



Solidifying Bermuda's Position as a Leading and Innovative Centre for Business

By Janice Gutteridge, Senior Associate and Andrew Barnes, Associate of Cox Hallett Wilkinson Limited, Bermuda

FinTech Development

The Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018 (ICO Act) is now operative and regulates public offerings to purchase or acquire digital assets made by Bermuda companies or LLCs. Digital assets are broadly defined to include all digital coins and tokens, however rewards programs and digital representations of value within gaming-platforms are excluded. The ICO Act targets public crowd funding and does not seek to regulate private sales or pure virtual currency issuances (see the Digital Asset Business Act 2018 (DABA)).

Entities seeking to offer digital assets to the public will require the consent of the Minister of Finance to conduct a restricted business pursuant to s.4A of the Companies Act 1981 (Companies Act). The Minister will be aided by the FinTech Advisory Committee (a body of senior industry professionals) with all matters relating to the FinTech industry

or its development. The application must include comprehensive information on the applicant; the project's organisation and scope; the issuance and nature of the digital assets; the transferability and functionality of the digital assets, and audit and compliance details.

The ICO Act prescribes certain minimum requirements for an offering document, including details of the promoter, the proposed business, the project description and projected timelines, the amount to be raised, the rights and restrictions on the digital assets and the general ICO risk statement.

DABA, once operative, will regulate digital asset business in or from Bermuda, with the result that payment service providers, digital asset or currency exchanges, custodial wallet services providers and digital asset services providers will be subject to regulation. DABA requires that licensed entities maintain a head office in Bermuda from which the digital asset business will be

directed and managed, and that they appoint an approved representative who is, among other things, subject to a statutory obligation to notify the Bermuda Monetary Authority (BMA) of certain events (e.g. likelihood of insolvency).

The BMA regulates licensing under DABA and distinguishes two types of license: a full license to provide any or all digital asset business activities (Class F) or the 'sandbox' license for a defined period, supervised by the BMA (Class M). Certain minimum licensing criteria are required for the BMA to grant a license, including having controllers and officers who are fit and proper persons; prudent compliance with AML/ATF regulations and maintaining minimum net assets; as well as having adequate accounting and record keeping systems, insurance policies and corporate governance commensurate to each specific licensed undertaking.

The new 'FinTech Business Work

Permit' immigration policy enables new Bermuda FinTech companies to receive immediate approval of five work permits within the first six months of obtaining their first FinTech Business Work Permit.

Recently, legislation has been tabled to introduce a new type of bank license to banks offering services to Bermuda based FinTech companies.

Bermuda's Beneficial Ownership Regime

Bermuda has introduced legislation establishing new disclosure and record keeping obligations with the principal aim of ensuring that the BMA and law enforcement agencies have access to up-to-date information on the beneficial ownership of Bermuda companies, LLCs and partnerships ('Corporates'). The beneficial ownership register is not available for public inspection and may only be accessed by, or on behalf of the Registrar of Companies (the Registrar).

Unless an exemption is available, Corporates will be required, at the time of their registration, continuation in Bermuda or conversion, to file a beneficial ownership register with the BMA. Existing Corporates are required to obtain information regarding their beneficial owners, or where applicable, relevant legal entities (RLEs), and to establish and maintain a beneficial ownership register to be kept at their registered office or at another authorised place. Corporates without an exemption have an obligation to take reasonable steps to identify any individual who is a beneficial owner or RLEs, each a 'registrable person' to be listed on the beneficial ownership register.

Once established, the beneficial ownership register must be updated with respect to any changes. Where the Corporate has reason to believe that there has been a relevant change to the beneficial ownership, they must issue a written notice to the registrable person seeking confirmation of any changes within 30 days of receipt. Updates to the beneficial ownership register must be filed as soon as practicable after the Corporate is notified of such change, and in any event not later than 14 days after such notification.

Non-compliance with the applicable beneficial ownership provisions attract significant penalties. A person may have a defence where they can show that they took reasonable steps to identify beneficial owners.

The deadline for filing the beneficial

ownership register is 23 September 2018. Further guidance is to be issued from the BMA.

Bye-laws registration

Amendments to the Companies Act introduce new requirements for companies to file extracts of their bye-laws with the Registrar pertaining to:

- the transfer of shares and the registration of estate representatives of deceased shareholders;
- the duties of the company secretary; and
- the number of members required to constitute a quorum at any general meeting of the company.

The Registrar is expected to release further information on the filing process in due course, and has indicated that companies will have until 20 September 2018 to be compliant.

The Personal Information Privacy Act 2016

The Personal Information Privacy Act 2016 (PIPA) was enacted in December 2016 with the objective of regulating how organisations, businesses and the Bermuda government may use personal information. The substantive provisions of PIPA are not expected to come into force until late 2018. Stakeholders are awaiting the appointment of a privacy commissioner, and it is expected that the commissioner will issue further guidance. Each organisation will be required to appoint a privacy officer who will be responsible for communicating with the privacy commissioner.

Once PIPA is fully operative every organisation will be required to adopt suitable measures and policies, taking into account the nature, scope, context and purposes of the 'use' of personal information and the risk to individuals by the use of that information. 'Use' is broadly defined and includes storing and destroying personal information.

Organisations must also be mindful of the EU's General Data Protection Regulation (GDPR), which is in force and extends to data located outside the EU, if the personal data being held pertains to an individual who is part of the EU, whether or not they are situated in the EU. PIPA does not precisely mirror GDPR and organisations need to be compliant with both.

The Bribery Act 2017

The Bribery Act 2017 (Bribery Act) became operative in September 2017

and creates the following offences:

- an offence of bribing (offering, promising or giving a financial or other advantage);
- an offence of being bribed (requesting, agreeing to receive or accepting a financial or other advantage);
- an offence of bribery of foreign public officials; and
- a corporate offence of failing to prevent bribery (the 'Corporate Offence').

The Corporate Offence is capable of being committed by both individuals and corporate bodies that carry on business (or part of a business) in Bermuda. The Corporate Offence is a strict liability offence with only one available defence for an accused party, namely that, on a balance of probabilities, the party implemented 'adequate measures' to prevent associated persons from undertaking such conduct.

The guidance notes issued by the Ministry of Legal Affairs list six principles that should inform corporate bodies of the 'adequate procedures' put in place by commercial organisations seeking to prevent bribery being committed on their behalf:

- Proportionate procedures
- Top-level commitment
- Risk assessment
- Due diligence
- Communication (including training)
- Monitoring and review

The Bribery Act imposes severe penalties, and corporate bodies should take particular note that persons found guilty of the Corporate Offence will be liable to pay an unlimited fine, upon conviction on indictment.

Aviation

Effective from 1 January 2018, Bermuda became a contracting state (by extension from the United Kingdom) to the Cape Town Convention and its supporting protocols ('Convention') by way of the Bermuda International Interests in Mobile Equipment (Cape Town Convention) Act 2016. The adoption of the Convention provides greater certainty for creditors and financiers in aviation financing and the protection of security interests on the international registry. The introduction of this legislation will solidify Bermuda's reputation as a leading jurisdiction for aviation financing and the Bermuda Civil Aviation Authority's Category 1 Aviation Regulatory Authority designation. ■