

Bermuda report – Q4 2022

Service area / [Corporate](#)

Legal jurisdictions / [Bermuda](#)

Date / [March 2023](#)

This report provides a summary of important legislative and regulatory developments in Bermuda for the quarter ended 31 December 2022. For this quarter, we focus on developments in the following sectors: Taxation; Intellectual Property; Banking; Digital Assets; Employment and Immigration; Insurance; Investment Business; Data Protection; and General Legal/Regulatory Reforms.

Taxation

On 4 October 2022, the Bermuda government announced that, in recognition of the fulfilment of Bermuda's commitment to the Organisation for Economic Co-operation and Development ("OECD") Forum for Harmful Tax Practices, the Code of Conduct Group of the Council of the European Union ("EU") removed Bermuda from Annex II.

Annex II is a list of cooperative jurisdictions maintained by the EU that reflects ongoing cooperation between the EU and its international partners and the commitments of these countries to reform their legislation to adhere to agreed tax good governance standards. Its purpose is to recognise ongoing constructive work in the field of taxation, and to encourage the positive approach taken by cooperative jurisdictions to implement tax good governance principles. Once a country has fulfilled their commitments that have been set out in Annex II they are removed from the list as being fully compliant with the standards set by the OECD.

Intellectual Property

On 9 December 2022, the Minister of Tourism provided an update on the revamping of Bermuda's intellectual property laws primarily set out in the Trade Marks Act 1974, Patents and Designs Act 1930 and Copyrights and Designs Act 2004. The updates are intended to make the legislation governing trademarks, patents, registered designs and copyrights more fully aligned with United Kingdom ("UK") and international standards. In connection with the updating of the intellectual property laws, the Bermuda government has plans to submit formal requests for extension of several treaties governing the protection of intellectual property rights to the UK.

A draft bill for updating the laws on trademarks was circulated for industry consultation in January and includes, among other updates, a proposed transition of the registration and renewal periods to 10 years, up from the current 7 years, for consistency with global standards.

The work on modernising the laws on patents and registered designs is expected to result in two pieces of new legislation, instead of the current consolidated legislation and consistent with the current approach of the UK.

In respect of copyrights, although the Copyrights and Designs Act 2004 is the most recently enacted of the intellectual property laws in Bermuda, updates are still needed, including changes to the legislation to enable voluntary registration of copyright ownership.

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Banking

On 9 November 2022 the Bermuda Monetary Authority (the “BMA”) launched its Bermuda Monetary Authority Legacy Banknote Campaign where it reminded the public that from 31 December 2022, they will have one year to deposit or exchange the horizontal Bermuda Dollars legacy banknotes. Effective 1 January 2024, those notes will be retired and no longer have value as legal tender.

Digital Assets

Guidance for Digital Asset Businesses Conducting Ancillary Investment Business

On 26 July 2022, the BMA published guidance notes for entities seeking exemption from dual licensing due to the ancillary nature of their activities (the “July 2022 Guidelines”). In the July 2022 Guidelines, the BMA provided information for entities seeking an exemption from the requirement to be licensed under the Investment Business Act 2003, pursuant to the Investment Business (Non-Registrable Persons) Order 2022, on the basis that the otherwise licensable activities are carried on in an ancillary manner to activities conducted and licensed under the Digital Asset Business Act 2008 (“DABA”).

In October 2022, the BMA published a revised version of the July 2022 Guidelines, (the “October 2022 Guidelines”), to further clarify which entities fall within scope, and the manner in which the BMA will determine whether activities are “ancillary”.

The October 2022 Guidelines note that in order for an entity’s investment business activities to be deemed ancillary and therefore qualify as a non-registrable person (“NRP”) under the Investment Business Act 2003 (the “IBA”), the total gross revenue which a digital asset business (“DAB”) generates from any investment activity it conducts should not exceed 25% of the total gross revenue generated from the activity or activities falling within the ambit of the IBA and DABA. The revenue generated from any non-licensable activities conducted by the entity would be excluded for the purposes of this calculation.

The October 2022 Guidelines also included the introduction of a buffer zone for DABs qualifying for NRP status under the IBA, based on their ‘ancillary’ investment activities, ranging from 25% to 35% of the total gross revenue generated by the DAB. Therefore, where the gross revenue generated by a DAB from its ancillary investment activity exceeds the 25% of total gross revenue threshold, it will be required to notify the BMA in this regard and agree on either (i) a ‘remediation plan’ towards compliance with the 25% threshold, or (ii) the roadmap towards the acquisition of an investment business licence. The DAB will be allowed, subject to any direction from the BMA to the contrary, to operate within the buffer zone for a period not exceeding one year.

