
April 23, 2012

A BILL

entitled

BANKS AND DEPOSIT COMPANIES AMENDMENT ACT 2012

A BILL

ARRANGEMENT OF SECTIONS

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WHEREAS it is expedient to enhance the powers of the Bermuda Monetary Authority under the Banks and Deposit Companies Act 1999 to effectively regulate the banking 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 exercise of disciplinary measures and for the publication of decisions:

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 may be cited as the Banks and Deposit Companies Amendment Act 2012.

Commentary: this Bill would come into force once it has gone through all its stages in Parliament and the Governor has assented to it.

Interpretation

2. In this Part, the “principal Act” means the Banks and Deposit Companies Act 1999 and references to “the Act” and “this Act” shall have a corresponding meaning.

Section 2 amended

3. 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 49K;

“warning notice” means a notice prepared in accordance with section 49J.”.

Section 9 amended

4. 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 a semicolon; and
 - (c) by inserting the following paragraph after paragraph (c) –
 - “(d) in exercising its powers –
 - (i) under section 49A to impose a civil penalty;
 - (ii) under section 49C to censure publicly;
 - (iii) under section 49E to make a prohibition order; and
 - (iv) under section 49M to publish information about any matter to which a decision notice relates.”.

***Commentary:** This clause would amend section 9 of the Act to widen the scope of matters to be covered by the statement of principles. This amendment would require the Authority to issue an amended statement of principles in accordance with which it proposes to act in relation to the exercise of its powers to impose civil penalties, censure publicly, make prohibition orders, and publish decisions.*

Section 16 amended

5. Section 16 of the principal Act is amended by repealing subsection (4).

Section 20 amended

6. Section 20 of the principal Act is amended –
 - (a) in subsection (1), by deleting in the tailpiece “written notice of its intention to do so” and substituting “a warning notice under section 49J”;

- (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 adding the following subsections:

“(4A) After giving a notice under subsection (1) and taking into account any representations made under section 49J (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 institution’s licence, to restrict its licence instead; or
- (d) if the proposed action was to restrict the institution’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) it shall forthwith provide either a decision notice under section 49K or a notice of discontinuance under section 49L as the case may be.”

- (c) by repealing subsections (5) to (12) inclusive.

Section 30 amended

- 7. Section 30 of the principal Act is amended –
 - (a) in subsection (1) by deleting “or” at the end of paragraph (a) and by adding the following paragraphs after paragraph (b) –
 - “(c) to impose a civil penalty under section 49A; or

(d) to publish a statement in respect of it pursuant to section 49C;”;

(b) by adding the following subsections after subsection (3) -

“(3A) Any person in respect of whom a prohibition order has been made under section 49E, may appeal to the tribunal against the decision.

(3B) Any person in respect of whom a decision notice has been issued refusing a revocation or variation of a prohibition order under section 49G (3) may appeal to the tribunal.”

(c) by repealing subsection (4) and substituting the following-

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

Commentary: *This clause would amend the grounds of appeal to the appeal tribunal to allow an appeal against a civil penalty imposed under proposed section 49A, against publication of statements under proposed section 49C on public censure, against the making of prohibition orders under section 49E and against a decision refusing to revoke or vary a prohibition order.*

New section 36A added

8. The principal Act is amended by adding the following section after section 36-

“Prudential and other returns

36A (1) The Authority may make Rules prescribing statutory returns that must be made by institutions.

(2) Without prejudice to the generality of subsection (1), Rules may prescribe -

- (a) capital adequacy returns;
- (b) liquidity returns;
- (c) large exposure returns;
- (d) foreign currency returns; and
- (e) annual returns of controllers and officers.

(3) Every institution shall, not later than 28 days after the relevant day, file with the Authority such returns as the Authority may prescribe in Rules made under this section.

(4) Every institution that fails to file a return within the time specified in subsection (3) shall be liable to a civil penalty not exceeding \$5,000 for each week or part of a week that it is in default.

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

(6) In this section “relevant day” means such day as may be specified in Rules.

(7) The Schedules to the Rules made by the Authority under this section shall be published separately on the website of the Authority: www.bma.bm, and shall be available for inspection at the offices of the Authority.

