphs (a) and (b), that, having regard to that person's likely influence on the licensed undertaking as a controller of the description in question, the criteria in Schedule 1 would continue to be fulfilled in the case of the licensed undertaking or, if any of those criteria is not fulfilled, that that person is likely to undertake adequate remedial action.

(2) Before serving a notice of objection under this section, the Authority shall serve the person concerned with a preliminary written notice stating that the Authority is considering service on that person of a notice of objection and that notice—

- (a) shall specify which of the matters mentioned in subsection (1) the Authority is not satisfied with and, subject to subsection (5), the reasons for which it is not satisfied; and

(b) shall give particulars of the rights conferred by subsection (3).

(3) A person served with a notice under subsection (2) may, within a period of 28 days beginning with the day on which the notice is served, make written representations to the Authority; and where such representations are made the Authority shall take them into account in deciding whether to serve a notice of objection.

(4) A notice of objection under this section shall—

(a) specify which of the matters mentioned in subsection (1) the Authority is not satisfied with and, subject to subsection (5), the reasons for which it is not satisfied; and

(b) give particulars of the rights conferred by section 48 .

(5) Subsections (2)(a) and (4)(a) shall not require the Authority to specify any reason which would in its opinion involve the disclosure of confidential information the disclosure of which would be prejudicial to a third party.

(6) Where a person required to give a notice under section 34 in relation to becoming a controller of any description becomes a controller of that description without having given the notice, the Authority may serve him with a notice of objection under this section at any time within three months after becoming aware of his having done so and may, for the purpose of deciding whether to serve him with such a notice, require him by notice in writing to provide such information or documents as the Authority may reasonably require.

(7) The period mentioned in section 34(1)(b) (with any extension under subsection (4) of that section) and the period mentioned in subsection (6) shall not expire, if they would otherwise do so, until 14 days after the end of the period within which representations can be made under subsection (3).

### **Objection to existing controller**

36 (1) Where it appears to the Authority that a person who is a controller of any description of a licensed undertaking is not or is no longer a fit and proper person to be

such a controller of the licensed undertaking, it may serve him with a written notice of objection to his being such a controller of the licensed undertaking.

(2) Before serving a notice of objection under this section, the Authority shall serve the person concerned with a preliminary written notice stating that the Authority is considering service on that person of a notice of objection and that notice shall—

(a) subject to subsection (5), specify the reasons for which it appears to the Authority that the person in question is not or is no longer a fit and proper person as mentioned in subsection (1); and

(b) give particulars of the rights conferred by subsection (3).

(3) A person served with a notice under subsection (2) may, within a period of 28 days beginning with the day on which the notice is served, make written representations to the Authority; and where such representations are made the Authority shall take them into account in deciding whether to serve a notice of objection.

(4) A notice of objection under this section shall—

(a) subject to subsection (5), specify the reasons for which it appears to the Authority that the person in question is not or is no longer a fit and proper person as mentioned in subsection (1); and

(b) give particulars of the rights conferred by section 48.

(5) Subsections (2)(a) and (4)(a) shall not require the Authority to specify any reason which would in its opinion involve the disclosure of confidential information the disclosure of which would be prejudicial to a third party.

### **Contraventions by controller**

37 (1) Subject to subsection (2), any person who contravenes section 34 by—

(a) failing to give the notice required by subsection (1)(a) of that section;  
or

(b) becoming a controller of any description to which that section

applies before the end of the period mentioned in subsection (1)(b) of that section in a case where the Authority has not served him with a preliminary notice under section 35(2), shall be guilty of an offence.

(2) A person shall not be guilty of an offence under subsection (1) 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 Authority written notice of the fact that he has become such a controller within 14 days of becoming aware of the fact.

(3) Any person who—

- (a) before the end of the period mentioned in section 34(1)(b), becomes a controller of any description to which that subsection applies after being served with a preliminary notice under section 35(2);
- (b) contravenes section 34 by becoming a controller of any description after being served with a notice of objection to his becoming a controller of that description; or
- (c) having become a controller of any description in contravention of that section (whether before or after being served with such notice of objection), continues to be such a controller after such a notice has been served on him, shall be guilty of an offence.

(4) A person guilty of an offence under subsection (1) or (2) shall be liable on summary conviction to a fine of \$25,000.

(5) A person guilty of an offence under subsection (3) shall be liable—

- (a) on summary conviction, to a fine of \$25,000 and in respect of an offence under paragraph (c) of that subsection, to a fine of \$500 for each day on which the offence has continued;
- (b) on conviction on indictment, to a fine of \$50,000 or to imprisonment

for two years or to both such fine and imprisonment.

### **Restriction on sale of shares**

38 (1) The powers conferred by this section shall be exercisable where a person—

- (a) has contravened section 34 by becoming a controller of any description after being served with a notice of objection to his becoming a controller of that description;
- (b) having become a controller of any description in contravention of section 34, continues to be one after a notice has been served on him; or
- (c) continues to be a controller of any description after being served under section 35 with a notice of objection to his being a controller of that description.

(2) The Authority may by notice in writing served on the person concerned direct that any specified shares to which this section applies shall, until further notice, be subject to one or more of the following restrictions—

- (a) any transfer of, or agreement to transfer, those shares or, in the case of unissued shares, any transfer of or agreement to transfer the right to be issued with them, shall be void;
- (b) no voting rights shall be exercisable in respect of the shares;
- (c) no further shares shall be issued in right of them or in pursuance of any offer made to their holder; or
- (d) except in liquidation, no payment shall be made of any sums due from the undertaking on the shares, whether in respect of capital or otherwise.

(3) The Court may, on the application of the Authority, order the sale of any specified shares to which this section applies and, if they are for the time being subject to

any restrictions under subsection (2), that they shall cease to be subject to those restrictions.

(4) No order shall be made under subsection (3) in a case where the notice of objection was served under section 36 or 37—

(a) until the end of the period within which an appeal can be brought against the notice of objection; and

(b) if an appeal is brought, until it has been determined or withdrawn.

(5) Where an order has been made under subsection (3), the Court may, on the application of the Authority, make such further order relating to the sale or transfer of the shares as it thinks fit.

(6) Where shares are sold in pursuance of an order under this section, the proceeds of sale, less the costs of the sale, shall be paid into the Court for the benefit of the persons beneficially interested in them; and any such person may apply to the Court for the whole or part of the proceeds to be paid to him.

(7) This section applies—

(a) to all the shares in the licensed undertaking of which the person in question is a controller of the relevant description which are held by him or any associate of his and were not so held immediately before he became such a controller of the licensed undertaking; and

(b) where the person in question became a controller of the relevant description as a result of the acquisition by him or any associate of his of shares in another company, to all the shares in that company which are held by him or any associate of his and were not so held before he became such a controller of that licensed undertaking.

(8) A copy of the notice served on the person concerned under subsection (2) shall be served on the licensed undertaking or company to whose shares it relates and, if it relates to shares held by an associate of that person, on that associate.

## **PART 5**

### **DISCIPLINARY MEASURES**

#### **Power to impose civil penalties for breach of requirements**

39 (1) Except as provided in section 12, 57, 66 and 7, every person who fails to comply with any requirement or contravenes any prohibition imposed by or under this Act shall be liable to a civil penalty not exceeding \$10,000,000, as the Authority considers appropriate, for each such failure.

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

(3) The Authority 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 that the requirement would be complied with.

#### **Civil penalties procedures**

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

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

#### **Public censure**

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

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

#### **Public censure procedure**

42 (1) If the Authority proposes to publish a statement in respect of a licensed undertaking under section 41, it must give the institution a warning notice.

(2) If the Authority decides to publish a statement under section 41 (whether or not in the terms proposed), it must give the licensed undertaking concerned a decision notice.

### **Prohibition orders**

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

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

(3) A prohibition order may relate to—

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

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

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

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

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

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

to the attention of the public.

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

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

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

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

(10) In this section—

“exempted person” means a person who is exempted in accordance with section 11 from the requirement to hold a licence by or under this Act;

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

“regulated person” has the meaning given in subsection (1); “specified” means specified in the prohibition order.

### **Prohibition orders: procedures**

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

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

### **Applications relating to prohibition orders: procedures**

45 (1) This section applies to an application for the variation or revocation of a

prohibition order.

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

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

### **Determination of applications for variation, etc.**

46 (1) The Authority may grant an application made under section 45 if it is satisfied that the applicant is a fit and proper person to perform the function to which the application relates.

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

- (a) has obtained a qualification;
- (b) has undergone, or is undergoing, training; or
- (c) possesses a level of competence required in relation to persons performing functions of the kind to which the application relates.

### **Injunctions**

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

- (a) that there is a reasonable likelihood that any person will contravene a relevant requirement; or
- (b) that any person has contravened a relevant requirement and that there is a reasonable likelihood that the contravention will continue or be repeated, the Court may make an order restraining the contravention.

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

- (a) that any person has contravened a relevant requirement; and
- (b) that there are steps which could be taken for remedying the contravention, the Court may make an order requiring that person,

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

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

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

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

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

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

## **PART 6**

### **RIGHTS OF APPEAL**

#### **Rights of appeal**

48 (1) A licensed undertaking granted a Class F licence which is aggrieved by a decision of the Authority—

- (a) to restrict its licence, to restrict it in a particular manner or to vary any restrictions of its licence;

- (b) to revoke its licence;
- (c) to impose a civil penalty under section 39; or
- (d) to publish a statement in respect of it pursuant to section 41 may appeal against the decision to the tribunal constituted in accordance with section 49 (the tribunal).

(2) Where—

- (a) the ground or a ground for a decision within subsection (1)(a) or (b) is that mentioned in section 26(2)(a); or
- (b) the effect of a decision within subsection (1)(a) is to require the removal of a person as a controller or officer of an undertaking, the controller or officer to whom the ground relates or whose removal is required may appeal to the tribunal against the finding that there is such a ground for the decision or, as the case may be, against the decision to require his removal.

(3) Any person on whom a notice of objection is served under section 35 or 36 may appeal to the tribunal against the decision of the Authority to serve the notice; but this subsection does not apply to a person in any case in which he has failed to give a notice or become or continued to be a controller in circumstances in which his doing so constitutes an offence under section 37(1), (2) or (3).

(4) Any individual in respect of whom a prohibition order has been made under section 43 may appeal to the tribunal.

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

(6) The tribunal may suspend the operation of a restriction or a variation of a restriction pending the determination of an appeal in respect of the decision.

(7) The revocation of a licensed undertaking's licence pursuant to a decision against which there is a right of appeal under this section shall not have effect—

- (a) until the end of the period within which the appeal can be brought; and
- (b) if such an appeal is brought, until it is determined or withdrawn.

### **Constitution of tribunals**

49 (1) A tribunal shall be constituted in accordance with this section, where an appeal is brought under section 48, to determine the appeal.

(2) The tribunal shall consist of a chairman, or, in his absence, a deputy chairman and two other members.

(3) The chairman and the deputy chairman shall be appointed by the Minister for a term not exceeding three years, and shall be barristers and attorneys of at least seven years' standing.

(4) The two other members of the tribunal shall be selected by the chairman or, in his absence, the deputy chairman, from a panel of members appointed by the Minister under subsection (6), who shall be persons appearing to the chairman or, as the case may be, the deputy chairman, to have relevant experience.

(5) During any period of time when the chairman or deputy chairman is absent from Bermuda or is for any other reason unable to act, the Minister may appoint another person to act in his place for the period of his absence or inability to act.

(6) The Minister shall appoint a panel of not less than nine persons with relevant experience to serve as members of appeal tribunals.

(7) A person shall not be eligible for appointment as chairman, deputy chairman or member of the tribunal if he is or has at any time during the period of two years ending with the date of his appointment been an officer, servant or agent of the Authority or of any licensed undertaking.

### **Determination of appeals**

50 (1) On an appeal made under section 48, the question for the determination of the tribunal shall be whether, for the reasons adduced by the appellant, the

decision was unlawful or not justified by the evidence on which it was based.

(2) On any such appeal, the tribunal may confirm or reverse the decision which is the subject of the appeal but shall not have power to vary it except that—

(a) where the decision was to impose or vary any restriction, the tribunal may direct the Authority to impose different restrictions or to vary them in a different way; or

(b) where the decision was to revoke a licence, the tribunal may direct the Authority to restrict it instead.

(3) Notice of a tribunal's determination, together with a statement of its reasons, shall be given to the appellant and to the Authority; and, unless the tribunal otherwise directs, the determination shall come into operation when the notice is given to the appellant and to the Authority.

### **Costs, procedure and evidence**

51 (1) A tribunal may give such directions as it thinks fit for the payment of costs or expenses by any party to the appeal.

(2) The Minister may make regulations with respect to appeals and those regulations may in particular make provision—

(a) as to the period within which and the manner in which such appeals are to be brought;

(b) as to the manner in which such appeals are to be conducted, including provision for any hearing to be held in private and as to the persons entitled to appear on behalf of the parties;

(c) as to the procedure to be adopted where appeals are brought both by a licensed undertaking and by a person who is to be a controller or officer of a licensed undertaking, including provision for the hearing of the appeals together and for the mutual disclosure of information;

(d) for requiring an appellant or the Authority to disclose or allow the

inspection of documents in his or its custody or under his or its control;

- (e) for requiring any person, on tender of the necessary expenses of his attendance, to attend and give evidence or produce documents in his custody or under his control and for authorising the administration of oaths to witnesses;
- (f) for enabling an appellant to withdraw an appeal or the Authority to withdraw its opposition to an appeal and for the consequences of any such withdrawal;
- (g) for taxing or otherwise settling any costs or expenses which the tribunal directs to be paid and for the enforcement of any such direction;
- (h) for enabling any preliminary or incidental functions in relation to an appeal to be discharged by the chairman or, as the case may be, the deputy chairman of the tribunal; and
- (i) as to any other matter connected with such appeals.