The October 2022 Guidelines also note that entities subject to the ancillary exemption are required to report to the BMA on a semi-annual basis: the revenue projection for the next 12 months; and key assumptions in support of the revenue projection.

Consultation on Client Disclosure Rules

On 20 October 2022, the BMA published a consultation paper to solicit feedback on proposed amendments to the Digital Asset Business Act 2018: Code of Practice and Digital Asset Business (Client Disclosure) Amendment Rules 2022 to formalise its oversight of the conduct of digital asset businesses licenced under DABA to secure appropriate protection for their clients in line with best practices within the digital assets business sector.

The proposed amendments seek to ensure, among other things, that a DAB will treat clients fairly and equitably, have continuing regard for client’s interest in the conduct of their business, have fair, clean and not misleading communications with clients, provide the necessary protection against the loss of clients assets due to internal fraud or misuse, handle compliance and errors in a fair and expedient manner and ensure that clients, especially retail clients, are aware of their responsibilities within the business relationship and facilitate access to appropriate resources to help them understand their responsibilities within the business relationship. The deadline for comments was 19 December 2022.

Employment and Immigration

Minimum Wage Bill

On 12 December 2022, the Employment (Minimum Hourly Wage Entitlement) Bill 2022 was passed in the House of Assembly (the “Minimum Wage Bill”). The Minimum Wage Bill generally seeks to establish the applicable procedures to determine the entitlement of an employee to a minimum hourly wage and the enforcement of the minimum hourly wage.

The Employment (Minimum Hourly Wage Entitlement) Act 2022 was given assent on 20 December 2022 but is not yet in force.

Work Permit Policy

On 29 December 2022, the Department of Immigration published a notice on its Work Permit Policy, as a result of numerous work permit applications and inquiries regarding work permit holders changing jobs within two years of their initial employment. According to Clause 4.6 of the Work Permit Policy, work permit holders can only change jobs in the first two years when made redundant, or on lodging a bona fide complaint with the Labour Relations Section of the Ministry of Economy and Labour against their employer. If the two-year requirement is not waived, the permit holder must remain with the initial employer for two years, or settle their affairs and depart Bermuda.

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Immigration and Protection Amendment Bill 2022

On 9 December 2022, the Bermuda Immigration and Protection Amendment Bill was passed in the House of Assembly. The Bill seeks to amend the Bermuda Immigration and Protection Act 1956, to clarify and strengthen the provision relating to the unrestricted period of residence of visitors to Bermuda such that a visitor may reside in Bermuda for a cumulative maximum period of 180 days in any one year.

The Bermuda Immigration and Protection Amendment Act 2022 was given assent on 20 December 2022 but is not yet in force.

Restricted and Closed Job Categories Update

On 28 December 2022, the Ministry of Economy and Labor announced that effective, 1 January 2023, the moratorium on new work permits issued for closed job categories will be extended for 5 months until 31 May 2023 and that general bartenders have moved from the restricted category to the closed category and guest service agents have been added to the closed category.

Insurance

Insurance Amendment Bill

On 20 December 2022, the Insurance Amendment Act 2022 came into effect (the “**Insurance Amendment Act**”). The Insurance Amendment Act amends the Insurance Act 1978, by, among other things, providing for Class IILT insurers as a new class of insurer subject to the BMA’s regulatory powers. The new Class IILT is for long term insurers that will carry on long term business in an innovative manner (including business models that include digital assets). This new class complements the existing Class IIGB for general business insurers that carry on general business in an innovative manner, which was introduced in 2019. Like Class IIGB insurers, the minimum paid up share capital for Class IILT insurers is \$120,000.

The Insurance Amendment Act also provides for enhancements relating to the BMA’s regulatory powers applicable to innovative intermediaries, being insurance agents, insurance brokers, insurance managers and insurance marketplace providers carrying on business in an innovative and experimental manner. It also clarifies that innovative intermediaries and innovative insurers (i.e. Class IGB and Class IILT insurers carrying on general and long term business, respectively, in an innovative and experimental matter) are in a sandbox regulatory regime and are therefore not required to prepare, keep or file statutory financial statements.

Targeted Enhancements to Regulatory and Supervisory Regimes for Commercial Insurers

On 8 December 2022, the BMA published a notice informing

stakeholders about incoming enhancements to Bermuda’s regulatory regime for commercial insurers. The BMA noted that this is in keeping with its goal to continuously monitor trends and market developments and adjust its regime according to international standards. The enhancements will focus primarily on the BMA’s regulatory framework for long-term life insurers and will cover technical provisions, Bermuda Solvency Capital Requirement (“**BSCR**”) computation and flexibility of the BSCR framework.

Additionally, the BMA noted that insurers with high asset allocations to illiquid and other non-traditional assets can expect intensive and comprehensive supervisory engagement as part of the BMA performing detailed analysis of the asset strategy in the context of prudent management of insurance liabilities.