Commentary: *this provision would empower the Authority to prescribe prudential and other returns in Rules made by it. Proposed subsection (3) would require such returns to be filed within 28 days of the relevant day, which would be a day specified in the Rules. Failure to do so would attract a default fine of \$5,000 for every week or part of a week that an institution is in default.*

Section 37 repealed

9. Section 37 of the principal Act is repealed.

Section 42 amended

10. Section 42 of the principal Act is amended-

(a) by replacing the word “his” with “the” and by inserting the words “he is appointed to carry out” after the word “investigation” in subsection (2).;

(b) in subsection 4(a) by deleting “all documents relating to the company 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 adding the following words after the word “require” in subsection (4)(b)-

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

(d) by adding the following subsection after subsection (6) -

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

(e) by adding the words “in criminal proceedings” at the end of subsection (8).

***Commentary:** this clause would amend section 42 to more narrowly define the documents to be produced to a person appointed to carry out an investigation on behalf of the Authority and to provide for the recovery of costs of an investigation from the institution.*

Section 42A added

11. The principal Act is amended by adding the following section after section 42 -

“Investigations of suspected contraventions

42A (1) The Authority may conduct an investigation if it appears to the Authority that-

- (a) a person may have contravened section 11;
- (b) an institution may have failed to comply with any requirements or contravened any prohibition imposed by or under this Act, regulations, rules or orders made thereunder;
- (c) an individual may not be a fit and proper person to perform functions in relation to a regulated activity (within the meaning of section 49E(9)).

(2) The power conferred by subsection 1(b) may be exercised in relation to a company that was a former licensed deposit-taking business but only in relation to –

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

Commentary: *this provision would widen the scope for investigations by the Authority beyond the current scope of investigating non-licensed deposit taking business. It would include investigations for breaches of any requirements imposed by or under the Act or regulations etc., and investigations into the fitness and propriety of individuals who perform functions in relation to an activity licensed under this Act. Further the power to investigate would extend to investigating former licensed deposit taking business in relation to business carried on at a time when they were licensed, and in investigations in relation to the ownership and control of former institutions at a time when they were licensed.*

These powers would be exercised in conjunction with internal policies and procedures for enforcement. Such policies would provide the steps that need to be taken for escalating and referring matters from supervisors to LS&E for investigation and enforcement. The requirement to give notice for the provision of information, documents etc. would put the person concerned on notice that they are under investigation and under compulsion to provide information and answer questions.

Section 43 amended

12. Section 43 of the principal Act is amended by –

(a) deleting the section heading and substituting the following –

“Power to require production of documents”

(b) deleting in subsection (1) the words beginning with “ Where the Authority” and ending with “any other person-” and substituting the following –

“The Authority may by notice in writing require the person who is the subject of an investigation under section 42A (“the person under investigation”) or any person connected with the person under investigation-”;

(c) deleting in subsection (1)(a) the words “investigating the suspected contravention” and substituting “the investigation”;

(d) deleting in subsection (1)(b) the words “by the Authority for that purpose” and substituting “for the investigation”;

(e) deleting in subsection (1)(c) the words “for determining whether such a contravention has occurred” and substituting “to the investigation as the Authority may require”;

(f) 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, senior executive, employee, agent, banker, accountant, auditor or barrister and attorney of a company 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.”

(g) by inserting the following subsection after subsection (6)-

“(7) For the purposes of this section, a person is connected with the person under investigation (“A”) 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.”.

Commentary: *This provision would make consequential amendments to existing section 43 (which makes provision for the powers of the Authority*

when conducting investigations) in light of the new provisions on investigations under proposed new section 42A. But it also enlarges the power to apply it to persons connected with persons under investigation. “Connected persons” is defined in proposed subsection (7).

Section 44 amended

13. Section 44 of the principal Act is amended-
- (a) in subsection (1) by deleting the words beginning with “laid by” and ending with “section 43”, and substituting “that the Authority is conducting an investigation under section 42A”;
 - (b) by repealing subsection (1)(a) and substituting “(a) a person has failed to comply with a notice served on him under section 43;”
 - (c) in subsection (2)(a) by deleting “the person mentioned in subsection (1)” and substituting “the person referred to in subsection (1)(a).”
 - (d) in subsection (4) by deleting subparagraph (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 42A.”

Commentary: *Like the earlier clause, this clause seeks to make consequential amendments to section 44 in light of the new provisions on investigations proposed in new section 42A.*

Section 47 repealed

14. Section 47(4) of the principal Act is repealed.

New heading added

15. The principal Act is amended by inserting the following new part heading after section 49-

“DISCIPLINARY MEASURES”.

Sections 49A to 49M added

16. The principal Act is amended by inserting the following sections after section 49 -

“Power to impose civil penalties for breach of requirements

49A (1) Except as provided in sections 16 and 36A, every person who fails to comply with any requirement or contravenes any prohibition imposed 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 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.