(3) Regulations made under subsection (2) shall be subject to the negative resolution procedure.

(4) A person who, having been required in accordance with regulations made under this section to attend and give evidence, fails without reasonable excuse to attend or give evidence, shall be guilty of an offence and liable on summary conviction to a fine of \$10,000.

(5) A person who without reasonable excuse alters, suppresses, conceals, destroys or refuses to produce any document which he has been required to produce in accordance with regulations under this section, or which he is liable to be so required to produce, shall be guilty of an offence and liable—

- (a) on summary conviction, to a fine of \$25,000 or to imprisonment for six months or to both such fine and imprisonment;

- (b) on conviction on indictment, to a fine of \$50,000 or to imprisonment for two years or to both such fine and imprisonment.

### **Further appeals on a point of law**

52 (1) A licensed undertaking or other person who has appealed to a tribunal may appeal to the Court on any question of law arising from the decision on the appeal by the tribunal and an appeal on any such question shall also lie at the instance of the Authority; and if the Court is of the opinion that the decision was erroneous in point of law it shall remit the matter to the tribunal for rehearing and determination by it.

(2) No appeal to the Court of Appeal shall be brought from a decision under subsection (1), except with leave of that court.

## **PART 8**

### **NOTICES AND INFORMATION**

#### **Warning notices**

53 (1) A warning notice must—

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

(2) The warning notice must specify a reasonable period (which may not be less than 14 days) within which the person to whom it is given may make representations to the Authority; and where such representations are made, the Authority shall take them into account in deciding whether to give a decision notice.

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

(4) A warning notice about a proposal to publish a statement under section 41 must set out the terms of the statement.

(5) A warning notice given under section 53 must set out the terms of the prohibition.

### **Decision notices**

54 (1) A decision notice must—

- (a) be in writing;
- (b) give reasons for the Authority's decision to take the action to which the notice relates;
- (c) give its decision; and
- (d) give an indication of the right to appeal the decision to the tribunal under section 48.

(2) A decision notice shall be given within 90 days beginning with the day on which a warning notice under section 53 was given; and if no decision notice under subsection(1) is given within that period, the Authority shall be treated as having at the end of that period given a notice of discontinuance under section 55.

(3) A decision notice about the imposition of a civil penalty under section 39 must state the date of payment.

(4) A decision notice about public censure under section 41 must—

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

(5) A decision notice about a prohibition order made under section 43(2) must—

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

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

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

(8) The Authority may give a further decision notice as a result of subsection (7) only if the person to whom the original notice was given consents.

(9) If the person to whom a decision notice under subsection (1) is given had the right to refer the matter to which the original decision notice related to the tribunal, he has that right as respects the decision notice under subsection (7).

### **Notices of discontinuance**

55 (1) Subject to section 54(2), if the Authority decides not to take the action proposed in a warning notice it must give a notice of discontinuance to the person to whom the warning notice was given.

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

### **Publication**

56 (1) Subject to sections 26, 41, 43, the Authority may publish such information about a matter to which a decision notice relates as it considers appropriate.

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

(a) before notifying the person concerned; and

(b) pending an appeal under section 49.

### **Notification of change of controller or officer**

57 (1) A licensed undertaking shall give written notice to the Authority of the fact of any person having become or ceased to be a controller or officer of the licensed

undertaking.

(2) A notice required to be given under subsection (1) shall be given before the end of the period of 14 days beginning with the day on which the licensed undertaking becomes aware of the relevant facts.

(3) A licensed undertaking which fails to give a notice required by this section shall be liable to a civil penalty calculated in accordance with subsection (4).

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

### **Power to obtain information and reports**

58 (1) The Authority may by notice in writing served on a licensed undertaking—

(a) require the undertaking to provide the Authority (or such person acting on behalf of the Authority as may be specified in the notice), at such time or times or at such intervals or in respect of such period or periods as may be so specified, with such information as the Authority may reasonably require for ensuring that the undertaking is complying with the provisions of this Act and any code of practice, and for safeguarding the interests of clients and potential clients of the undertaking;

(b) require the undertaking to provide the Authority with a report, in such form as may be specified in the notice, by the undertaking's auditor or by an accountant or other person with relevant professional skill in, or on any aspect of, any matter about which the Authority has required or could require the undertaking to provide information under paragraph (a).

(2) The person appointed by a licensed undertaking to make any report

required under subsection (1)(b) shall forthwith give written notice to the Authority of any factor matter of which he becomes aware which is likely to be of material significance for the discharge, in relation to the licensed undertaking, of the functions of the Authority under this Act.

### **General power to require production of documents**

59 (1) The Authority may—

(a) by notice in writing served on a licensed undertaking require it to produce, within such time and at such place as may be specified in the notice, such document or documents of such description as may be so specified;

(b) authorise an officer, servant or agent of the Authority, producing such evidence of his authority, to require it to provide to him such information, or to produce to him such documents, as he may specify, being such information or documents as the Authority may reasonably require for the performance of its functions under this Act.

(2) Where, by virtue of subsection (1), the Authority or any officer, servant or agent of the Authority has power to require the production of any documents from a licensed undertaking, the Authority or that officer, servant or agent shall have the like power to require the production of those documents from any person who appears to be in possession of them; but where any person from whom such production is required claims alien on documents produced by him, the production shall be without prejudice to the lien.

(3) The power under this section to require a licensed undertaking or other person to produce any documents includes power—

(a) if the documents are produced, to take copies of them or extracts from them and to require that undertaking or person, or any other person who is a present or past controller or officer of, or is or was at any time employed by or acting as an employee of, the licensed

undertaking in question, to provide an explanation of any of them;  
and

- (b) if the documents are not produced, to require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

(4) If it appears to the Authority to be desirable in the interests of the clients or potential clients of a licensed undertaking which is a company to do so, it may also exercise the powers conferred by section 58 and subsection (1) of this section in relation to any company which is or has at any relevant time been—

- (a) a parent company, subsidiary company or related company of that undertaking;
- (b) a subsidiary company of a parent company of that undertaking;
- (c) a parent company of a subsidiary company of that undertaking; or
- (d) a company in the case of which a shareholder controller of that undertaking, either alone or with any associate or associates, holds 50% or more of the shares or is entitled to exercise, or control the exercise of, more than 50% of the voting power at a general meeting.

(5) The Authority may by notice in writing served on any person who is or is to be a controller or officer of a licensed undertaking require him to provide the Authority, within such time as may be specified in the notice, with such information or documents as the Authority may reasonably require for determining whether he is a fit and proper person to hold the particular position which he holds or is to hold.

(6) Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both such fine and imprisonment.

(7) Nothing in this section shall require the disclosure or production by a person of information or documents which he would be entitled to refuse to disclose or

produce on the grounds of legal professional privilege in proceedings in Bermuda.

### **Right of entry to obtain information and documents**

60 (1) Any officer, servant or agent of the Authority may, on producing if required evidence of his authority, enter any premises occupied by a person on whom a notice has been served under sections 58(1) and 59(1) for the purpose of obtaining there the information or documents required by that notice and of exercising the powers conferred by section 64(3). (2) Any officer, servant or agent of the Authority may, on producing if required evidence of his authority, enter any premises occupied by any person on whom a notice could be served under sections 58(1) and 59(1) for the purpose of obtaining there such information or documents as are specified in the authority, but the Authority shall not authorise any person to act under this subsection unless it has reasonable cause to believe that if such a notice were served it would not be complied with or that any documents to which it would relate would be removed, tampered with or destroyed.

(3) Any person who intentionally obstructs a person exercising rights conferred by this section shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both such fine and imprisonment.

## **PART 9**

### **INVESTIGATIONS**

#### **Investigations on behalf of the Authority**

61 (1) If it appears to the Authority desirable to do so in the interests of the clients or potential clients of a licensed undertaking, the Authority may appoint one or more competent persons to investigate and report to the Authority on—

- (a) the nature, conduct or state of the undertaking's business or any particular aspect of it; or

(b) the ownership or control of the undertaking, and the Authority shall give written notice of any such appointment to the undertaking concerned.

(2) If a person appointed under subsection (1) thinks it necessary for the purposes of the investigation he is appointed to carry out, he may also investigate the business of any company which is or has at any relevant time been—

(a) a parent company, subsidiary company or related company of the undertaking under investigation;

(b) a subsidiary company or related company of a parent company of that undertaking;

(c) a parent company of a subsidiary company of that undertaking; or

(d) a company in the case of which a shareholder controller of that undertaking, either alone or with any associate or associates, holds 50% or more of the shares or is entitled to exercise, or control the exercise of, more than 50% of the voting power at a general meeting.

(3) Where a person appointed under subsection (1) decides to investigate the business of any company by virtue of subsection (2), he shall give it written notice to that effect.

(4) It shall be the duty of every person who is or was a controller, officer, employee, agent, banker, auditor or barrister and attorney of a licensed undertaking which is under investigation (whether by virtue of subsection (1) or (2)), or any person appointed to make a report in respect of that undertaking under section 58(1)(b)—

(a) to produce to the persons appointed under subsection (1), within such time and at such place as they may require, such documents, or documents of such description, as may be specified, being documents the production of which may be reasonably required for the investigation, which are in his custody or power;

(b) to attend before the persons so appointed at such time and place as

they may require and answer questions relevant to the investigation as the persons appointed under subsection (1) may require; and

- (c) otherwise to give the persons so appointed all assistance in connection with the investigation which he is reasonably able to give, and those persons may take copies of or extracts from any documents produced to them under paragraph (a).

(5) For the purpose of exercising his powers under this section, a person appointed under subsection (1) may enter any premises occupied by a licensed undertaking which is being investigated by him under this section; but he shall not do so without prior notice in writing.

(6) A person exercising powers by virtue of an appointment under this section shall, if so required, produce evidence of his authority.

(7) Unless the Authority otherwise directs, the licensed undertaking under investigation shall pay to the Authority all expenses of, and incidental to, the investigation.

(8) Any person who—

- (a) without reasonable excuse, fails to produce any documents which it is his duty to produce under subsection (4);
- (b) without reasonable excuse, fails to attend before the persons appointed under subsection (1) when required to do so;
- (c) without reasonable excuse, fails to answer any question which is put to him by persons so appointed with respect to a licensed undertaking which is under investigation or a company which is being investigated by virtue of subsection (2); or
- (d) intentionally obstructs a person in the exercise of the rights conferred by subsection (5), shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both such fine and imprisonment.

(9) A statement made by a person in compliance with a requirement imposed

by virtue of this section shall not be used in evidence against him.

(10) Nothing in this section shall require the disclosure or production by a person of information or documents which he would be entitled to refuse to disclose or produce on the grounds of legal professional privilege in proceedings in Bermuda.

### **Investigations of suspected contraventions**

62 (1) The Authority may conduct an investigation if it appears to the Authority that—

(a) a person may have contravened section 10;

(b) any exempted person may have contravened any restriction or exemption or condition given under an exemption order under section 11;

(c) an undertaking may have contravened a requirement imposed by or under this Act, regulations or orders made thereunder;

(d) an individual may not be a fit and proper person to perform functions in relation to a regulated activity within the meaning of section 37.

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

(a) business carried on at any time when the undertaking was licensed under this Act; or

(b) the ownership or control of an undertaking at any time when it was licensed under this Act.

### **Power to require production of documents during investigation**

63 (1) The Authority may by notice in writing require the person who is the subject of an investigation under section 62 (“the person under investigation”) or any person connected with the person under investigation—

- (a) to provide, at such place as may be specified in the notice and either forthwith or at such time as may be so specified, such information as the Authority may reasonably require for the purpose of the investigation;
- (b) to produce, at such place as may be specified in the notice and either forthwith or at such time as may be so specified, such documents, or documents of such description, as may be specified, being documents the production of which may be reasonably required for the investigation;
- (c) to attend at such place and time as may be specified in the notice and answer questions relevant to the enquiry as the Authority may require.

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

- (a) to produce to the Authority, within such time and at such place as the Authority may require, such documents, or documents of such description, as may be specified, being documents the production of which may be reasonably required for the investigation, which are in his custody or power;
- (b) to attend before the Authority at such time and place as the Authority may require and answer questions relevant to the investigation as the Authority may require; and
- (c) to take such actions as the Authority may direct in connection with the investigation.

(3) The Authority or a duly authorised officer, servant or agent of the Authority may take copies of or extracts from any documents produced under this section.

(4) Any officer, servant or agent of the Authority may, on producing if

required evidence of his authority, enter any premises occupied by a person on whom a notice has been served under subsection (1) for the purpose of obtaining there the information or documents required by the notice, putting the questions referred to in paragraph (c) of that subsection or exercising the powers conferred by subsection (3).

(5) Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section or intentionally obstructs a person in the exercise of the rights conferred by subsection (4) shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both such fine and imprisonment.

(6) A statement made by a person in compliance with a requirement imposed by virtue of this section shall not be used in evidence against him.

(7) Nothing in this section shall require the disclosure or production by a person of information or documents which he would be entitled to refuse to disclose or produce on the grounds of legal professional privilege in proceedings in Bermuda.

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

- (a) a member of a group to which the person under investigation belongs;
- (b) a controller of the person under investigation;
- (c) a partner of a partnership of which the person under investigation is a member.

### **Powers of entry**

64 (1) A magistrate may issue a warrant under this section if satisfied on information on oath that the Authority is conducting an investigation under section 52 and—

- (a) a person has failed to comply with a notice served on him under section 64;
- (b) that there are reasonable grounds for suspecting the completeness of any information provided or documents produced by the person in response to a notice served on him under section 63; or

- (c) that there are reasonable grounds for suspecting that if a notice were served on the person under section 63 it would not be complied with or that any documents to which it would relate would be removed, tampered with or destroyed.