The BMA also intends to intensify deep dives on the following: investment strategy, liquidity, asset liability management, risk management, intra-group transactions and affiliated relationships, governance and solvency.

In addition to the regulatory enhancements planned for the insurance sector, the BMA, in its supervisory capacity intends to require insurers to disclose the nature and characteristics of all assets, including funds held by ceding insurers. Additionally, the BMA intends to strengthen existing requirements related to liquidity, in particular stress testing, contingency funding plan and risk management reporting. Insurers will be required to identify all related party-originated investments (and other activities) and the potential conflict of interest associated with the related party activities and disclose how the potential conflict is managed.

These and other enhancements will be included in a consultation paper, which the BMA intends to issue in the first quarter of 2023.

Investment Business

On 9 November 2022 the BMA published its Corporate Governance Policy for Trust, Investment Business and Fund Administrators (revised August 2022), (the “**Corporate Governance Policy**”). The Corporate Governance Policy applies to a licensed or registered person (“**LRP**”) under the IBA (among other Acts), and sets out nine principles and related guidance, which reinforce key elements of corporate governance.

In relation to unincorporated LRPs: generally, the principles should be applied to all LRPs, with references to the board of directors substituted with references to the partners or owners as applicable. Principles which seek to address the alignment of ownership, oversight, and management may not be applicable to such LRPs.

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The nine core principles as further expounded upon in the Corporate Governance Policy are:

1. Every institution should have an effective corporate governance framework in place that is appropriate to its size, complexity, structure and risk profile. This framework should establish a structure through which the objectives of the institution can be set, monitored and achieved and which provides incentives to align the interests of owners, directors and management.
2. Institutions should be governed by an effective board of directors.
3. The size and composition of the board should reflect the scale and complexity of the institution's activities.
4. Directors should be, and remain, qualified, including through training, for their positions. They should have a clear understanding of their role in corporate governance and be able to exercise sound and objective judgment about the affairs of the institution.
5. Under the direction of the board, senior management should ensure that the institution's activities are consistent with the business strategy, risk appetite and policies approved by the board.
6. The board is responsible for risk oversight and should establish and maintain a sound mechanism to identify and address the risks which are relevant to the institution.
7. The board should ensure that the institution has an effective system of internal controls.
8. The board should ensure remuneration arrangements are consistent with effective risk management and the long-term interests of the business.
9. The board should ensure that an appropriate reporting framework is in place for both internal and external stakeholders.

Data Protection

Bermuda's Personal Information Protection Act ("PIPA") received assent in July 2016 but is not yet fully in force. On 23 December 2022, it was announced that the office of the Privacy Commissioner is working with the Bermuda Government on a harmonisation amendment to PIPA to bring it into effect smoothly, including by possibly adopting a staggered approach to implementation so that PIPA becomes applicable to different sectors in stages.

Despite PIPA not yet being fully in force, the office of the Privacy Commissioner is encouraging organisations to take a proactive approach to preparing for the implementation of PIPA. The Privacy Commissioner has launched a programme entitled the "Pink Sandbox" that invites organisations to register and participate with the Privacy Commissioner in preparing for and building a PIPA compliant framework ahead of enactment.

General Legal/Regulatory Reforms

Amendments to the Bermuda Monetary Act 1969

On 20 December 2022 the Bermuda Monetary Authority Amendment (No.3) Act 2022 (the "BMA Amendment Act") came into effect. The BMA Amendment Act amends the Bermuda Monetary Authority Act 1969 (the "BMA Act") by updating the definition of "specified securities" which relates to the BMA's reserves, so that it includes, among other things: securities issued by mutual funds, investment trusts, investment companies and limited partnerships wherever established or incorporated; futures contract, options, forward contract and swaps; investments in private placements; or investments in asset-backed and mortgaged-backed securities, in the definition of specified securities.

The BMA Amendment Act also amends the BMA Act by updating the functions of the BMA with respect to reserves, by enabling the BMA to adequately and efficiently maintain appropriate reserves.

Additionally, the BMA Amendment Act amends the BMA Act by removing the provision stating that the purchase of shares of any company including the shares of any banking company is a prohibited activity for the BMA.

The BMA Amendment Act also clarifies the fees applicable under the headings "Investment Business Act 2003" and "Digital Asset Business Act 2018". With the clarification amendments, the annual fees of \$850 have been introduced for persons defined for the purposes of sections 13A and 13B of the Investment Business Act 2003, as Class A and Class B Registered Persons respectively, and the fees related to persons who are permitted to carry on the business of maintaining private keys under the Digital Asset Business Act 2018 were corrected from \$15,000 to \$150,000.

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