Commentary: *This makes provision for disciplinary measures. It would empower the Authority to impose civil penalties for failure to comply with any requirement, or contravention of any prohibition, imposed by or under this Act. The maximum amount that can be imposed for any breach is \$500,000. It should be noted that this section would not apply to breach of a provision of the Act that otherwise attracts a specified civil penalty such as that for late payment of fees and late filing of returns. In that case, the penalty specified for late payment of fees in section 16 and for late filing of returns under section 36A would apply.*

In determining what is an “appropriate” level of penalty, the Authority is required to take into account the provisions of subsection (2): the fine must be effective in the sense that it would be of a sufficient amount to make the person concerned take notice, it must be proportionate to the breach, and it must be dissuasive in the sense that it would act as a deterrent.

Subsection (3) precludes the Authority from imposing a fine if the Authority is satisfied that the person concerned took all reasonable steps and exercised all due diligence to ensure compliance.

This clause would extend the power of the Authority to impose civil fines not only for breaches of the AML/CFT regulations, but also for breaches of the provisions of this Act and other requirements imposed by or under it.

Civil penalties procedures

49B (1) If the Authority proposes to impose a civil penalty, it must give the institution concerned a warning notice.

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

Commentary: *This sets out the procedure for imposing fines. The Authority must give a warning notice first, followed by a decision notice. Proposed sections 49J and 49K make provision for the contents of such notices.*

Public censure

49C (1) If the Authority considers that an institution 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 institution.

Public censure procedure

49D (1) If the Authority proposes to publish a statement in respect of an institution under section 49C, it must give the institution a warning notice.

(2) If the Authority decides to publish a statement under section 49C (whether or not in the terms proposed), it must give the institution concerned a decision notice.

Commentary: *Clause 49C provides for a new disciplinary measure, that is, one where the person concerned would be publicly censured but without any other measures taken against them. An institution would be censured by the publication of a statement by the Authority stating that that it has contravened a requirement of the legislation. Before doing so however, the Authority would be required to follow the procedure set out in section 49D. This includes: the issue of a warning notice which would contain a draft of the statement that the Authority proposes to publish, an opportunity for the person concerned to make representations to the Authority, consideration by the Authority of such representations, and the issue of a decision notice if appropriate, setting out particulars of the information to be published and information on their right to appeal.*

These provisions replicate those of sections 53 to 63 of the Investment Business Act 2003 and the intention is to roll this out to apply to all sectors.

Prohibition orders

49E (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) An institution 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 prohibition 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) 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.”

(9) In this section –

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

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

“specified” means specified in the prohibition order.

Commentary: *This provision seeks to ban certain officers from performing functions in relation to any regulated activity, that is to say, an activity that is regulated under the Banks and Deposit Companies Act 1999.*

As this provision is replicated in the other Acts, a particular conduct could give rise to simultaneously banning a person from performing functions in relation to institutions conducting business in other sectors of the financial services industry. Guidance under this Act would inform affected persons of Authority policy in relation to the amendment or lifting of the ban. The prohibition order will not on the face of it have any qualifications or conditions. This obviates the need for institutions to ascertain whether conditions have been satisfied; all they need to enquire into is whether a person is banned from performing a particular function.

This provision would enable the Authority to make a number of prohibition orders, depending on the circumstances of each particular case and after an assessment of the qualities of the individual concerned. The Authority would be able to prohibit an individual from performing a specified function, for example functions of chief executive, director, senior executive, and risk management. It should be noted that the focus here is on function and not on office. That would be a slight shift from the provisions in the minimum criteria where the focus is on the office. The order would specify the functions or class of functions which the person would be prohibited from engaging in. It could also tie this to either a specified regulated activity, a regulated activity within a specified description or all regulated activities. So for example, a person can be banned from performing functions of a senior officer with –

- *any institution;*
- *a named institution,*
- *any institution of a specified class (e.g. a bank or a deposit company);*

Subsection (4) would require the Authority to have regard to certain matters in exercising its discretion to ban. These include such assessment criteria as might be set out in statement of principles. Such criteria would address each of fitness (competence and skills for the job) and propriety (integrity, reputation).

The requirement that officers and controllers be fit and proper is a common requirement under the regulatory acts and the Authority has published criteria on this in statements of principles issued under the various regulatory acts. It would be important for the Authority to be consistent and ensure that its approach to fitness and propriety under this provision is not at odds with those established under statement of principles for other purposes.

A person who performs or agrees to perform a function in breach of the order would be liable to a civil penalty.