(2) A warrant under this section shall authorise any police officer not below the rank of inspector, together with any other person named in the warrant and any other police officers—

- (a) to enter any premises occupied by the person under investigation which are specified in the warrant, using such force as is reasonably necessary for the purpose;
- (b) to search the premises and take possession of any documents appearing to be such documents as are mentioned in subsection (1) or to take, in relation to any such documents, any other steps which may appear to be necessary for preserving them or preventing interference with them;
- (c) to take copies of or extracts from any such documents;
- (d) to require any person named in the warrant to answer questions relevant for determining whether that person is guilty of any such contravention as is mentioned in section 62.

(3) A warrant under this section shall continue in force until the end of the period of one month beginning with the day on which it is issued.

(4) Any documents of which possession is taken under this section may be retained—

- (a) for a period of three months; or
- (b) until the conclusion of proceedings, if within the period of three months referred to in paragraph (a), proceedings to which the documents are relevant are commenced against any person for any such contravention as is mentioned in section 62.

(5) Any person who intentionally obstructs the exercise of any right conferred by a warrant issued under this section or fails without reasonable excuse to comply with any requirement imposed in accordance with subsection (2)(d) shall be guilty of an offence and liable—

(a) on summary conviction, to a fine of \$25,000 or to imprisonment for six months or to both such fine and imprisonment;

(b) on conviction on indictment, to a fine of \$50,000 or to imprisonment for two years or to both such fine and imprisonment.

### **Obstruction of investigations**

65 (1) A person who knows or suspects that an investigation is being or is likely to be carried out—

(a) into a suspected contravention of section 10 or a term or condition of an exemption order made under section 11; or

(b) under section 62,

shall be guilty of an offence if he falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents which he knows or suspects are or would be relevant to such an investigation unless he proves that he had no intention of concealing facts disclosed by the documents from persons carrying out such an investigation.

(2) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine of \$25,000 or to imprisonment for six months or to both such fine and imprisonment;

(b) on conviction on indictment, to a fine of \$50,000 or to imprisonment for two years or to both such fine and imprisonment.

## **PART 10**

## CERTIFICATE OF COMPLIANCE

### **Certificates of compliance**

66 (1) Every licensed undertaking shall, within four months from the end of its financial year, deliver to the Authority a certificate of compliance, signed by an officer of the undertaking, made up to the end of its financial year, certifying that the undertaking has complied with the minimum criteria and codes of practice.

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

## **PART 11**

### **RESTRICTION ON DISCLOSURE OF INFORMATION**

#### **Restricted information**

67 (1) Except as provided by sections 68, 69 and 70, no person who—

(a) under or for the purposes of this Act, receives information relating to the business or other affairs of any person; and

(b) obtains information directly or indirectly from a person who has received it as provided under paragraph (a), shall disclose the information without the consent of the person to whom it relates and (if different) the person from whom it was received as aforesaid.

(2) This section does not apply to information which at the time of the disclosure is or has already been made available to the public from other sources or to information in the form of a summary or collection of information so framed as not to enable

information relating to any particular person to be ascertained from it.

(3) Any person who discloses information in contravention of this section commits an offence and is liable—

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

(b) on conviction on indictment, to a fine of \$100,000 or to imprisonment for five years or to both such fine and imprisonment.

### **Disclosure for facilitating the discharge of functions of the Authority**

68 (1) Section 70 does not preclude the disclosure of information in any case in which disclosure is for the purpose of enabling or assisting the Authority to discharge—

(a) its functions under this Act; and

(b) its functions under the Bermuda Monetary Authority Act 1969.

(2) Without prejudice to the generality of subsection (1), section 70 does not preclude the disclosure of information by the Authority to the auditor or accountant of a licensed undertaking, or to the person appointed to make a report under section 59(1)(b) if it appears to the Authority that disclosing the information would enable or assist the Authority to discharge the functions mentioned in that section or would otherwise be in the interests of the clients or potential clients of a licensed undertaking.

### **Disclosure for facilitating the discharge of functions by other authorities**

69 (1) Section 70 does not preclude the disclosure of information to the Minister or other authority in Bermuda in any case in which the disclosure is for the purpose of enabling or assisting him to discharge his regulatory functions.

(2) Section 70 does not preclude the disclosure of information for the purpose of enabling or assisting an authority in a country or territory outside Bermuda to exercise functions corresponding to the functions of the Authority under this Act.

(3) Subsection (2) does not apply in relation to disclosures to an authority

unless the Authority is satisfied that the authority is subject to restrictions on further disclosure at least equivalent to those imposed by sections 70 and 71 and this section.

- (4) Section 70 does not preclude the disclosure of information—
- (a) for the purpose of enabling or assisting a person to do anything which he is required to do in pursuance of a requirement imposed under section 59 (1) (b);
  - (b) with a view to the undertaking of, or otherwise for the purposes of, any criminal proceedings, whether under this Act or any other Act;
  - (c) in connection with any other proceedings arising out of this Act.

(5) Section 61 does not preclude the disclosure by the Authority to the Director of Public Prosecutions or a police officer not below the rank of inspector of information obtained pursuant to section 62, 64 or 65 or of information in the possession of the Authority as to any suspected contravention in relation to which the powers conferred by those sections are exercisable.

(6) Information which is disclosed to a person in pursuance of this section shall not be used otherwise than for the purposes mentioned in this section.

### **Information supplied to the Authority by relevant overseas authority**

70 (1) Section 67 applies to information which has been supplied to the Authority for the purposes of any relevant functions by the relevant supervisory authority in a country or territory outside Bermuda.

- (2) Information supplied to the Authority as mentioned in subsection (1) shall not be disclosed except as provided by section 67 or—
- (a) for the purpose of enabling or assisting the Authority to discharge its functions under this Act; or
  - (b) with a view to the undertaking of, or otherwise for the purpose of, criminal proceedings, whether under this Act or any other Act.

(3) In this section—

“relevant functions”, in relation to the Authority, means its functions under this Act;

“relevant supervisory authority” means the authority discharging in a country or territory outside Bermuda functions corresponding to those of the Authority under this Act.

## **PART 13**

### **MISCELLANEOUS AND SUPPLEMENTAL**

#### **False documents or information**

71 (1) Any person who, for any purposes of this Act—

- (a) issues a document, or supplies information, which is false or misleading in a material respect; or
- (b) signs a document which is false or misleading in a material respect; or
- (c) takes part in the preparation or issue of a document, or the supplying of information, which is false in a material respect, commits an offence.

(2) A person who commits an offence under subsection (1) is liable—

- (a) on summary conviction, to a fine of \$25,000 or to imprisonment for two years or to both such fine and imprisonment;
- (b) on conviction on indictment, to a fine of \$50,000 or to imprisonment for four years or to both such fine and imprisonment.

(3) It shall be a defence for a person charged with an offence under subsection (1) to prove—

(a) if an individual, that he had no knowledge of the falsity or misleading character of the document or information, and took every reasonable precaution to ensure its accuracy; and

(b) if not an individual, that every person acting on such person's behalf had no such knowledge, and took every such reasonable precaution, as aforesaid.

### **Offences**

72 (1) Where an offence under this Act committed by a licensed undertaking is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, any officer of the licensed undertaking, or any person who was purporting to act in any such capacity, he, as well as the licensed undertaking, shall be guilty of that offence and be liable to be proceeded against and punished accordingly unless such person shows that he took all reasonable steps to avoid the commission of an offence.

(2) Where the affairs of a licensed undertaking are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the licensed undertaking.

### **Prohibition on use of words "virtual currency business"**

73 (1) No person carrying on business in or from Bermuda shall use any name which indicates or may reasonably be understood to indicate (whether in English or in any other language) that it is carrying on virtual currency business unless it is a licensed undertaking under section 12.

(2) Any person using a name in contravention of subsection (1) commits an offence and is liable on summary conviction to a fine of \$5,000.

### **Notices**

74 (1) This section has effect in relation to any notice, direction or other document required or authorised by or under this Act to be given to or served on any person other than the Authority.

(2) Any such document may be given to or served on the person in question by—

(a) delivering it to him;

(b) leaving it at his principal place of business; or

(c) sending it to him at that address by facsimile or other similar means which produces a document containing the text of the communication.

(3) Any such document may in the case of a company be given to or served by—

(a) delivering it to the company's principal place of business or registered office in Bermuda; or

(b) sending it by registered post addressed to the company's principal place of business.

### **Service of notice on Authority**

75 (1) No notice required by this Act to be given to or served on the Authority shall be regarded as given or served until it is received.

(2) Subject to subsection (1), such notice may be given by facsimile or other similar means which produces a document containing the text of the communication.

### **Civil debt and civil penalties**

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

(2) When a person is liable to a civil penalty imposed by or under this Act,

such person shall not also be charged with an offence under this Act in relation to the same matters.

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

## **Regulations**

77 (1) The Minister may, after consulting with the Authority, make regulations prescribing anything which may be prescribed under this Act and generally for the implementation of this Act.

(2) Without prejudice to the generality of subsection (1), regulations may in particular provide with respect to any of the following matters—

- (a) any matter relating to the conduct of a virtual currency business;
- (b) the requirement for any additional service or services to be deemed a virtual currency business activity;
- (c) the preparation, adoption and implementation of processes or procedures relating to a virtual currency business.

(3) Regulations made under subsection (1) may—

- (a) prescribe penalties not exceeding \$10,000 for any breach of the regulations;
- (b) make such transitional, incidental or supplementary provision as appears to the Minister to be necessary or expedient.

(4) Regulations made under this Act shall be subject to the negative resolution procedure.

## **Transitional**

78

(1) An undertaking carrying on virtual currency business prior to the commencement of this Act shall be required to submit an application to the Authority in accordance with section 12 within three months of the date of commencement of this Act.

(2) An undertaking shall be liable to pay the fee prescribed by virtue of section 12 on the issue of its licence under subsection (1), and shall be liable to pay the fee prescribed thereby on or before 31 March and annually thereafter, and the provisions of section 12(2) shall apply in relation to failure to pay such fee.

(3) Where the undertaking referred to in subsection (1) makes an application for a licence within three months from the date of commencement of this Act, it may continue to carry on virtual currency business activities without a licence until that application is approved, declined or withdrawn.

### **Consequential amendments**

79 Schedule 2 which amends the Bermuda Monetary Authority Act 1969, the Anti-Terrorism (Financial and Other Measures) Act 2004, Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 and the Proceeds of Crime Act 1997 has effect.

## VIRTUAL CURRENCY BUSINESS ACT 2018

### SCHEDULE 1

(Section 13)

## MINIMUM CRITERIA FOR LICENSING

### **Controllers and officers to be fit and proper persons**

1 (1) Every person who is, or is to be, a controller or officer of the licensed undertaking is a fit and proper person to hold the particular position which he holds or is to hold.

(2) In determining whether a person is a fit and proper person to hold any particular position, regard shall be had to his probity, to his competence and soundness of judgement for fulfilling the responsibilities of that position, to the diligence with which he is fulfilling or likely to fulfil those responsibilities and to whether the interests of clients or potential clients of the licensed undertaking are, or are likely to be, in any way threatened by his holding that position.

(3) Without prejudice to the generality of the foregoing provisions, regard may be had to the previous conduct and activities in business or financial matters of the person in question and, in particular, to any evidence that he has—

- (a) committed an offence involving fraud or other dishonesty, or violence;
- (b) contravened any provision made by or under any enactment appearing to the Authority to be designed for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice by persons concerned in the provision of banking, insurance, investment or other financial services or the management of companies or against financial loss due to the conduct of discharged or undischarged bankrupts;
- (c) engaged in any business practices appearing to the Authority to be deceitful or oppressive or otherwise improper (whether lawful or not) or which otherwise reflect discredit on his method of conducting business;
- (d) engaged in or has been associated with any other business practices or

otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgement.

**Business to be conducted in prudent manner**

2 (1) The licensed undertaking shall conduct or, in the case of an undertaking which is not yet carrying on virtual currency business, will conduct its business in a prudent manner.

(2) In determining whether a licensed undertaking is conducting its business in a prudent manner, the Authority shall take into account any failure by the undertaking to comply with the provisions of—

- (a) this Act;
- (b) any applicable 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 Anti-Terrorist Financing) Regulations 2008;
- (c) codes of practice issued by the Authority pursuant to section 6 of this Act;
- (d) international sanctions in effect in Bermuda.

(3) A licensed undertaking shall not be regarded as conducting its business in a prudent manner unless it maintains or, as the case may be, will maintain minimum net assets of \$100,000 or such amount as the Authority may direct taking into consideration the nature, size and complexity of the licensed undertaking.

(4) A licensed undertaking shall not be regarded as conducting its business in a prudent manner unless it maintains or, as the case may be, will maintain adequate accounting and other records of its business and adequate systems of control of its business and records, and has developed policies and procedures pertaining to its obligations under this Act or any other Act.

(5) Those records and systems shall not be regarded as adequate unless they are such as to enable the business of the licensed undertaking to be prudently managed and the licensed undertaking to comply with the duties imposed on it by or under this Act or other provisions of law.

(6) A licensed undertaking shall not be regarded as conducting its business in a prudent manner unless it has effected a policy of insurance to cover risks inherent in the operation of its business of an amount commensurate with the nature and scale of its virtual currency business.

(6) Subparagraphs (2) to (6) are without prejudice to the generality of subparagraph (1).

### **Integrity and skill**

3 The business of the licensed undertaking is or, in the case of an undertaking which is not yet carrying on virtual currency business, will be carried on with integrity and the professional skills appropriate to the nature and scale of its activities.

### **Corporate governance**

4 (1) The licensed undertaking shall implement corporate governance policies and processes as the Authority considers appropriate given the nature, size, complexity and risk profile of the licensed company.

(2) Without prejudice to subparagraph (1) the business of the licensed undertaking shall be—

- (a) effectively directed by at least two persons; and
- (b) under the oversight of such number of non-executive directors appointed as the Authority considers appropriate given the nature, size, complexity and risk profile of the licensed undertaking.

