



BERMUDA

INVESTMENT BUSINESS AMENDMENT ACT 2012

2012 : 37

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WHEREAS it is expedient to enhance the powers of the Bermuda Monetary Authority under the Investment Business Act 2003 to effectively regulate the investment

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business industry in Bermuda and to meet appropriate international standards; to provide for the imposition of civil penalties, the making of prohibition orders and other disciplinary measures including injunctive relief; and to provide for the giving of notices in relation to the exercise of disciplinary measures and for the publication of decisions of the Authority:

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

### Citation

1 This Act, which amends the Investment Business Act 2003 (the "principal Act"), may be cited as the Investment Business Amendment Act 2012.

### Amends section 2

2 Section 2 of the principal Act is amended by inserting in the appropriate alphabetical order the following definitions—

- "decision notice" means a notice prepared in accordance with section 57;
- "warning notice" means a notice prepared in accordance with section 56."

### Amends section 9

3 Section 9(1) of the principal Act is amended—

- (a) in paragraph (b) by deleting "and" at the end thereof;
- (b) in paragraph (c) by deleting the period and substituting "; and"; and
- (c) by inserting the following new paragraph after paragraph (c)—
  - "(d) in exercising its powers under—
    - (i) section 52A to impose a civil penalty;
    - (ii) section 53 to censure publicly;
    - (iii) section 55A to make a prohibition order; and
    - (iv) section 60 to publish information about any matter to which a decision notice relates."

### Amends section 20

4 Section 20 of the principal Act is amended by—

- (a) repealing subsection (5).
- (b) in subsection (6) by deleting "(whether or not constituting an offence under subsection (5))".

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### Amends section 22

5 Section 22 of the principal Act is amended—

- (a) in subsection (1), by deleting “written notice of its intention to do so” and substituting “a warning notice under section 56”;
- (b) by repealing subsections (2) and (3);
- (c) in subsection (4), by deleting the tailpiece and substituting “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”;
- (d) by inserting the following subsections after subsection (4)—

“(4A) After giving a notice under subsection (1) and taking into account any representations made under section 56(2), the Authority shall decide—

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

(4B) Once the Authority has made a decision under subsection (4A) above it shall forthwith give either a decision notice under section 57 or a notice of discontinuance under section 58, as the case may be.”.

- (e) by repealing subsections (5) to (12).

### Amends section 33

6 Section 33 of the principal Act is amended—

- (a) in subsection (1)(c) by deleting the “or” at the end thereof;
- (b) in subsection (1)(d) by deleting the comma at the end and substituting “; or”;
- (c) after subsection (1)(d) by inserting the following paragraph—
  - “(e) to impose a civil penalty under section 52A;”;
- (d) by inserting the following subsections after subsection (3)—

“(3A) Any person in respect of whom a prohibition order has been made under section 55A may appeal to the tribunal against the decision.

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(3B) 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.”;

(e) by repealing subsection (4) and substituting the following—

“(4) The tribunal may suspend the operation of the decision appealed against pending the determination of an appeal in respect of the decision.”.

Amends section 43

7 Section 43 of the principal Act is amended—

(a) in subsection (3) by deleting the words “guilty of an offence and liable on summary conviction to a fine of \$10,000” and substituting “liable to a civil penalty calculated in accordance with subsection (4)”;

(b) by inserting the following after subsection (3)—

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

Amends section 44

8 Section 44(3) of the principal Act is amended by repealing subsection (3) and substituting the following—

“(3) An investment provider 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 investment provider is in default.”

Amends section 49

9 Section 49 of the principal Act is amended—

(a) in subsection (2) by deleting the words “his investigation” and substituting “the investigation he is appointed to carry out”;

(b) in subsection (4)(a) by deleting “all documents relating to the person concerned” and substituting “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) by repealing subsection (4)(b) and substituting the following—

“(b) to attend before the persons so appointed at such time and place as they may require and such answer questions relevant to the investigation as such persons may require; and”

(d) by inserting the following subsection after subsection (6)—

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“(6A) Unless the Authority otherwise directs, the investment provider under investigation shall pay to the Authority all expenses of, and incidental to, the investigation.”

