



2nd March 2012

Dear Industry Stakeholders,

**Re: Corporate Service Provider Business Act (the “Bill”)**

The Bermuda Monetary Authority (the “Authority”) wishes to thank the stakeholders for their continued support of our key initiatives. In September 2011 the Authority issued a consultation paper and in October 2011 published a draft of the Bill. A number of comments were received. The Authority is committed to engaging our stakeholders in such initiatives as we strive to achieve our supervisory objectives.

The Authority’s responses to the key substantive comments that were received are outlined below.

*1. Phasing out of double-vetting*

**In June 2011, Government agreed that if an effective regulatory regime for corporate service providers could be developed then the duplicate vetting arrangement known as “double-vetting” – whereby both the Authority and corporate service provider businesses vet potential owners of shares in Bermuda companies – would be discontinued.**

**Concern has been expressed to the Authority that this approach for vetting by corporate service provider businesses (“CSPs”) would be conflicted and would not be effective as the CSP would be expected to assess a potential client. This would undermine the risks that the present regime is intended to address.**

The Authority’s position is that the under the minimum licensing criteria a CSP will be required to have systems, policies and procedures in place to ensure that such functions are carried out in a responsible manner including considering the impact on the jurisdiction (see discussion on ‘Reputation of the jurisdiction of the entity at the time it is being formed below).

## **2. *Exchange Control (Transitional Amendments)***

**The approach proposed in the Bill regarding the manner in which companies will be expected to meet the requirements under the Exchange Control Regulations 1973 (the “Regulations”) is to expressly exempt companies that appoint a licensed corporate services provider, and which licensed corporate service provider keeps or makes any necessary alteration in the register of members of the company in accordance with section 65 of the Companies Act 1981, from the obligation to obtain from the Controller of Foreign Exchange permission for share issuances and transfers. This approach recognises the need for a nexus between the role of the corporate services provider and the nature of the exemption provided.**

**Industry representatives have recommended that the continued application of control of share transfer is outmoded and confusing to foreign investors and, instead, exchange control as it relates to share issuances/transfers should be removed and abolished, which would require the repeal of regulations 12 and 13 of the Regulations.**

The Authority’s position is that the abolishment of these exchange control regulations is not advisable. The provisions of the Exchange Control Act 1972 and the Regulations apply to the entire corporate sector of Bermuda and the repeal of these regulations would result in no oversight of entities not utilizing the services of CSPs. It is proposed that once the range of companies that are not managed by CSPs is identified, the position will be reviewed.

## **3. *Reputation of the jurisdiction***

**The Minimum Criteria in the First Schedule of the Bill to be imposed under a licence issued to a CSP obliges the CSP to review an entity’s business at the time of formation from the perspective of jurisdictional risk and has given rise to concerns as to how to apply this obligation, and whether it should at the very least be qualified to include a primary requirement on the CSP to have systems and procedures to achieve the objective.**

The object of the CSP regulatory regime is to provide not only prudential oversight of CSP’s but the public policy objective of assessing entities at time of formation and the impact of their businesses on Bermuda’s reputation. Given the wide range of activities this sector participates in, it is not feasible to specifically detail this obligation but the criteria does apply at the time of incorporation, partnership formation and share issuance/transfer activities. The alternative to such an obligation is to retain the present

regime for vetting at the time of incorporation and of transferring shares, which is seen as a significant impediment to Bermuda's competitive stance.

The Authority would point out that a similarly worded obligation exists in the Guernsey legislation, a comparable jurisdiction to Bermuda. The benefit of a non-prescriptive obligation is that different undertakings can develop policies consistent and proportional to their operations.

#### **4. *Duplicative and tiered licensing***

**Financial institutions have queried whether a CSP within their group needs to be licensed.**

**They would prefer not to have to obtain separate licenses for their affiliated companies that offer corporate services as defined in the Bill, particularly services that are restricted to nominee shareholding and custodian services.**

**They submitted a proposal that existing licenses may be extended to cover CSP activities or, alternatively, that one license for CSP activities carried out by group affiliates may be issued for the entire group, obviating the need for separate licenses to be obtained for each affiliate or subsidiary providing CSP services.**

**It was also suggested that a tiered licensing regime could be considered, providing for:**

- (1) a higher fee and full license where an entity is offering the full range of CSP services and is otherwise unlicensed;**
- (2) a lower fee and conditional license where an entity is providing CSP services that would not include the provision of company registration and directorship services and is otherwise unlicensed; and**
- (3) an exemption from licensing where an entity is engaging in CSP services and is otherwise licensed and regulated by the Authority.**

The Authority will look closely at the activities carried out by licensed entities and the exemptions which may be appropriate. The Authority does accept that if a service is only offered to members of its group that entity may be exempted. However, duplicative licensing would be relevant where a CSP of a group offers services to third parties, outside of the group. In that case, a separate license would be required since this is considered a separate business subject to regulation under the provisions of the Bill.

Further, the Authority does not support the proposal to adopt a tiered licensing regime given:

- (i) The policy objective of the Bill is that there ought to be the same prudential regulation of all persons doing this type of business, even if they are carrying out regulated functions under other legislation; and
- (ii) There is no distinguishable difference in the fees to be paid. Under the Bill, the fees are assessed on the scale of the operation and not the scope of business.

5. *Licensing of lawyers*

**The Authority will look closely at the activities carried out by licensed entities and the exemptions which may be appropriate. Clarification has been sought as to whether lawyers or law firms will need to be licensed under the Bill if they incorporate companies on behalf of clients. A related question that has also been asked is, because the definition of corporate service provider business includes arranging for another person to act as a director, officer or secretary of a company, whether a lawyer (or law firm) arranging for such positions to be filled (by or by way of its affiliated CSP, which the lawyer (or law firm) indirectly profits from) must be licensed under the Bill.**

Lawyers or law firms that act as company or partnership formation agents will require a license under the Bill. Furthermore, the Authority views lawyers arranging for directors or officers in the context of “carrying on business” as a CSP. However, simply arranging for a CSP to carry on the activities prescribed in the Act would not be caught by the definition of “carrying on business”.

6. *Extent of vetting requirements of CSP clients*

**Concern has been expressed regarding the extent of the vetting requirements that will apply to CSP clients – that is, whether it will be a 25% threshold in triggering diligence obligations for ultimate beneficial owners based on the AML requirements to vet persons who ‘control’ 25% of the shares of an entity or the current 5% threshold in respect of corporate registrations and authorization and transfer of securities.**

CSP’s will be required to comply with the Proceeds of Crime Act 1997 and regulations pertaining to vetting of beneficial owners of their customers. With the changes made to the FATF recommendations the approach for vetting customers will be risk based and this will determine the nature of the due diligence obligations. Therefore the threshold of 25% may be applicable depending on the circumstances of each case. Any other requirements pertaining to beneficial ownership and relevant thresholds, other than for the purposes of the proceeds of crime legislation, will be policy matters to be addressed by other authorities.

Please feel free to contact the Authority if you have any questions.

Yours sincerely,

The Bermuda Monetary Authority