## **Consolidated supervision**

5 The position of the licensed undertaking within the structure of any group to which it may belong shall be such that it will not obstruct the conduct of effective consolidated supervision.

## SCHEDULE 2

(Section 79)

### CONSEQUENTIAL AMENDMENTS

#### **Amends Bermuda Monetary Authority Act 1969**

1 The Bermuda Monetary Authority Act is amended—

- (a) in the Third Schedule, by adding the words “Undertaking licensed under the Virtual Currency Business Act 2018”;
- (c) in the Fourth Schedule, by adding “ Virtual Currency Business Act 2018—

- (1) Application fee pursuant to section 12     **\$2,266**
- (2) Grant of a licence to carry on a virtual currency business pursuant to section 16(1) (a) —  
The lower of fees set out under paragraphs (a) and (b) where—
  - (a) equals \$450,000; and
  - (b) equals the higher of \$15,000 and 0.00075 multiplied by estimated client receipts.
- (3) Annual fee pursuant to section 16(1)(b) —  
The lower of fees set out under paragraphs (a) and (b) where—

- (a) equals \$450,000; and
  - (b) equals the higher of \$15,000 and 0.00075 multiplied by client receipts.
- (4) Exemption or modification of rules or requirements pursuant to section 8 **\$5,000**
  - (5) Extension of Class M licence under section 12 (6) **\$10,000**
  - (6) Variation of a condition under section 20 **\$5,000**

For the purposes of this section,

“client receipts” means gross revenue received from virtual currency business services provided to clients by a licensed undertaking;

“estimated client receipts” means estimated gross revenue earned from virtual currency business services provided to clients by a licensed undertaking for the next year.”

**Amends Anti-Terrorism (Financial and Other Measures) Act 2004**

2 The Anti-Terrorism (Financial and Other Measures) Act 2004 is amended, in section 2 in the definition of “AML/ATF regulated financial institution”, by inserting the following new paragraph after paragraph (f)—

“(g) carries on virtual currency business within the meaning of section 2(2) of the Virtual Currency Business Act 2018;”.

**Amends Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008**

3 The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 is amended in section 2(1)—

(a) in the definition of “AML/ATF regulated financial institution”, by inserting the following subsection after subsection “(i)” and substituting the following—

“(j) carries on virtual currency business in accordance with section 2 of the Virtual Currency Business Act 2018

(b) in the definition of “regulatory Acts” by inserting a new paragraph after paragraph “(h)” —

“(i) Virtual Currency Business Act 2018.”

#### **Amends Proceeds of Crime Act 1997**

4 The Proceeds of Crime Act 1997 is amended, in section 42A in the definition of “AML/ATF regulated financial institution”, by inserting the following new paragraph after paragraph “(h)” —

“(i) is a licensed undertaking carrying on virtual business within the meaning of section 4 of the Virtual Currency Business Act 2018;”

## **EXPLANATORY MEMORANDUM**

The purpose of this Act is to introduce a supervisory framework for the Bermuda Monetary Authority to regulate persons carrying on virtual currency business and for the protection of the interests of clients or potential clients of persons carrying on the business of virtual currency business.

Clause 1 provides for the citation.

Clause 2 provides for inter alia, substantive interpretation of the term “virtual currency business”. For purposes of the Bill the term is interpreted to mean the provision of virtual currency business.

Clause 3 makes provision for the interpretation of the terms “director”, “controller”, “senior executive” and “associate” and for the substantive interpretation of the phrase “carrying on virtual currency business activities in Bermuda”.

Clause 4 provides for the substantive interpretation of the phrase “carrying on virtual currency business in Bermuda”. The clause provides for the circumstances that are to apply to a person for such person to be considered as carrying on virtual currency business in Bermuda, where such person is situated either within Bermuda or outside of Bermuda.

Clause 5 requires the Authority to publish a statement of principles. This statement is to indicate to persons carrying on virtual currency business how the Authority proposes to carry out certain aspects of its licensing and supervisory functions. This clause also allows the Authority to publish guidance on the application of the Bill and regulations made under it.

Clause 6 empowers the Authority to issue codes of practice. Persons carrying on virtual currency business are required to observe these codes of practice. A failure to observe the codes of practice could lead to regulatory sanctions.

Clause 7 empowers the Authority to make prudential rules and returns and

to require such to be filed by licensed undertakings; keep a copy of the most recent Rules or returns at its head office and file such with the Authority no later than four months after the end of its financial year.

Clause 8 makes provision for the Authority to modify or exempt licensed undertakings from the requirements of Act, prudential standards and statutory returns and empowers the Authority to take necessary or other actions in relation to the business or operations of licensed undertakings.

Clause 9 makes provision for the establishment of an Advisory Panel to the Authority.

Clause 10 prohibits any person from carrying on virtual currency business unless that person is licensed by the Authority or exempted under clause 11.

Clause 11 empowers the Minister to make orders exempting specified persons from the requirement to hold a licence. The Minister may, acting on the advice of the Authority, issue an exemption order.

Clause 12 provides a procedure for making applications to the Authority for licences. An application must be accompanied by a business plan, application fee prescribed under the Bermuda Monetary Authority Act 1969 and such other information or documents as the Authority may require.

Clause 13 empowers the Authority to grant or refuse applications for licences. The Authority must refuse an application unless it is satisfied that the minimum criteria are fulfilled with respect to the applicant. The Minister is empowered to amend Schedule 1 that sets out the minimum criteria by order.

Clause 14 empowers the Authority to determine that an undertaking should be licensed in a class otherwise than it applied for.

Clause 15 requires licences to be displayed. The Authority is required to publish a list of all licensed undertakings on its website.

Clause 16 provides for fees to be prescribed under the Bermuda Monetary Authority Act 1969. It provides for the fees to be payable on the grant of the licence and thereafter annually on or before 31 March. Where a licensed undertaking fails to submit such fee in time, it shall be liable to a civil penalty.

Clause 17 makes provision for a licensed undertaking to hold client assets separate from those of its business.

Clause 18 makes provision for an obligation to be imposed on an undertaking to maintain either a surety; obtain insurance or place assets in a trust to cover losses by the licensed undertaking which may arise in relation to client assets.

Clause 19 imposes an obligation on all licensed undertakings to appoint a senior representative with an office in Bermuda.

Clause 20 makes provision for every senior representative to report certain events to the Authority.

Clause 21 introduces a requirement for every licensed undertaking to maintain a head office in Bermuda. The intent of this clause is to ensure that every undertaking licensed has a “physical presence” on island.

Clause 22 provides for licensed undertakings to apply to the Authority in respect of “material changes” to its business.

Clause 23 empowers the Authority to restrict the licence of an undertaking where inter alia; a licensed undertaking fails to satisfy the minimum criteria; it contravenes a provision of the Bill or fails to meet an obligation imposed by or under the Bill - but in circumstances not to justify revocation of the licence. The Authority’s objective in restricting a licence is to protect clients or potential clients of an undertaking.

Clause 24 provides for the revocation of a licence and the grounds for revocation are set out under paragraphs (a) to (f).

Clause 25 provides for the winding-up of a licensed undertaking that has had its licence revoked, if it is just and equitable to wind it up.

Clause 26 requires the Authority to give notice to a licensed undertaking where it proposes to restrict, vary a restriction or revoke its licence. The Authority is required to give the undertaking a warning notice in writing which must state the action it proposes to take and give reasons for the proposed action. The licensed undertaking is given the opportunity to make representations to the Authority. The Authority after considering representations made to it by the licensed undertaking can

decide to either proceed with its proposed action or take no further action. It can also, where it has proposed revoking a licence, restrict it instead; and where it has proposed restricting or varying the licence in a certain manner, restrict or vary it in a different manner. Once the Authority has made its decision it must provide a decision notice in writing which shall set out the reasons for its decision and where appropriate, an indication of the right to appeal to a tribunal. Where the Authority decides not to take the action proposed in a warning notice it must give a notice of discontinuance, identifying the action which is being discontinued.

Clause 27 provides for the imposition of restrictions in cases of urgency by the Authority. In such cases, the Authority is not required to give a licensed undertaking notice under clause 26 (1) of its intention to impose a restriction. A licensed undertaking may also make representations to the Authority and a Class F licensed undertaking only can appeal a decision of the Authority under this clause.

Clause 28 provides for the giving of directions by the Authority to a licensed undertaking following the revocation or surrender of its licence- where such directions as appear to the Authority desirable for safeguarding the interests of the clients. Failure to comply with directions is a criminal offence.

Clause 29 provides for the notification and confirmation of directions given by the Authority to licensed undertakings under clause 28. The Authority is required to give directions by notice in writing and is empowered to vary a direction by a further direction. The Authority may also revoke a direction by notice in writing by exercise of its powers under this clause. Further, a direction given shall cease to have effect at the end of 28 days unless it is confirmed by a further notice given by the Authority to the licensed undertaking.

Clause 30 provides for the surrender of a licence by an undertaking. The surrender of a licence is irrevocable, unless it is expressed to take effect at a future date, and before that date the Authority by notice in writing allows it to be withdrawn.

Clause 31 makes provision for every licensed undertaking to prepare annual financial statements or accounts; keep a copy of the most recent accounts at its head office along with the auditor's report, and file such with the Authority no later

than four months after the end of its financial year.

Clause 32 requires every licensed undertaking to annually appoint an auditor approved by the Authority to audit its financial statements or accounts. A licensed undertaking which fails to do so is guilty of an offence and liable on summary conviction to a fine of \$25,000.

Clause 33 imposes an obligation on appointed auditors to communicate certain matters to the Authority, including his resignation, his intention to not seek re-appointment and a decision to include a modification in his report. An auditor who fails to comply with any requirement imposed on him under this section shall be liable on summary conviction to a fine of \$25,000.

Clause 34 requires any person who proposes to become a 10%, majority shareholder controller or a partner of a licensed undertaking to obtain the prior approval of the Authority by notice in writing. Such person shall only become a shareholder controller if the Authority does not object or respond within a specified period.

Clause 35 provides for the Authority to object to any person who seeks to become a new controller of; or to increase his shareholding in a licensed undertaking. Provision is further made for the time frame of notices to be submitted to the Authority and the Authority to respond to same, accordingly. Persons receiving any notice from the Authority under this section may also make representations to the Authority which it has to take into account in its determinations.

Clause 36 provides for the Authority to object to an existing controller who it considers is no longer a fit and proper person. Provision is made for the giving of notices and for the making of representations by the person concerned.

Clause 37 provides for contraventions by a controller of various requirements under the Bill. Contraventions are committed, in particular, with respect to the failure by a person to notify the Authority as required that the person is to become a 10% or majority controller of a licensed undertaking or where a person fails to comply with notices of objection to him being a controller given by the Authority. The Authority may impose penalties which range from \$25,000 to \$50,000.

Clause 38 makes provision for the Authority to impose certain restrictions on the shares of a controller. The Authority may also apply to the court for an order for the sale of specified shares.

Clause 39 proposes to empower the Authority to impose civil penalties of up to \$10,000,000 for failure to comply with any requirement, or contravention of any prohibition, imposed by or under the Bill.

Clause 40 makes provision for Authority must give a warning notice first, followed by a decision notice where it intends to impose a civil penalty.

Clause 41 makes provision for public censure of a licensed undertaking by the publication of a statement by the Authority that such undertaking has contravened a requirement imposed by or under the Bill.

Clause 42 sets out the public censure procedure.

Clause 43 proposes to empower the Authority to make prohibition orders depending on the circumstances of each particular case and after an assessment of the qualities of the individual concerned. A person who performs or agrees to perform a function in breach of the order would be liable to a civil penalty.

Clause 44 proposes to introduce the procedure for the making of prohibition orders by the Authority. The Authority must first give a warning notice followed by a decision notice.

Clause 45 establishes a procedure for the making of applications to vary or revoke a prohibition order.

Clause 46 makes provision for the Authority to grant an application under section 45 to revoke or vary a prohibition order if it is satisfied that a person in respect of whom an order had been made is now fit and proper.

Clause 47 makes provision for the Authority to apply to the Supreme Court to issue of three types of injunction orders as required.

Clause 48 provides for appeals to a tribunal against decisions of the Authority in certain circumstances by Class F license holders only.

Clause 49 provides for the constitution of appeal tribunals. A tribunal comprises a chairman, or deputy chairman to act in his absence, who must be a

barrister and attorney of at least seven years standing; and two other members with virtual currency business experience. The chairman and deputy chairman of the tribunal are appointed by the Minister. The other members are appointed by the chairman, or, in his absence, by the deputy chairman from a panel.

Clause 50 provides for the jurisdiction and powers of the tribunal in the determination of appeals.

Clause 51 provides for costs, procedure and evidence related to any party to the appeal.

Clause 52 provides for further appeals by a licensed undertaking or other person against the decisions of the tribunal to lie to the Supreme Court on questions of law only.

Clause 53 makes provision for the process of the issuance of warning notices by the Authority. The warning notice must set out the proposed action and the reasons for it and also gives an indication of whether or not the Authority proposes to publish its decision. The notice provides a period of not less than 14 days to enable the licensed undertaking or person concerned to make representations. The Authority could extend this period on application.

Clause 54 makes provision for the process by the Authority to issue a decision notice. The decision notice must provide the particulars of the decision and the reasons for the action and an indication of whether or not the Authority intends to publish the decision. It shall also inform the person concerned of its right to appeal to the tribunal. The Authority is required to make a determination within 90 days after issuance of a warning notice and if no decision notice is given within that period, it shall be treated as having discontinued the action. Provision is also made for the Authority to take a different action in accordance with certain requirements.

Clause 55 makes provision for the Authority to give a notice of discontinuance to the person concerned if, following the issue of a warning notice the Authority decides not to proceed with the proposed action.

Clause 56 makes provision for the Authority to decide what information should be published about a decision and prohibits the Authority from publishing a

decision unless it has first notified the person concerned, and pending the outcome of any appeal that might have been made.