Inserts section 49A

10 The principal Act is amended by inserting the following section after section 49—

“Investigation of suspected contraventions

49A (1) The Authority may conduct an investigation if it appears to the Authority that—

- (a) a person may have contravened section 12;
- (b) an exempted person may have contravened any condition or restriction of an exemption order made under section 13;
- (c) an investment provider may have failed to comply with any requirements or contravened any prohibition imposed by or under this Act, Regulations, Rules or Orders made thereunder; or
- (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 55A(10).

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

- (a) business carried on at any time when the investment provider was licensed under this Act; or
- (b) the ownership or control of an investment provider at any time when it was licensed under this Act.”.

Amends section 50

11 Section 50 of the principal Act is amended—

- (a) by deleting the section heading and substituting the following—

“Power to require production of documents”

- (b) by repealing subsection (1) and substituting the following—

“(1) The Authority may by notice in writing require the person who is the subject of an investigation under section 49A (the “person under investigation”) or any person connected with the person under investigations—

- (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;

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- (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 investigation as the Authority may require.”;
- (c) in subsection (3) by deleting the words “paragraph (e)” and substituting “paragraph (c)”;
- (d) by inserting the following subsection after subsection (1)—

“(1A) The Authority may by notice in writing require every person who is or was a director controller, officer, employee, agent, banker, auditor, accountant or barrister and attorney of a person under investigation—

- (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.”;
- (e) by inserting the following subsection after subsection (6)—

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

Amends section 51

12 Section 51 of the principal Act is amended—

- (a) in subsection (1) by deleting the words beginning with “laid by” and ending with “section 50” and substituting “that the Authority is conducting an investigation under section 49A”;
- (b) by repealing subsection (1)(a) and substituting the following—

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- “(a) that a person has failed to comply with a notice served on him under section 50;”;
- (c) in subsection (2)(a) by deleting the words “the person mentioned in subsection (1)” and substituting “the person referred to in subsection (1)(a)”;
- (d) in subsection (4) by repealing paragraph (b) and substituting the following—
  - “(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 49A.”

Inserts section 52A and 52B

13 The principal Act is amended by inserting the following sections under the heading “Chapter 6: Disciplinary Measures” and before section 53—

“Power to impose civil penalties for breach of requirements

52A (1) Except as provided in sections 19, 43 and 44, every person who fails to comply with any requirement or contravenes any prohibition by or under this Act shall be liable to a penalty not exceeding \$500,000, as the Authority considers appropriate, for each such failure or contravention.

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

(3) The Authority shall not impose a penalty under subsection (1) 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

52B (1) If the Authority proposes to impose a civil penalty, it must give the person concerned a warning notice.

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

Inserts section 55A to 55D

14 The principal Act is amended by inserting the following sections after section 55—

“Prohibition orders

55A (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 other 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) An investment provider must ensure that no function of his, 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 prohibition order.

(7) The Authority must 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 regulated activity carried on by a person who is an exempt 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;
- (b) on conviction on indictment to a fine of \$200,000 or to imprisonment for four years or to both.

(10) In this section—

“exempt person” means a person who is exempt from the requirement to hold a licence by or under any of the provisions of this Act;

“regulated activity” means any activity that is carried on by way of business requiring licensing or other authority by the Authority under any provision of this Act;

“regulated person” has the meaning given in subsection (1);

“specified” means specified in the prohibition order.



Prohibition orders: procedures

55B (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

55C (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.

55D (1) The Authority may grant an application made under section 55C 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.”

Repeals and replaces sections 56 to 57

15 The principal Act is amended by repealing sections 56 and 57 and substituting the following—

*“Notices*

Warning notices

56 (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 given under section 22 proposing action within subsection (1)(a) or (1)(b) of that section must specify the proposed restriction or, as the case maybe, the proposed variation.

(5) A warning notice about public censure given under section 53 must set out the terms of the statement.

(6) A warning notice given under section 55B must set out the terms of the prohibition.

#### Decision notices

57 (1) A decision notice must—

- (a) be in writing;
- (b) give the Authority's reasons for the 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 appeal tribunal under section 30.

(2) A decision notice shall be given within 90 days beginning with the day on which a warning notice under section 56 was given; and if no 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 58.

(3) A decision notice about imposing a condition under section 20 must set out the terms of the condition.

(4) A decision notice about the imposition of a civil penalty under section 52A must state the date of payment.

(5) A decision notice about public censure under section 53 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.

