

World Securities Law Report

International Information for International Businesses

Monthly News & Comment on Securities Regulation from Around the World

Volume 17, Number 7

July 2010

BERMUDA

Investment Funds Act Revisions Proposed By Monetary Authority

By Alex Erskine and Myles Flint, of Appleby, Bermuda.

Bermuda is continually seeking to ensure that its laws and regulations are in line with international good practice. The Bermuda Monetary Authority (the "Authority"), following discussions with Business Bermuda's IFA Review Sub-Committee and the Fund Administrators Committee, May 21, 2010, asked Bermuda's investment fund and fund administration industries to review its Consultation Paper (the "Review") relating to amendments and additions to the Investment Funds Act 2006 (the "IFA").

The BMA indicated that its reasoning for conducting the Review is as follows:

"The proposed amendments and additions are designed primarily to align the regulatory framework for funds and fund administrators more closely with the requirements that exist in other regulatory legislation in Bermuda, whilst ensuring that the framework overall remains risk-based and recognises the unique nature of the funds industry locally. In making these proposals, the Authority has sought to preserve an appropriate balance between securing appropriate degrees of protection for investors, most of whom are institutional or may be presumed to have a high degree of financial sophistication, while not imposing an undue regulatory burden on the industry."

Key Proposed Changes

The Review concentrates on the following principal matters:

- **Definition of Service Provider:** This has been extended to include auditors appointed to a fund in order to draw auditors under Sections 7 and 14 of the IFA, being the "fit and proper" tests.
- **Service Provider Disclosure for Exempted Funds:** Section 7(1)(b) IFA requires that the Authority is satisfied that a fund operator of an exempted fund and its service providers are "fit and proper persons". In addition, Section 9 IFA sets out the criteria for exemption of a fund and includes the requirement to have a recognised fund administrator, an auditor and a Bermuda resident officer or trustee or resident representative. To bring exempted funds into line, there are additional requirements for exempted funds to appoint an investment manager, registrar, custodian and/or prime broker. All such additional service providers will be included in the vetting process per Section 7(1)(b) IFA in the same way as for authorised funds.
- **Changes in control for Fund Administrators:** The following provisions will be added to the IFA:
 - fund administrators are to notify the Authority in advance when there is a prospective change in control; and
 - the Authority is to have powers to object to a change in control to prevent it happening or to object to existing controllers where the Authority concludes they are no longer fit and proper to be controllers.

The proposals are designed to mirror the existing provisions for other Bermuda licensed entities to ensure appropriate oversight can be exercised over those corporate entities and individuals who exercise significant control over fund administration businesses.

- **Rights of Appeal:** Section 55 IFA is to be amended to provide that, where the Authority has objected to a change of controller, in accordance with the notification of new or existing controller provisions under Section 45 IFA, the person who is the subject of such objection may appeal against the Authority's decision to a Tribunal duly constituted under Section 56 IFA. This ensures that proper judicial review of the Authority's exercise of its powers, per Section 45 IFA, is provided for.
- **The 'Four Eyes' Criterion for Fund Administrators:** The concept that business should be directed by at least two individuals is a standard regulatory requirement based on sound corporate governance principles that aims to prevent one individual exercising excessive control over the affairs of a licensed entity. This principle has been extended to include fund administrators. The Authority will expect all fund administrators to be able to explain how their particular arrangements satisfy this criterion.
- **Fund Officers to be 'Fit and Proper':** The IFA currently requires a fund to notify the Authority of persons appointed as directors. The IFA does not currently provide that such people should be "fit and proper" to act as such. Section 14(1) IFA will be

amended to require that any officers of a fund should be "fit and proper" at the time of authorisation in order to ensure that the fund's business is conducted in a prudent manner.

Comment

The Review is designed to secure enhanced protection for investors in Bermuda funds going forward. It provides useful amendments and improvements to the IFA in terms of both investment funds and fund administrators. It illustrates Bermuda's commitment to providing a leading and responsible offering to the investment fund and fund administration industries. With European and other global fund related legislation in the pipeline, the monitoring and review of Bermuda's laws and fund industry regulation in particular is an ongoing process.

Comments on the Review were due by June 10, 2010.

The text of the Consultation Paper may be accessed on the Bermuda Monetary Authority's website at <http://www.bma.bm/document-centre/consultation-papers/investment-fund.asp>.

Alex Erskine, Partner, and Myles Flint, Counsel, are in Appleby's Bermuda office. They may be contacted at aerskine@applebyglobal.com and mflint@applebyglobal.com. © 2010 Appleby.