Clause 57 requires a licensed undertaking to notify the Authority of any change in its controllers or officers. Where an undertaking fails to comply, it shall be liable to a civil penalty.

Clause 58 makes provision for the Authority to obtain information and reports from a licensed undertaking. A report requested by the Authority under this clause may be prepared by a licensed undertaking's auditor, accountant or other person.

Clause 59 provides for the production of documents for examination by the Authority. The Authority may also require, amongst other matters, for the parent or a subsidiary company of a licensed undertaking to produce documents for its examination, if it appears to it to be desirable in the interests of clients.

Clause 60 makes provision for any officer, servant or agent of the Authority to enter into premises occupied by a licensed undertaking to obtain information or documents in certain circumstances.

Clause 61 makes provision for the Authority to investigate the virtual currency business conducted by a licensed undertaking. Such investigations may be conducted by third parties on behalf of the Authority; all expenses of which are payable by the licensed undertaking under investigation unless otherwise directed by the Authority. The Authority may launch an investigation into the nature, conduct or state of the business of a licensed undertaking or any particular aspect of it; or into the ownership and control of a licensed undertaking. Various powers are given to the investigator to enable him to carry out his duties. Various offences are created in connection with the failing of a licensed undertaking or other relevant persons to assist in or obstructing an investigation.

Clause 62 makes provision for the Authority to investigate suspected contraventions of fundamental requirements in the Bill and other requirements imposed by or under the Bill, regulations, rules or orders for purposes of the Bill.

Clause 63 makes provision for a power to be exercised by the Authority to

require a person under investigation or any person connected to the person under investigation to provide information, produce documents or attend for questioning.

Clause 64 makes provision for the issuance of search warrants by a magistrate in cases where a person is suspected of removing, tampering or destroying documents required by the Authority for its functions, or in cases where a person under investigation or any person connected to the person under investigation refuses to provide the information or documents requested by the Authority.

Clause 65 makes it an offence for a person who knows or suspects that an investigation is likely to be carried out in certain circumstances, to obstruct investigations.

Clause 66 makes provision for a licensed undertaking to within four months from the end of its financial year, deliver to the Authority a certificate signed by an officer of the licensed undertaking, certifying that the licensed undertaking has, (with respect to the preceding financial year) complied or failed to comply with the minimum criteria for licensing under Schedule 1 and codes of practice; and that it has observed any limitations imposed on it by the Authority under its license (if applicable).

Clause 67 prohibits the disclosure of information relating to the business or other affairs of persons coming into the possession of any person exercising functions under the Act.

Clause 68 authorises the disclosure of information in clause 67 if it is necessary for facilitating the discharge of the functions of the Authority.

Clause 69 authorises disclosure to the Minister and to other authorities in Bermuda by the Authority for the purpose of enabling or assisting them to discharge their regulatory functions. Disclosure may be made to overseas regulators who exercise functions corresponding to the functions of the Authority, provided that such overseas regulators are subject to similar restrictions on further disclosure. Information may be disclosed for the purposes of criminal proceedings and may be disclosed to the Director of Public Prosecutions or a police officer not below the rank of inspector.

Clause 70 imposes similar restrictions on the disclosure of information supplied to the Authority by an overseas authority

Clause 71 creates offences in connection with false documents or information.

Clause 72 provides for offences committed by a licensed undertaking in certain circumstances.

Clause 73 proposes to prohibit the use of the words "virtual currency business" by persons not holding a licence.

Clause 74 provides the procedure for the giving and serving of notices to a licensed undertaking.

Clause 75 provides that a notice required under the Bill to be given or served on the Authority shall not be regarded as given or served until it is received by the Authority.

Clause 76 makes provision that where a person is convicted of an offence under the Bill no civil penalty can be imposed relative to the same matter.

Clause 77 makes provision for the Minister after consulting with the Authority to make regulations prescribing any matter which may be prescribed and in general to implement the requirements of the Act.

Clause 78 makes provision for transitional arrangements relating to persons already carrying on virtual currency business prior to commencement of the Act to make an application to the Authority within three months of the date of commencement or cease conducting business. Any person who makes such an application within the requisite timeframe may carry on conducting business until such time their application is approved or declined by the Authority or withdrawn by them.

Clause 79 provides for consequential amendments to the Bermuda Monetary Act 1969 and Anti- Terrorism and Proceeds of Crime laws to bring it into conformity with the Bill.

# **VIRTUAL CURRENCY (CLIENT DISCLOSURE) RULES 2018**

## **BERMUDA**

### **VIRTUAL CURRENCY (CLIENT DISCLOSURE) RULES 2018**

**BR / 2018**

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The Bermuda Monetary Authority (the Authority), in exercise of the powers conferred by section 7 of the Act, makes the following Rules—

#### **Citation**

- 1 These Rules may be cited as the Virtual Currency (Client Disclosure) Rules 2018.

#### **Interpretation**

- 2 In these Rules—
  - “Act” means the Virtual Currency Business Act 2018;

#### **Disclosures and other protections for clients**

- 3 (1) Every licensed undertaking prior to entering into an initial transaction for, on behalf of, or with a client shall disclose to such client—
  - (a) all material risks associated with its products, services and activities; and
  - (b) any additional disclosure the Authority determines reasonably necessary for the protection of clients.

(2) A disclosure required by sub-section (1) must be made separately from any other information provided by the licensed undertaking to the client and shall be provided in a manner which allows for the client to record the disclosure.

(3) A licensed undertaking may make an application to the Authority to provide alternate disclosures to clients,

## **VIRTUAL CURRENCY (CLIENT DISCLOSURE) RULES 2018**

(4) In considering any application made to it by a licensed undertaking, the Authority may take the following matters into consideration—

- (a) the protection of clients and potential clients;
- (b) the nature, scale and complexity of the virtual currency business activities carried on by the licensed undertaking.

(5) At the time of entering into an agreement to provide products and services to a client, each licensed undertaking shall disclose to such client to the extent such matters are applicable to the product or service to be provided—

- (a) the class of licence it holds;
- (b) a schedule of fees and charges for any service or product to be provided by the licensed undertaking; the manner in which fees and charges will be calculated by the licensed undertaking if such are not set in advance and disclosed at the time the agreement is entered into and the manner in which payment is to be made by the client to the licensed undertaking in respect of any fee or charge payable;
- (c) whether the licensed undertaking has obtained insurance to address losses which may arise as a result of the provision of any service or product it may offer; which includes but is not limited to, insurance cover for cyber or any other type of theft;
- (d) whether a transfer or exchange of virtual currency is irrevocable and any exceptions to irrevocability;
- (e) a description of—
  - (i) the licensed undertaking's liability and other remedies available to the client for an unauthorized, mistaken, or accidental transfer or exchange of a client's virtual currency;
  - (ii) the basis for any recovery by the client from the licensed undertaking for losses to client assets;
  - (iii) the manner in which a client must update contact information required to be provided to the licensed undertaking;
  - (iv) a client's ability to stop a pre-authorized transfer of virtual currency and where clients do have the ability to stop a transfer, the procedure to initiate a stop-payment order to transfer or exchange virtual currency or to revoke authorization for a subsequent transfer of virtual currency;
  - (v) the client's ability to receive a receipt or other evidence of a transfer or exchange and the process for receiving such receipt;
  - (vi) requirement for the client to receive not less than thirty days prior notice of material change to the terms and conditions of any services provided by the licensed undertaking, which includes amendment to policies

**VIRTUAL CURRENCY (CLIENT DISCLOSURE) RULES 2018**

applicable to the client's account;

- (f) at the conclusion of a transaction with a client, the licensed undertaking shall provide to the client by confirmation in writing the following information—
- (i) the name and contact information of the licensed undertaking;
  - (ii) contact information allowing for a client to request information—
    - (a) about its account;
    - (b) the licensed undertaking's business activities in general; or
    - (c) to make a complaint to the licensed undertaking;
  - (iii) the type, value, date, precise time, and amount of all transactions applicable to the client's account;
  - (iv) the fee charged for transactions, including any charge for conversion of virtual currency to another virtual currency or to fiat currency.

Made this                      day of                      2018

Chairman  
The Bermuda Monetary Authority

DRAFT



# **BERMUDA MONETARY AUTHORITY**

**CODE OF PRACTICE**

**VIRTUAL CURRENCY BUSINESS ACT 2018**

**APRIL 2018**

DRAFT

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## **I. INTRODUCTION**

1. This Code of Practice (the “Code”) is made pursuant to section 6 of the Virtual Currency Business Act 2018 (the “Act”). Section 6 requires the Bermuda Monetary Authority (the “Authority”) to publish in such manner as it thinks fit a code that provides guidance on the duties, requirements, procedures, standards and sound principles to be observed by persons carrying on virtual currency business. Failure to comply with provisions set out in the Code will be a factor taken into account by the Authority in determining whether a licensed virtual currency business service provider (“VCB”) is meeting its obligation to conduct its business in a sound and prudent manner.
2. The Code should be read in conjunction with the Virtual Currency Business Statement of Principles issued under section 5 of the Act.

## **II. PROPORTIONALITY PRINCIPLE**

3. The Authority appreciates that VCBs have varying risk profiles arising from the nature, scale, and complexity of the business, and that those VCBs with higher risk profiles would require more comprehensive governance and risk management frameworks to conduct business in a sound and prudent manner.
4. Accordingly, the Authority will assess the VCB’s compliance with the Code in a proportionate manner relative to its nature, scale, and complexity. These elements will be considered collectively, rather than individually (e.g. a VCB could be relatively small in scale, but carry out extremely complex business and therefore would still be required to maintain a sophisticated risk management framework). In defining these elements:
  - (a) Nature includes the relationship between the client entity and the VCB or characteristics of the service provided (e.g. a VCB that takes custody of a clients’ assets versus one that does not, etc.);
  - (b) Scale includes size aspects such as volume of business conducted or size of the balance sheet in conjunction with materiality considerations (e.g. an assessment of the impact of a VCB’s failure); and
  - (c) Complexity includes items such as organisational structures and product design.
5. In assessing the existence of sound and prudent business conduct, the Authority will have regard for both its prudential objectives and the appropriateness of each Code provision for the VCB, taking into account that VCB’s nature, scale, and complexity.
6. The proportionality principle, discussed above, is applicable to all sections of the Code regardless of whether the principle is explicitly mentioned.

## **III. CORPORATE GOVERNANCE**

7. The VCB must establish and maintain a sound corporate governance

framework, which provides for appropriate oversight of the VCB's business and adequately recognises and protects the interests of clients. The framework should have regard for international best practice on effective corporate governance. Corporate governance includes principles on corporate discipline, accountability, responsibility, compliance, and oversight.

8. The ultimate responsibility for sound and prudent governance and oversight of the VCB rests with its board of directors or equivalent governing body ("the board"). In this regard, the board is responsible for ensuring corporate governance policies and practices are developed and applied in a prudent manner that promotes the efficient, objective and independent judgment and decision making by the board. The board must also have adequate powers and resources to be able to discharge its duties fully and effectively.

### **The Board**

9. The Authority recognises that the board plays a critical role in the successful operation of a VCB. The board is chiefly responsible for setting corporate strategy, reviewing and monitoring managerial performance and determining an acceptable level of risk. Therefore, the effectiveness of the VCB's board is a basic tenet of the Authority's risk-based supervisory approach. Pragmatically, the board will likely delegate tasks; however, delegation of authority to board committees, chief and senior executives, employees, or external parties does not absolve the board from its ultimate responsibilities.
10. The board must ensure that the business is effectively directed and managed, and conducted in a professional manner with appropriate integrity, and due care. It is the responsibility of the board to ensure that processes exist to assess and document the fitness and propriety of its members, controllers, and officers. The board must also take into account the fact that conflicts, or potential conflicts of interest, may on occasion preclude the involvement of specific individual members on particular issues or decisions.
11. To effectively discharge its duties, the board must have an appropriate number and mix of directors to ensure that it has requisite experience, knowledge, skills and expertise commensurate with the nature, scale and complexity of the VCB's business.
12. Individual Board members must:
  - (a) act in good faith, honestly and reasonably exercise due care and diligence;
  - (b) ensure the interests of clients are protected;
  - (c) exercise independent judgment and objectivity in his/her decision making; and
  - (d) ensure appropriate policies and procedures exist to effectively deal with conflicts of interest.

## Oversight Responsibilities of the Board

13. As the VCB's governing body, a key board responsibility is setting appropriate strategies and overseeing the implementation. This includes ensuring that senior executives establish a framework to implement the VCB's strategic business objectives.
14. The board is also responsible for providing suitable oversight of the VCB's governance, risk management and internal controls frameworks, including any activities and roles that are delegated or outsourced. A list of oversight responsibilities that the board must consider when establishing and assessing the effectiveness of the corporate governance framework include ensuring the existence of:
  - An operational framework (including risk management, internal audit and compliance functions) to ensure adequate oversight responsibilities so that sound corporate governance exists throughout the organisation;
  - Processes to assess and document the fitness and propriety of board members, controllers, the chief and senior executives, senior representative, and third-party service providers, including auditors, custodians, investment managers, etc.;
  - Board committees (where required) to provide oversight of both key operational areas, including finance and investments;
  - Policies and procedures to ensure adequate board oversight of senior executives;
  - Processes for the engagement and dismissal of the chief and senior executives and third-party service providers;
  - Policies and procedures to manage and mitigate conflicts of interest;
  - Processes to ensure key employees are adequately skilled to execute and discharge their duty and are compensated in a manner that encourages sound risk management and compliance;
  - Clearly defined charters, roles and responsibilities for the board, committees, chief and senior executives, and other key employees;
  - Business and operational strategies, plans, budgets, and significant policies and procedures including those surrounding oversight;
  - Review and approval of significant policies and procedures promoting effective corporate governance across the organisation, including those for risk management and internal controls, internal audit, and compliance functions;
  - Clear documentation and regular review of processes regarding the roles and responsibilities of the board, the chief and senior executives, and other key employees delegated corporate governance responsibilities (including appropriate segregation of the oversight function from management responsibilities);
  - Adequate independence for the risk management, internal audit, and compliance functions to assist in oversight responsibilities and ensure these functions have a direct communication channel to the board and relevant committees; and
  - Processes to confirm that the board has appropriate access to accurate,

relevant, and timely information to enable it to carry out its duties and functions, including the monitoring and review of the performance and risk exposures of the VCB and the performance of senior executives.