Subsection (5) would impose an obligation on regulated persons not to employ persons to perform functions that they are prohibited from performing. A breach of such a provision would attract enforcement powers available to the Authority (which would include a financial penalty). This would apply not only to the institution concerned but to any company licensed by the BMA that employs a person in breach of the Order.

Subsection (6) would enable the Authority, on the application of the person concerned, to vary the prohibition order – or revoke it. It should be noted that the original Order would not have an expiry date or other condition attached to it because the Authority would not at that time know

when the person concerned would become fit and proper. It would be open to the prohibited person to apply to the Authority at any time to seek the revocation or modification of the Order on the basis that the original grounds for the imposition of the order no longer apply. The Authority applying the provisions of section 49H might do so, if for example, it is satisfied that by virtue of the person obtaining appropriate qualifications and relevant experience, that person is able to satisfy the criteria for fitness and propriety that he had lacked earlier.

Prohibition Orders: procedures

49F (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.

Commentary: *This provision would establish a procedure for making prohibition orders. If the Authority proposes to make such an order it would be required to give a warning notice to the person concerned. The notice would set out the proposed terms of the prohibition. If the Authority then decides to make a prohibition order, it would be required to issue a decision notice. Such an order would be subject to an appeal to the appeal tribunal under section 30.*

Proposed section 49J and 49K deal with the contents, etc. of warning notices and decision notices.

Applications relating to prohibition orders: procedures

49G (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.

Commentary: *This provision would establish a procedure for the making of applications to vary or revoke an order, requiring the Authority to serve appropriate notices. Depending on the action that the Authority would take, it would be required to issue a decision notice.*

Determination of applications for variation etc.

49H (1) The Authority may grant an application made under section 49G 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.

Commentary: *This provision would permit the Authority to revoke or amend a prohibition order if it is satisfied that a person in respect of whom an order had been made is now fit and proper. Subsection (2) sets out the matters that the Authority may take into account in determining an application for variation or revocation of a prohibition order.*

Injunctions

Injunctions

49I (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."

Commentary: *This provision allows for the issue of injunction orders by the Supreme Court on the application of the Authority. This corresponds to similar provisions on injunction in the Investment Business Act 2003.*

There are three types of orders that could be applied for and made by the Court. The first is an order restraining a person from contravening any requirement imposed by or under the Act: subsection (1); the second is an order requiring persons to take steps to remedy a contravention of such a requirement (subsection (2)); and the third is an order restraining a person from disposing or otherwise dealing with assets (subsection (3)).

NOTICES

Warning notices

49J (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 20(1) 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 a proposal to publish a statement given under section 49C must set out the terms of the statement.

(6) A warning notice given under section 49F(1) must set out the terms of the prohibition.

Commentary: *this provision would establish a procedure for the issue of warning notices under sections 20(1), 49B, 49D, and 49F. A warning*

notice is the initial step in an enforcement action. It is a ‘minded to’ take action type of notice following an investigation into a breach. It would set out the proposed action and the reasons for it. It would also give an indication of whether or not the Authority proposes to publish its decision. The notice would provide a period, not less than 14 days, to enable the institution or person concerned to make representations. The Authority could extend this period on application.

Decision notices

49K (1) A decision notice must —

- (a) be in writing; and
- (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 appeal tribunal under section 30.

(2) A decision notice shall be given within ninety days beginning with the day on which a warning notice under section 49J 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 49L.

(3) A decision notice under section 20(4B) imposing a restriction or variation shall set out the terms of the restriction or variation.

(4) A decision notice about the imposition of a civil penalty under section 49A must state the date of payment.

(5) A decision notice about public censure under section 49C 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 49F 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.

(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 under subsection (8).

Commentary: *this provision would establish a procedure for the issue of decision notices under sections 49A, 49C, 49F and 49G.*

A decision notice would inform the institution or the person concerned, that the Authority has now concluded that it is appropriate to take the action in respect of which a warning notice had been issued. It would set out the particulars of the decision and the reasons for the action. The notice would also give an indication of whether or not the Authority

would publish the decision; and would inform the institution concerned of its right to appeal to the tribunal.

The Authority would be required to make up its mind within 90 days after a warning notice was given and if no decision notice was given within that period, it shall be treated as having discontinued the action.

Subsections (3) to (7) make provision for the contents of decision notices in various cases.

Subsection (8) provides for a different action to be taken if, before the direction is given, the Authority decides to take a different action with the consent of the institution. This would apply for example in a case where the Authority decides to issue a prohibition order against an officer, but before issuing it, the institution and the Authority agree on some other enforcement action arising from the same matter, such as the payment of a fine or public censure etc.