(6) A decision notice about a prohibition order made under section 55A (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.

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

(8) 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.

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

(10) If the person to whom a decision notice is given under subsection (1) 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 given under subsection (8).”.

Amends section 58

16 Section 58 of the principal Act is amended by repealing section 58 and substituting the following—

“Notices of discontinuance

58 (1) Subject to section 57(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.”.

Repeals and replaces section 60

17 The principal Act is amended by repealing section 60 and substituting the following—

“Publication

60 (1) Subject to sections 22, 53 and 55A, 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 under subsection (1)—

(a) before notifying the person concerned; and

(b) pending an appeal under section 33.”.

Inserts section 83A

18 The principal Act is amended by inserting the following section after section 83—

“Civil debt and civil penalties

83A (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 section 52B in relation to the same matter.

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

### Consequential amendments

19 Schedules 1 and 2 (which make consequential amendments) have effect.

### Commencement

20 This Act shall come into operation on such day as the Minister may appoint by notice published in the Gazette and the Minister may appoint different days for different provisions.

SCHEDULE 1

(section 19)

- 1 The following provisions of the principal Act are repealed—
  - (a) section 19(3);
  - (b) section 20(5);
  - (c) section 24(4);
  - (d) section 59.
  
- 2 The Second Schedule to the principal Act (Minimum Criteria for Licensing) is amended—
  - (a) by repealing paragraph 5(2) and substituting the following—

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

    - (a) this Act;
    - (b) any other law, including provisions of the law pertaining to anti-money laundering and anti-financing of terrorism as provided in the Proceeds of Crime Act 1997, the Anti-Terrorism (Financial and Other Measures) Act 2004 and the Proceeds of Crime (Anti-Money Laundering and Antiterrorist Financing) Regulations 2008;
    - (c) codes of conduct issued by the Authority pursuant to section 10 of this Act; and
    - (d) international sanctions in force in Bermuda.”

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SCHEDULE 2

(section 19)

AMENDMENTS TO THE INVESTMENT BUSINESS APPEAL TRIBUNAL REGULATIONS  
2004

Amends Regulation 3

1 Regulation 3 of the Investment Business Appeal Tribunal Regulations 2004 (the “principal Regulations”) is amended—

- (a) in paragraph (a) by deleting “serves notice in writing on the appellant of its decision” and substituting “gives a decision notice to the appellant”;
- (b) in paragraph (c) by deleting “serves notice in writing on the appellant of its decision.” and substituting “gives a decision notice to the appellant.”.

Schedule amended

2 (1) Paragraph 1 of the Schedule to the principal Regulations is amended—

- (a) in subparagraph (a) by deleting the words “any notice served under section 22(1) or 22(4)” and substituting “the warning notice given under section 56”.
- (b) in subparagraph (b) by deleting “22(5)” and substituting “56(2)”;
- (c) in subparagraph (c) by deleting “any decision notice served under section 22(7)” and substituting “the decision notice given under section 57(2)”;
- (d) by deleting paragraph (d).

(2) Paragraph (2)(a) of the Schedule to the principal Regulations is amended by deleting “or 22(4)”.

(3) The principal Regulations are amended by inserting after paragraph 4 the following paragraphs—

- “5 In the case of an appeal against a decision of the Authority to impose a civil penalty—
- (a) a copy of the warning notice given under section 52B(1) of the Act;
  - (b) a copy of the decision notice given under section 52B(2) of the Act; and
  - (c) a copy of any written representations made in accordance with section 56(2) thereof.

6 In the case of an appeal against a decision of the Authority to publish a statement in respect of an institution—

- (a) a copy of the warning notice given under section 54 of the Act;
- (b) a copy of the decision notice given under section 55 of the Act; and

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- (c) a copy of any written representations made in accordance with section 56(2) thereof.

7 In the case of an appeal against a decision of the Authority to make a prohibition order—

- (a) a copy of the warning notice given under section 55B(1) of the Act;
- (b) a copy of the decision notice given under section 55B(2) of the Act; and
- (c) a copy of any written representations made in accordance with section 56(2) thereof.

8 In the case of an appeal against a decision of the Authority to refuse to revoke or vary a prohibition order a copy of the decision notice given under section 55C(3) thereof.”

[Assent Date: 08 August 2012]

[Operative Date: 19 September 2012]