## **Responsibility of the Chief and Senior Executives**

15. The board must ensure that great care is taken in the selection of the chief and senior executives given the important role these play. In addition to supporting the board, the chief and senior executives are also responsible for the prudent administration of the VCB. Such responsibilities include:
- Manage and execute the day-to-day operations of the VCB, subject to the mandate established by the board and the laws and regulations in the operating jurisdiction;
  - Assist the board to develop and implement an appropriate control environment including those around reporting and security systems;
  - Provide recommendations on strategic plans, objectives, key policies, and procedures to the board for evaluation and authorisation;
  - Assist the board with its oversight responsibilities by ensuring that the board has accurate and timely information, allowing the board to conduct robust and candid discussions on operational performance, strategy, and major policies, and to appraise the performance of management;
  - Support oversight of both internal control functions (e.g. risk management, internal audit, compliance) and external third-party services;
  - Ensure that key functions assigned corporate governance responsibilities are supported with adequate resources to execute and discharge their duties; and
  - Ensure that external service providers, including approved auditors, have adequate resources and information to fulfil their role, including access to timely and accurate internal and outsourced records.

Given the governance responsibilities, where requirements are imposed upon the VCB throughout the Code, the Authority will look to, and expect, the chief and senior executives, and ultimately the board, to ensure compliance.

## **VI. SENIOR REPRESENTATIVE**

16. The role of the approved senior representative is integral to the BMA's VCB supervisory and regulatory framework. While the VCB's board and the chief and senior executives have primary responsibility for the conduct and performance of the VCB, the approved senior representative acts in an "early warning" role and monitors the VCB's compliance with the Act on a continuous basis in accordance with Section 20 of the Act.
17. The Act requires every VCB to appoint a senior representative who must be resident in Bermuda, and to maintain a head office in Bermuda. The appointed senior representative must be knowledgeable in virtual currency business and related Bermuda laws and regulations.

18. The approved senior representative would generally be a director or senior executive of the VCB who, under Section 20 of the Act, has the legislated duty to report certain events to the Authority.
19. The board and chief and senior executives must make arrangements to enable the approved senior representative to undertake his/her duties pursuant to the Act in an efficient and effective basis, including providing access to relevant records.

## **V. RISK MANAGEMENT FRAMEWORK**

20. The board and the chief and senior executives should, based on their judgement, adopt an effective risk management and internal controls framework. The framework should have regard for international best practice on risk management and internal controls. This includes ensuring the fitness and propriety of individuals responsible for the management and oversight of the framework.

### **Risk Management Function**

21. The VCB must establish a function to assist it with the oversight responsibility of the organisation's risk management framework. Depending on its risk profile, the function may be headed by a Chief Risk Officer or the responsibilities assigned to, or shared amongst, the VCB's operational unit leaders. Regardless, there should be a mechanism to allow direct reporting to the board or its established committees.
22. The risk management function should include:
  - Clearly defined and documented roles and responsibilities that are reviewed and approved by the board on a frequent basis;
  - A sound and effective risk management framework including developing (with the support of operational unit leaders) policies, procedures, and internal controls promoting the identification, assessment, monitoring, and reporting of material risks in a timely manner;
  - Establishing key policies (e.g. risk policy, cyber security policy, customer private key storage policy, and policies required under the Proceeds of Crime Anti Money Laundering, etc.) and assessing effectiveness and compliance with established benchmarks such as risk appetite and risk tolerance limits;
  - Employing measurement techniques such as benchmarking or stress and scenario testing; and
  - Reviewing on a regular basis the risk management techniques employed in light of changing operational, regulatory, and market developments to ensure continued effectiveness and adoption of international best practice.
23. Risk management, risk identification, risk assessment, risk monitoring and risk reporting are critical for an effective risk management framework. As such, the VCB must implement these in an effective manner for the benefit of the VCB's stakeholders and to support its business objectives.

## **VI. CLIENT DUE DILIGENCE**

24. Industry participants, including clients, have the potential to adversely impact a jurisdiction's reputation and bring harm to society at large. Accordingly, the VCB must have procedures in place to ensure that proper due diligence is carried out before a decision is made to act for any new client. At a minimum, the VCB needs to be able to comply with The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008, The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 and the Anti-Terrorism (Financial and Other Measures) Act 2004, together with any other relevant legislation that may come into force from time to time.
25. The duty of vigilance includes verification, recognition and reporting of suspicious transactions, the keeping of "know your client records", and delivering the appropriate Anti Money Laundering training to all staff. The VCB must ensure that its procedures enable it to determine and verify the true identity of customers requesting its services. Copies of photo identification such as a driver's licence or passport should be retained in compliance with the Proceeds of Crime Act 1997 and relevant guidance notes and codes. The VCB must undertake due diligence checks on clients to protect against illegal activity, including money laundering and terrorist financing.
26. Where appropriate, measures that the VCB should consider putting in place to minimise the risk of abuse, include (depending upon client risk ratings) appropriate standard rules relating to maximum individual transaction sizes for its different virtual currency services. In such cases, the VCB should have the ability to collate and aggregate individual transactions that may form part of a larger transaction and may be intended to avoid standard limits or reporting requirements.
27. The VCB must maintain detailed records for both sides of a transaction that include: information to identify the parties, the public key addresses or accounts involved, the nature and date of the transaction, and the amount transferred. The VCB must monitor transactions for the purpose of detecting those which lack originator and/or beneficiary information, and take appropriate measures. These measures may include taking action to freeze an account or to prohibit conducting transactions with designated persons and entities.

## **VII. INTEGRITY AND ETHICS**

28. The VCB must conduct its business with integrity at all times, acting with due care, skill and diligence. It must deal fairly with all clients and seek to ensure that clients are not misled as to the service being provided and the duties and obligations of the VCB.

## **VIII. DISCLOSURE OF INFORMATION**

29. Any obligation to observe the confidentiality of information communicated by clients must be adhered to by the VCB (including its shareholders, directors, officers,

senior executives, employees, outsourced partners, etc.) - unless the VCB is given relevant consent, is required by applicable law to disclose information, or provides information in accordance with the terms of the client constitutional documents. Accordingly, persons who have access to the VCB's confidential information should be advised in writing upon engagement. Further, the VCB should provide periodic reminders thereafter of confidentiality issues.

30. To comply with its duty to uphold integrity and ethics, the VCB's communication with clients and prospective clients must be clear and a fair representation. This includes marketing and promotional material. The VCB's public platform or materials provided to prospective clients prior to entering into an arrangement must include details of the board, senior executive team, registered office, description of complaints procedure, and arrangements in case of business failure. The VCB must disclose to clients any material business changes that impact clients.
31. For transparency purposes, the VCB must also ensure that its status as a licensed undertaking is disclosed in all advertisements and correspondence. The following wording is suggested:

“Company X is licensed to conduct virtual currency business by the Bermuda Monetary Authority.”

## **IX. INTERNAL MANAGEMENT CONTROLS**

32. The board and the chief and senior executives must review and assess the effectiveness of the internal reporting and operating controls. Any material deficiencies must be documented and resolution measures should be implemented in a timely manner. The board and the chief and senior executives should ensure the implementation of policies and procedures requiring that internal control weaknesses are reported directly to the board and chief and senior executives.

### **Segregation and Protection of Client Assets**

33. Section 18 (1) of the Act directs a VCB to ensure that any assets belonging to clients are kept segregated from the VCB's own assets. The VCB may place client assets in a trust with a qualified custodian, or have a surety bond or indemnity insurance, or implement other arrangements to ensure return of client assets in the event the VCB is placed into liquidation or becomes insolvent. While remaining separate from its own, the VCB may commingle client assets where such would benefit clients; however, proper accounting must be in place to accurately allocate each holding to the respective client.
34. The VCB must have mechanisms in place to assess its liquidity needs, including sums required for trading and other client transaction types. These mechanisms must be used to inform the VCB's client private key storage policy. The client private key storage policy should require that at least ninety percent of client private keys, not required for client transactions, should be held in cold storage to mitigate against client loss arising from cyber-attacks.

## **Competent and Effective Management**

35. The VCB should have competent management commensurate with the nature, scale and complexity of its business. The VCB must also have appropriate management resources to control the affairs of the licensed business, including ensuring compliance with legal obligations and standards under the Code.

## **Delegation**

36. The board may delegate the administration and other duties to directors, chief and senior executives, employees or committees as it deems appropriate. When doing so, decisions should align with authorisation and signing powers outlined in policies and procedures, and regard must also be given to risks to stakeholder protection and applicable laws.

## **Accounting and other Record Keeping**

37. Appropriate records must be kept and preserved in Bermuda. These records will at least include information for the VCB to effectively carry out its functions and comply with applicable law. Systems must be in place to ensure that decision-makers, regulators, clients and other relevant stakeholders can receive requisite information in a timely manner. This should include the identity of shareholders, directors, officers or business partners. In addition, records of account and client transactions must be maintained in accordance with the laws applicable to it.
38. The VCB's accounting and record keeping systems must support its compliance with regulatory reporting, such as the annual statutory report, or other reporting that the Authority may require on an ad hoc basis in fulfilment of the Authority's regulatory oversight responsibilities.

## **Adequate Personnel**

39. The VCB must have available suitable numbers of staff who are appropriately trained and competent to discharge their duties effectively. The VCB should ensure that the responsibilities and authority of each staff member are clear and appropriate given his/her qualifications and experience, and that staff receive the necessary training appropriate for their roles.
40. The VCB should ensure that it has in place systems, controls, policies and procedures, to ensure that staff members perform their duties in a diligent and proper manner. It is important that staff understand and comply with the established systems, policies and procedures including those dealing with new business acceptance, financial transactions, and staff training.

## **Cybersecurity Program**

41. In many respects, virtual currency business is susceptible to risks such as cyber threats or systems failure. Accordingly, the VCB must have a comprehensive cybersecurity program that is commensurate with the nature, scale and complexity of its business. Such should include a documented cyber security policy.

42. The VCB must implement a written cyber security policy setting forth the VCB's policies and procedures for the protection of its electronic systems, and client and counterparty data stored on those systems. The policies must be reviewed and approved by the VCB's board at least annually.
43. The cyber security policy must minimally address the following areas:
- (a) information security;
  - (b) data governance and classification;
  - (c) access controls;
  - (d) business continuity and disaster recovery planning and resources;
  - (e) capacity and performance planning;
  - (f) systems operations and availability concerns;
  - (g) systems and network security;
  - (h) systems and application development and quality assurance;
  - (i) physical security and environmental controls;
  - (j) customer data privacy;
  - (k) vendor and third-party service provider management;
  - (l) monitoring and implementing changes to core protocols not directly controlled by the VCB, as applicable; and
  - (m) incident response.
44. Further, the VCB must designate a qualified employee to serve as its Chief Information Security Officer ("CISO") responsible for overseeing and implementing the VCB's cyber security program and enforcing its cyber security policy.
45. The VCB must employ adequate cyber security personnel to manage its cyber security risks and provide opportunity and resources for cyber security personnel to stay abreast of changing cyber security threats and countermeasures. VCB's must require personnel to remain current.
46. An effective cyber security program should be able to ensure the availability and functionality of the VCB's electronic systems, and to protect both those systems and any sensitive data stored on those systems (including customer assets) from unauthorized access, use, or tampering. The program will also need to address risks arising from third-party vendors where there is system connectivity, and include policies related to hot and cold client private key storage.
47. Further, the cyber security program should outline policies surrounding how the VCB will tackle market abuse and, where applicable, under what conditions it will halt trading, suspend or close offending client accounts and notify relevant authorities.
48. In summary, at a minimum, the VCB's cybersecurity program will be required to satisfy five core functions:
- (a) identify internal and external risks;

- (b) protect licensee electronic systems and the information stored on those systems;
- (c) detect system intrusions, and breaches;
- (d) respond to a detected event and mitigate negative effects; and
- (e) recover from operational disruption to the normal course of business.

49. A VCB must annually commission an external audit of its cybersecurity program. The external auditor's report must detail the review of the VCB's business processes, systems, policies and dependencies/relationships with the systems of third party partners and affiliates to confirm that control measures are adequate to ensure consistent compliance with the Act, related Rules and this Code.

50. VCBs must also be proactive in alerting the Authority to any significant developments relevant to its staffing or to its systems and controls environment. This includes any failure or breach of its systems that involve the loss of, or unauthorised access to, any personal identifiable information that it holds on its clients.

### **Internal Audit Function**

51. Sound practice requires the implementation of the "Three Lines of Defence" with the first line being risk taking, and the second being risk control and compliance. The third critical line is internal audit. The VCB must have an internal audit function. The internal audit function should:

- Be segregated and staffed by persons adequately independent of operational functions, including risk management, compliance, operations and finance;
- Have clearly defined and documented charters, roles and responsibilities that are reviewed and approved by the board on a regular basis and that demonstrate the independence and separation of the function;
- Document material policies and procedures to be reviewed and approved by the board;
- Have unrestricted access to all areas of the organisation, including access to any records held by third-party service providers;
- Examine operational practices to ensure the adequacy and effectiveness of governance, risk management, policies, procedures, and controls;
- Have appropriate authority within the organisation to ensure management addresses any internal audit findings and recommendations with respect to the adequacy and effectiveness of governance, risk management, policies, procedures and controls;
- Have sufficient resources and fit and proper staff to carry out duties and responsibilities;
- Have sufficient knowledge and experience to employ methodologies designed to assist the VCB in identifying key risks; and
- Assist the board to identify areas for improvement.