Conclusion of action

Notices of discontinuance

49L (1) Subject to section 49K(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.

Commentary: *It may be the case that following the issue of a warning notice, the Authority decides not to proceed with the proposed action. This could happen after consideration of representations or the emergence of new facts. In such cases, the Authority would be required to give the person concerned a notice of discontinuance.*

Publication

Publication

49M (1) Subject to sections 20, 49C and 49E, 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 30.

Commentary:

Subsection (1) leaves it to the Authority to decide what information should be published about a decision.

Subsection (2) makes provision prohibiting 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.

17. Section 50 amended

Section 50 of the principal Act is amended by repealing subsection (2).

Section 55A added

18. The principal Act is amended by adding the following section after section 55 –

“False documents or information

55A (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 and is liable –

- (i) on summary conviction to a fine of \$50,000 or to imprisonment for two years or to both;
- (ii) on conviction on indictment to a fine of \$200,000 or to imprisonment for four years or to both.”

(2) 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 his behalf had no such knowledge, and took every such reasonable precaution, as aforesaid.

Commentary: *This provision seeks to make it an offence to issue documents or provide information that is false or misleading in a material respect. Section (2) provides for a defence where the person concerned had no knowledge of the falsity or misleading character of the document or information, and in the case of a company, that the persons acting on its behalf had no such knowledge, etc. or took reasonable precautions.*

Section 56A added

19. The principal Act is amended by adding the following section after section 56 –

“Civil Debt and Civil Penalties

“56A (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 49A in relation to the same matter.

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

Commentary: *This provides a mechanism for the recovery of civil penalties imposed under the Act. The BMA would be able to claim the amount owing by way of civil proceedings in court. The clause also directs that where a person is convicted of a criminal charge, no civil penalty can be imposed relative to the same matter.*

Consequential amendments

20. Schedules I and II (which make consequential amendments) have effect.

Commentary: *This provision seeks to make amendments that are consequential to the introduction of civil penalties for breaches and obligations that, under current provisions, attract criminal penalties.*

Commencement

21. 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 I

(section 34)

1. The following provisions of the principal Act are repealed –
 1. section 17(5)
 2. section 35(3)
 3. section 36(3), (4) and (5)
 4. section 38(9) and (10)
 5. section 47(4)
 6. section 50(2)
2. The Schedule to the Act (Minimum Criteria for Licensing) is amended—
 - (a) in paragraph 1(1) by deleting the words “hold the particular position which he holds or is to hold” and substituting “perform functions in relation to any activity carried on by the registered person”; and
 - (b) by repealing paragraph 4(4) and substituting the following—

“(4) In determining whether a registered person is conducting its business in a prudent manner, the Authority shall take into account any failure by the registered person 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 Anti-Terrorist Financing) Regulations 2008;

(c) the code of conduct; and

(d) international sanctions in force in Bermuda.

SCHEDULE II

(section 34)

AMENDMENT TO THE BANKING APPEAL TRIBUNAL REGULATIONS 2001

Amends Paragraph 3

1 Paragraph 3 of the Banking Appeal Tribunal Regulations 2001 (the “principle Regulations”) is amended–

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

Schedule amended

2 (1) Paragraph (1) of the Schedule to the principle Regulations is amended–

- (f) in subparagraph (a) by deleting “any notice served under section 20 (1) or 20 (4)” and inserting “the warning notice given under section 49J”.
- (g) in subparagraph (b) by deleting “20 (5)” and inserting “49J (2)”.
- (h) in subparagraph (c) by deleting “any decision notice served under section 20 (7)” and inserting “the decision notice given under section 49K (2)”.
- (i) by deleting paragraph (d).

11. Paragraph (2)(a) of the Schedule to the principle Regulations is amended by deleting “20 (4)”.

12. The following paragraphs are inserted after paragraph 4 of the principle Regulations—

“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 49B(1) of the Act;
- (b) a copy of the decision notice given under section 49B(2) of the Act; and
- (c) a copy of any written representations made in accordance with section 49J(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 49D(1) of the Act;
- (b) a copy of the decision notice given under section 49D(2) of the Act; and
- (c) a copy of any written representations made in accordance with section 49J(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 49F(1) of the Act;
- (b) a copy of the decision notice given under section 49F(2) of the Act; and
- (c) a copy of any written representations made in accordance with section 49J(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 49G(3) thereof.”