### **Compliance Function**

52. Regulatory and other requirements (such are internal policies and procedures) are imposed for the protection of the VCB itself, clients and stakeholders more widely. The establishment of a function focused on how well the VCB adheres to the varied

requirements is valuable. The VCB must develop a function to assist it to monitor and evaluate its compliance with jurisdictional laws and regulations, internal controls, policies, and procedures. The compliance function should also promote and sustain a corporate culture of compliance and integrity.

53. The compliance function should include:

- Policies, procedures and processes documenting the compliance with the risk management framework, legal and ethical conduct, applicable laws, rules and standards;
- System of compliance monitoring and testing, including a plan to address any deficiencies or non-compliance that may be identified;
- Training programs for staff on compliance issues, and provide a mechanism for staff to report confidentially concerns regarding compliance deficiencies and breaches.

### Self-Assessment

54. VCBs must have a comprehensive and integrated forward looking view of all material reasonably foreseeable risks that arises from its business model and interaction with the wider environment. This allows a more informed assessment of the appropriateness of its business strategy and enhances its ability to position itself for future success and sustainability. The VCB must therefore develop policies, processes, and procedures to assess all its material reasonably foreseeable risks over its forward looking planning horizon and self-determine its capital (both quality and quantity), liquidity, and resourcing needs to inform its business strategy. The risk self-assessment must be performed at least annually. The VCB should be guided by the proportionality principle in establishing the risk self-assessment framework. Minimally, the assessment should:

- Be an integral part of the VCB's risk management framework;
- Be clearly documented, reviewed, and evaluated regularly by the board and the chief and senior executives to ensure continual advancement in light of changes in the strategic direction and market developments;
- Cover both all material reasonably foreseeable risks and a forward looking time horizon deemed appropriate by the board, having regard for the dynamics of the virtual currency business industry and wider relevant influences;
- Ensure an appropriate oversight process whereby material deficiencies are reported on a timely basis and suitable actions taken.

55. The VCB must ensure the fitness and propriety of key individuals overseeing and performing the assessment; this includes third-party service providers, if applicable, assisting with assessment process.

### Fees

56. A VCB is expected to exhibit proper transparency in its dealings with clients and potential clients and to act ethically and with integrity at all times. Terms of business, including fees and commissions for its different services must be prominently

displayed, and any changes promptly brought to the attention of customers to ensure that there is no misunderstanding with regard to transaction charges and other fees.

### **Client Agreements**

57. To ensure clients are dealt with fairly and are informed, VCBs must disclose terms of business with each prospective client, and keep a record of the terms of the agreement with each client, including evidence of the client's agreement to those terms. That agreement should include, but not be limited to, the following provisions:
- (a) a clear description of the services to be provided, fees to be charged and the manner in which fees are expected to be deducted or paid;
  - (b) a general description of how, and by whom, requests for action are to be given;
  - (c) a general description of any provisions for the termination of the agreement and the consequences of termination; and
  - (d) a statement that the VCB is licensed by the Authority including the type of licence issued.

### **Responsibility to Clients and Client Complaint Procedures**

58. The VCB must ensure that its business is conducted in such a way as to treat its clients fairly, both before the inception of the contractual arrangement and through to the point at which all obligations under a contract have been satisfied. The VCB must establish and implement policies and procedures to ensure that this occurs.
59. The VCB must ensure that client complaints are properly logged and dealt with in a timely basis. A record of the details of the complaint, the VCB's response and any action taken as a result should be maintained.

### **Conflicts of Interest**

60. Conflicts naturally arise in the course of business and may be exploited on account of information asymmetry. The VCB must ensure it has policies and procedures to mitigate conflicts to avoid harm to clients and stakeholders more widely, including policies and procedures regarding disclosing relevant information. VCBs need to implement internal rules and procedures for dealing with conflicts of interest. Where conflicts cannot be avoided, VCBs must seek to ensure that the interests of clients are not damaged through undisclosed conflicts of interest.
61. This includes whether the conflict arises directly in the course of its own role or, as relevant, between the VCB and its service providers or, for example, between different classes of investors.
62. The nature and relative market cap of the virtual currency business industry inherently exposes it to arbitrage and market valuation manipulation. With information asymmetry and global connectivity, the VCB's board, officers or staff may at times be positioned to exploit opportunities at the expense of stakeholders. The conflict of interest policies and procedures must also include measures that

would prevent market manipulation such as pump and dump schemes that may bring harm to clients.

## **X. OUTSOURCING**

63. While a VCB may outsource certain important business roles (such as asset management, custodial services, cyber security, compliance, and internal audit) to third parties or affiliates, such action does not remove the responsibility from the VCB to ensure that all the requirements of the Act and related legislation, and this Code, are complied with to the same level as if these roles were performed in house.
64. Where the VCB outsources roles either externally to third parties or internally to other affiliated entities, the board must ensure that there is oversight and clear accountability for all outsourced roles as if these functions were performed internally and subject to the VCB's own standards on governance and internal controls. The board should also ensure that the service agreement includes terms on compliance with jurisdictional laws and regulations. Agreements should not prohibit cooperation with the Authority, and the Authority's access to data and records in a timely manner.
65. Where the board has outsourced a role and/or is considering outsourcing a role, the board must assess the impact or potential impact on the VCB. The board must not outsource a role that is reasonably expected to adversely affect the VCB's ability to operate in a prudent manner. These considerations include where outsourcing is reasonably expected to:
  - Adversely affect the VCB's governance and risk management structures;
  - Unduly increase operational risk;
  - Affect the Authority's ability to effectively supervise and regulate the VCB; and
  - Adversely affect client protection.

## **XI. COOPERATION WITH REGULATORY AUTHORITIES**

66. The VCB is expected to deal openly and in a spirit of cooperation with the Authority and any other relevant regulatory authorities. This includes ensuring that any outsourced vendors are aware of their role in assisting the VCB in meeting its obligations under the Act and related legislation, and this Code.
67. The VCB should also ensure that any contracts or agreements that it enters into does not intentionally, or otherwise, frustrate the Authority's ability to carry out its supervisory or regulatory obligations in relation to the VCB.

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**THE BERMUDA MONETARY AUTHORITY**

**Virtual Currency Business Act 2018**

**Statement of Principles**

April 2018

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## **I. INTRODUCTION**

1. This Statement of Principles (the “Principles”) is made pursuant to section 5 of the Virtual Currency Business Act 2018 (the “Act”) which requires the Bermuda Monetary Authority (the “Authority”) to publish in such manner as it thinks fit a statement of principles in accordance with which it is acting or proposing to act:
  - a. in interpreting the minimum criteria specified in Schedule 1 to the Act and the grounds for revocation specified in section 24;
  - b. in exercising its power to grant, revoke or restrict a licence;
  - c. in exercising its power to obtain information and reports, and to require production of documents; and
  - d. in exercising other enforcement powers.
2. The Principles are of general application and seek to take into account the diversity of virtual currency business service providers (“VCBs”) that may be licensed under the Act and the prospect of institutional and market changes. As a consequence of this, the Principles may likely need to be revised and further developed over time. If the Authority makes a material change to the Principles, the Authority will publish a revised version. The Principles should be read in conjunction with any Guidance Notes which are issued pursuant to section 5 of the Act and that set out guidance relating to implementing certain standards.
3. This document is also to be read in conjunction with the Statement of Principles on the Use of Enforcement Powers (“SPUEP”). The SPUEP, sets out the principles in accordance with which the Authority acts or proposes to act in exercising its power to revoke or restrict a licence. In relation to enforcement activities where there are any differences between the SPUEP, the Proceeds of Crime (Anti- Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 Statement of Principles (“AML Principles”), and the Principles then the content of the SPUEP will prevail.

## **II. EXPLANATION FOR THE STATEMENT OF PRINCIPLES**

4. The Principles, along with the SPUEP, are relevant to the Authority’s decisions on whether to license a VCB (company, partnership or individual) to revoke or restrict a licence. The Authority’s interpretation of the minimum licensing criteria in Schedule 1 and the grounds for revocation in section 24 of the Act, together with these Principles underlying the exercise of its powers, encapsulate the main standards the Authority considers when conducting its supervision of VCBs. The functions of VCB supervision include monitoring the ongoing compliance of VCBs with these standards and verifying compliance with the obligations imposed under the Act, the

policies and procedures of the VCB and compliance with external obligations, for example the Proceeds of Crime Act 1997, the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 and the relevant Regulations.

5. If there are concerns, the Authority will consider what steps should be taken to address the issue and where appropriate, it will seek remedial action by persuasion and encouragement. Where persuasion and encouragement fail, the Authority may look to stronger measures to ensure compliance. If the Authority considers that its powers should be exercised in the public interest, it may utilise the various powers provided in the Act including the imposition of restrictions on a licence and, ultimately, revocation of a licence.
6. The Principles include references to various policy and guidance papers issued by the Authority from time to time. Copies of the relevant material are generally available from the Authority's website [www.bma.bm](http://www.bma.bm).
7. Section III of the Principles considers the interpretation of each of the licensing criteria in Schedule 1 to the Act. Section IV sets out the considerations relevant to the Authority's exercise of its discretion to grant a licence. Section V sets out the principles underlying the exercise of the Authority's power to obtain information and reports and to require the production of documents.
8. The SPUEP sets out the interpretation of the various grounds for the revocation of a licence in section 24 of the Act and the principles underlying the exercise of the Authority's discretion to revoke or impose restrictions on a licence (section 23 and 24 of the Act).
9. It is likely that the Authority would exercise its powers to restrict or revoke a licence, in the context of the enforcement process. The Authority may also exercise its discretion to utilise such powers in a supervisory context (e.g. to impose additional reporting requirements or where an institution ceases operations or conducts limited scope business). These powers might also be used to protect the interests of the public, in connection with an external threat unconnected with the VCB's conduct, in accordance with section 8 of the Act.

### **III. SCHEDULE 1: MINIMUM CRITERIA FOR LICENSING**

#### ***Introduction***

10. Before a VCB may be granted a licence, the Authority has to be satisfied that all the criteria in Schedule 1 to the Act are, or are capable of, being fulfilled by the applicant. Once licensed, VCBs are subject to the Authority's continuing supervision

and regulation, which includes the criteria for licensing. VCBs are required to submit information about their business at intervals determined by the Authority in accordance with the Act and any related regulations, rules, guidance notes or codes. Where a VCB fails to meet a criterion, the Authority can and may take action in accordance with the powers vested under the Act and as detailed in the Principles, the AML Principles and the SPUEP.

11. The Act sets out the framework for the minimum criteria to be met and complied with by licensed VCBs. These criteria are interpreted and applied in the context of the particular circumstances of individual VCBs, and developments in the sector generally. In addition to reviewing the periodic, annual and other reporting data received from VCBs, the Authority's supervision involves detailed prudential discussions with the VCBs' senior management as required. The Authority shall determine the frequency of those discussions based on the nature, scale, complexity and risks undertaken by the VCB and the conduct of its business. Meetings may take place either at the Authority's offices or at the VCB's premises. In addition, compliance visits are routinely made to the premises of VCBs to add to the Authority's understanding of the VCB's management structures, operations, policies and controls and to assist the Authority in satisfying itself that each VCB continues to conduct its business prudently and in accordance with all relevant criteria. Where a VCB becomes aware of breaches or potential breaches, it is expected that the VCB will alert the Authority forthwith so that any necessary remedial action can quickly be agreed. Similarly, the VCB must alert the Authority to any proposed material change in its business. This will allow the Authority to assess whether the changes impact the VCB's ability to fulfil the minimum criteria.
12. This part of the Principles sets out the Authority's interpretation of the statutory licensing criteria.

***Schedule 1 Paragraph 1: "Controllers and Officers to be fit and proper persons"***

13. This paragraph provides that every person who is, or is to be, a controller or officer (as defined under section 3 of the Act (officers are defined as including persons appointed as directors, secretaries or senior executives) of a VCB is to be a fit and proper person to perform VCB-related functions. With regard to an individual who is, or is to be, a controller or officer, the relevant considerations include whether the person has relevant experience, sufficient skills, knowledge, and soundness of judgment to undertake and fulfil his or her particular duties and responsibilities. The standards required of persons in these positions will vary considerably, depending on the precise position held by the person concerned. Thus, a person could be fit and proper for one position but not be fit and proper for a position involving different responsibilities and duties. The diligence with which the person is fulfilling, or is likely to fulfil, those duties and responsibilities is also considered so that the

Authority can assess whether the person does or will devote sufficient time and attention to them.

14. The Authority sees the standards as being particularly high in the case of persons with primary responsibility for the conduct of a VCB's affairs, taking into account the nature and scale of the VCB's business.
15. In assessing whether a person has the relevant competence, soundness of judgment and diligence, the Authority considers whether the person has had previous experience with similar responsibilities, the record in fulfilling them and, where appropriate, whether the person has suitable qualifications and training. As to soundness of judgment, the Authority looks to the person's previous conduct and decision taking.
16. The probity of the person concerned is very important. It is essential that a person who is responsible for the conduct of VCB business is of high integrity. In contrast to the fitness elements of this criterion which reflects an individual judgment relating to the particular position that the person holds or is to hold, the judgment of probity reflects much more of a common standard, applicable irrespective of the particular position held.
17. Specifically, the Authority takes into account the person's reputation and character. It considers, inter alia, whether the person has a criminal record, convictions for fraud or other dishonesty, which would clearly be particularly relevant. The Authority also gives particular weight to whether the person has contravened any provision of law, including legislation covering the trust, banking, insurance, investment sectors or other legislation designed to protect members of the public against financial loss, due to dishonesty, incompetence or malpractice. In addition, it considers whether the person has been involved in any business practices appearing to the Authority to be deceitful or oppressive or improper, or which would otherwise discredit his or her method of conducting business. In addition to compliance with statutory provisions, the Authority also considers a person's record of compliance with various non-statutory codes in so far as they may be relevant to the licensing criteria and to the public interest.
18. The Authority also takes into consideration whether the person has been censured or disqualified by professional or regulatory bodies, e.g. Institute of Chartered Secretaries and Administrators; Institute of Directors; Society of Trust and Estate Practitioners; Bermuda Bar Association; Chartered Professional Accountants of Bermuda; Bermuda Stock Exchange; Chartered Financial Analysts (CFA) Institute; or corresponding bodies in other jurisdictions. Those who have been censured or disqualified are unlikely to be acceptable.

19. While any evidence of relevant past misconduct needs to be taken into consideration, the Authority recognises that lapse of time, and a person's subsequent conduct, are factors which may be relevant in assessing whether the person is now fit and proper for a particular position.
20. Once a VCB is licensed, the Authority continues to consider the performance of the person in exercising his or her duties. Imprudence in the conduct of a VCB's business, or actions which have threatened (without necessarily having damaged) the public interest will reflect adversely on the competence and soundness of judgment of those responsible. Similarly, failure by a VCB to conduct its business with integrity and professional skills will reflect adversely on the probity and/or competence and/or soundness of judgment of those responsible. This applies whether the matters of concern have arisen from the way the persons responsible have acted or from their failure to act in an appropriate manner. The Authority takes a cumulative approach in assessing the significance of such actions or omissions – that is, it may determine that a person does not fulfil the criterion on the basis of several instances of such conduct which, if taken individually, may not lead to that conclusion.

### ***Shareholder Controllers***

21. Shareholder controllers, as defined by sections 3(4) and 3(5) of the Act may hold a wide variety of positions relating to a VCB, and the application of the fit and proper criterion takes account of this. The key consideration is the likely or actual impact on the interests of clients and potential clients of a person holding the particular position as shareholder controller. This is viewed in the context of the circumstances of the individual case, and of the particular position held. The general presumption is that the greater the influence on the VCB, the higher the threshold will be for the shareholder controller to fulfil the criterion. Thus, for example, higher standards will generally be required of a shareholder controller owning, say, 20 per cent or more of the shares of a VCB compared with a shareholder controller owning 5 per cent.
22. In reviewing the application of the criterion to shareholder controllers or persons proposing to become such controllers, the Authority considers two main factors.
23. First, it considers what influence the person has or is likely to have on the conduct of the affairs of the VCB. If the person does, or is likely to, exercise a close control over the business, the Authority would look for evidence that he has the probity and soundness of judgment and relevant knowledge and skills for running a VCB. On the other hand, if the shareholder does not, or is not likely to, influence the directors and management of the VCB on the detailed conduct of the business, it would not be necessary to require such a level of relevant knowledge and experience.
24. The second consideration is whether the financial position, reputation or conduct of the shareholder controller or prospective shareholder controller has damaged or is

likely to damage the VCB through ‘contagion’ which undermines confidence in that VCB. For example, if a holding company, or a major shareholder, were to suffer financial problems it could damage confidence of clients or potential clients in the stability or financial integrity of the licensed VCB. Generally, the higher the shareholding, the greater the risk of ‘contagion’ if the shareholder encounters financial difficulties. The risk of contagion is not, however, confined to financial weakness. Publicity about illegal or unethical conduct by a holding company or another member of the group may also damage confidence in the VCB. VCBs are expected to notify the Authority immediately if they become aware of material concerns regarding the suitability of a shareholder controller.

25. In the case of a controller who ‘directs’ or ‘instructs’ a shareholder controller, similar considerations apply to those relevant to assessing the fulfilment of the shareholder controllers criterion. In other words, the standards that an indirect controller needs to satisfy are likely to be at a minimum the standards also required of the person who is indirectly controlled.
26. Where a person is a controller by virtue of ‘directing’ or ‘instructing’ the board of a VCB, the standards required are high. The controller has to have the probity and relevant knowledge, experience, skills and diligence for running a VCB. The qualities required are those which are also appropriate for the board of directors or partners of a VCB.

***Schedule 1 Paragraph 2: "business to be conducted in a prudent manner"***

27. Schedule 1 sub-paragraphs 1 and 6 of the Act make it clear that there is a general requirement for VCBs to conduct their business in a prudent manner. It is the overall responsibility of the board, partners, and senior management of an institution to ensure that there is effective control over the entire business and that it is conducted prudently. Board members, partners, and senior management must understand the underlying risks in the business and be committed to a robust control environment.
28. Sub-paragraphs 2 to 5 set out a number of specific requirements, each of which must be fulfilled before a VCB may be regarded as conducting its business in a prudent manner.
29. The Act also makes it clear that the specific requirements outlined in sub-paragraphs 2 to 5 are not exhaustive. Accordingly, the Authority takes into account a range of other considerations in assessing whether a VCB is prudently run. These include for example, the VCB’s management and corporate governance arrangements (such as, in the case of a company, the composition of the board of directors and the arrangements for the board’s overall control and direction of the institution); the VCB’s general strategy and objectives; planning arrangements; policies on accounting, market conduct; and recruitment arrangements and training to ensure that the VCB has adequate numbers of experienced and skilled staff in order to carry out

its various activities in a prudent manner. Particularly close attention is also paid to the arrangements in place for preventing and detecting criminal activities, and for ensuring compliance with the VCB's legal obligations in preventing money laundering and terrorist financing. The Authority would also expect a VCB to occupy premises suitable for the purpose of conducting its business.

30. Failure by the VCB to comply with applicable laws in foreign jurisdictions, in which the VCB or its subsidiaries operate, if applicable, may also affect the Authority's assessment of prudent conduct.
31. A VCB should have policies and procedures to enable it to comply with international sanctions in force in Bermuda.
32. VCBs face a wide variety of potentially major financial risks in their business although the possibility of many of these risks crystallising is, hopefully, generally remote. Rather than explicitly requiring VCBs to hold capital against all these risks, the Act requires VCBs more generally hold adequate capital and insurance cover. A VCB will not be regarded as carrying on its business in a prudent manner unless it maintains insurance cover that is appropriate to the nature and scale of its operations.
33. In judging the adequacy of insurance protection, the Authority looks to be satisfied that the scope and scale of cover in place provides reasonable assurance of the ability of the VCB to continue to operate in the event that it should face either major damage to its infrastructure or material claims from clients for loss or damage sustained. It is in the first instance for those directing the business of the licensed undertaking to assess the level of risk they face in the business and to determine the type and extent of coverage appropriate for that business. 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; office contents. The Authority will review the adequacy of cover in place, having regard to the scale, composition and complexity of the business.

***Schedule 1 Paragraphs 2 (4) and (5): "adequate accounting and record- keeping systems"***

34. The Authority does not regard a VCB's records and systems as adequate unless they can enable its business to be prudently managed and the VCB is able to comply with the duties imposed on it by or under the Act. In other words, the records and systems must be such that the VCB is able to fulfil the various other elements of the prudent conduct criterion and to identify threats to the public interest. They should also be sufficient to enable the VCB to comply with the notification and reporting requirements under the Act. Thus, delays in providing information or inaccuracies in the information provided, will call into question the fulfilment of the requirement of sub-paragraphs 2 (4) and 2 (5). The systems for client records should be sufficient to enable the VCB to maintain its books and records with satisfactory back-up in place.

35. The nature and scope of the particular records and systems which a VCB should maintain should be commensurate with its needs and particular circumstances, so that its business can be conducted without endangering its clients and potential clients. In determining whether a VCB's records and systems are adequate, the Authority considers the nature, scale and complexity of its business.

***Schedule 1 Paragraph 3 “Integrity and skill”***

36. This paragraph is concerned with the manner in which the business of the VCB is conducted and is distinct from the question of whether its controllers and officers are fit and proper persons. The business of a VCB must be conducted ethically and honestly and the staff employed by the VCB must have the skills and knowledge appropriate to the nature and scale of the VCB.

37. The integrity element of the criterion requires the VCB to observe high ethical standards in conducting its business. Criminal offences or other breaches of statute will obviously call into question the fulfilment of this criterion. Particularly relevant are contraventions of any provision made by or under enactments, whether in Bermuda or elsewhere, designed to protect members of the public against financial loss due to dishonesty, incompetence or malpractice.

38. The Authority would expect VCBs to have a number of employees sufficient to carry out the range and scale of its business. The Authority, in determining whether a VCB has sufficient personnel, will take into account the human resources that the VCB may draw upon through other arrangements, e.g. outsourcing, secondments, or other similar arrangements as well as the methods of recruitment to ensure that the VCB employs an adequate number of persons who are fit and proper to perform the duties for which they are employed.

39. Staff must be provided with on-the-job training on the VCB's internal policies, procedures and internal controls. The VCB should ensure that adequate training is provided specific to the roles and responsibilities that staff members perform. Such training should be provided on an ongoing basis, including training on its AML/ATF responsibilities.

40. A VCB shall establish procedures to ensure the adequate supervision of staff in their dealings with clients and the management of client structures. Appropriate records relating to the training, experience and qualifications of staff shall be maintained.

***Schedule 1 Paragraph 4 “Corporate Governance”***

41. This paragraph provides that the VCB shall implement corporate governance policies and processes as the Authority considers appropriate given the nature, scale, complexity and risk profile of the VCB.

42. In the case of a VCB which is a company or partnership, the business should be effectively directed by such number of individuals as the Authority considers appropriate given the nature, scale, complexity and risk profile of the VCB. The Authority recognises that standards of good corporate governance may differ between VCBs according to the size and complexity of their respective businesses.
43. In the case of a VCB which is a company, the directors should include such number (if any) of non-executive directors, as the Authority considers appropriate. The number will depend on the circumstances of the VCB and the nature, size, complexity and risk profile of the VCB.
44. The Authority considers that non-executive directors can play a valuable role in bringing an outsider's independent perspective to the running of the business and to ensure proper challenge to the executive directors and other management. The Authority sees non-executive directors as having, in particular, an important role as members of a VCB's audit committee or in performing the role which such a committee would otherwise perform.

***Schedule 1 Paragraph 5 "Consolidated Supervision"***

45. The Authority may agree to take on a wider role of consolidated supervisor of a VCB and its related institutions, particularly when the related institutions may have implications for the VCB. Under such an arrangement, the VCB and its related institutions are expected to fully cooperate with and provide all requested information to the Authority.

**IV. PRINCIPLES RELATING TO THE GRANTING OF LICENCES**

46. To grant a licence under the Act, the Authority needs to be satisfied that all the minimum licensing criteria in Schedule 1 are met. In order to be so satisfied, the applicant and any other relevant parties must first have provided all the appropriate information requested by the Authority in connection with the application. Even where it is satisfied that the criteria are or can be met, the Authority retains a residual discretion not to grant a licence – 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 public interest or the interests of clients or potential clients. The Authority also considers, in exercising its discretion, whether it is likely that it will receive adequate information from the VCB and relevant connected parties to enable it to monitor the fulfilment of the criteria and to identify potential threats to the VCB's clients.

## **V. POWERS TO OBTAIN INFORMATION AND REPORTS**

47. The Authority's supervisory arrangements for licensed VCBs comprise three principal elements. First, the Authority conducts certain off-site analysis and reviews, based on regular data received from VCBs. This is supplemented by a regular programme of prudential discussions, during which the Authority interviews senior management on a wide range of relevant issues, including recent and current performance, material compliance and control issues, and business development and strategy questions. Finally, the Authority conducts routine on-site reviews during which it assesses a VCB's on-going compliance with aspects of the licensing criteria and, in particular, with paragraph 2 (2) of Schedule 1 to the Act. These reviews of compliance are intended to provide insight into the effectiveness of the internal controls in place and the ability of management to identify, monitor and manage key risks arising from the VCB's operations.
48. Prudential supervision involves the receipt and analysis of a variety of regular and ad hoc information from VCBs. The Authority's standard reporting arrangements are kept under review and amended from time to time in light of developments.
49. Section 58 of the Act provides formal powers for the Authority by notice in writing to require from a VCB such information as it may reasonably require for the performance of the Authority's functions under the Act. The section also provides for the Authority to require a VCB to make available a report by its auditor (or by an accountant or other person with relevant professional skill) on any aspect of, or any matter about which the Authority has required or could require the VCB to provide. In the case of reports commissioned under section 58(1) (b), the Authority has agreed that they will wherever possible be commissioned from a VCB's own external auditors. However, in certain circumstances, another professional firm may be used. This would be the case, for example, where a report called for particular technical skills or when the Authority has had previous concerns about the quality or completeness of work conducted by the external auditor.
50. The Authority has also agreed that, as a general rule, it will limit the extent to which it will have recourse to professional reports of this nature. Instead, the Authority's general policy is to use its own staff to assess directly through the on-site work, described above, the adequacy of a VCB's systems and controls. Nonetheless, where particularly specialised work is required or other special considerations arise, the Authority may commission a professional report under section 58.
51. Section 59 of the Act provides statutory powers for the Authority by written notice to require a VCB to produce relevant documents or information. This power can also be used to obtain relevant documents in the possession of other persons and also to

require information or documents from entities related to a VCB. Section 60 of the Act provides the Authority with specific powers to enter the business premises of persons on whom notice under sections 58 or 59 has been served for the purpose of obtaining relevant information or documents. The Authority makes routine use of section 58 and section 59 powers when conducting its on-site review visits to licence holders, in order to deal with any client confidentiality issues that might arise in the course of compliance testing.

52. Much of the information required by the Authority for its supervision of VCBs is provided pursuant to the Authority's statutory powers in the Act to require relevant information and documents. In addition, the Act stipulates certain matters as being subject to specific statutory reporting requirements – notably, the requirement for a VCB to submit a certificate of compliance, signed by an officer, certifying that the VCB has complied with the minimum criteria (as provided for in section 66 of the Act).

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