BERMUDA MONETARY AUTHORITY
BMA House
43 Victoria Street
Hamilton HM 12 Bermuda
P.O. Box 2447
Hamilton HM JX Bermuda
tel: 1 (441) 295 5278 fax: 1 (441) 292 7421
email: enquiries@bma.bm website: www.bma.bm

1 March 2012

Dear Industry Stakeholders,

Re: Insurance Amendment Act 2012 (the "Bill") - Enhanced Enforcement Powers

The Bermuda Monetary Authority (the "Authority") wishes to thank the stakeholders for their continued support of our key initiatives. In October 2010 a consultation paper on proposed enhancements to enforcement powers of the Authority was issued and in November 2011 the Authority 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. Public Censure and Publication of Decision Notice

Proposed in the Bill is a public censure power that enables the Authority to publish a statement regarding a breach of a statutory requirement. The statement will be, in effect, that the Authority has identified that a specific breach has occurred and describes the breach.

Also proposed in the Bill is a wide and discretionary power allowing the Authority to publish information concerning a decision made to take regulatory action. In cases of serious contravention, public policy will generally dictate that there be significant and compelling reasons before publication of the relevant decision would not occur.

Concern has been expressed to the Authority that (1) public censure may negatively impact the reputation of the insurer beyond what was intended, (2) publication of non-major regulatory action can be detrimental and dilute attention given to serious issues and (3) there should be indications of criteria/threshold of materiality for publication.

The Authority would point out that publishing information about specific enforcement actions serves a number of purposes, namely, to inform the public of regulatory actions taken by the Authority, to inform policyholders about the conduct of their institutions and to maximize the deterrent value of any enforcement action taken.

Further, such powers may only be exercised after following due process. Specifically, the public censure power can only be exercised after following due process which involves giving a warning notice (other than in cases of urgency), receiving submissions and considering them before giving a decision notice; and a decision notice may not be published where an appeal is pending. Where publication is proposed of other regulatory actions, the entity involved will be notified an opportunity afforded to make representations why publication should not occur. The manner in which the Authority would use these powers will be set in the statement of principles (“SOP”) which will summarize key criteria to be followed when exercising these powers.

2. Regulation of Individuals

The Bill contains a provision enabling the Authority to make a prohibition order. The Authority would be able to prohibit an individual from performing a specified function or functions, for example functions of chief executive, director, senior executive, underwriting, actuarial and risk management in respect of regulated activities.

Industry representatives were supportive of this power, but reserved judgment pending development of grounds for banning. Also, there were calls for a right to appeal against a decision to impose a prohibition order and for an individual to have the right to apply to vary or to revoke a prohibition order.

The Authority confirms that the test for imposing a prohibition order on an individual is ‘fitness and propriety’. The Authority’s position is that criteria for the test will be based on, but not limited to, the Minimum Criteria as set out in the Act. Broadly speaking, ‘fitness’ will be determined with regard to competence and skill; “propriety” by integrity and reputation. The Bill includes the right to appeal the imposition of a prohibition order and the right to apply for variation or revocation of the same.

3. Civil Penalties

Under this power, the Authority may impose a penalty not exceeding $500,000 as it considers appropriate on a person who fails to comply with any requirement or contravenes any prohibition imposed by or under the Insurance Act 1978. This power would not apply to breach of a provision that otherwise attracts a specified civil penalty.

There was a general consensus among industry on the adoption of civil penalties powers; it was indicated that the current power is outmoded, cumbersome and inefficient. A cautious approach in implementing fines was recommended to the Authority.

In response to industry's concerns in this regard, the Authority would point out that the manner in which it determines a fine to be imposed – which fine must be effective, proportionate and dissuasive - will be set in the SOP.

4. Injunction to restrain or compel Conduct

The Bill contains provisions giving the Authority the power to seek court orders restraining or compelling specific conduct.

An industry respondent requested more time to comment, pending further discussion of a "regulatory ladder" indicating how the Authority would utilize enforcement actions.

The manner in which the Authority will exercise its powers will be described in the SOP. This statement will detail the various matters the Authority will take into consideration when assessing use of the enforcement powers. In most cases the Authority will seek remediation to ensure compliance before considering enforcement action. It needs to be recognized that there is no "ladder of enforcement" envisaged as a methodology for dealing with enforcement issues. It is not intended to have an escalating process, with a series of pre-requisites imposed before the each step in regulatory enforcement is taken. Such an approach, in the opinion of the Authority, would unduly restrict it in identifying which enforcement option is best suited to the facts and circumstances of the matter in question and would inhibit both the speed and flexibility which are necessary aspects of any effective enforcement regime. There will be due process with warning notice and an opportunity to make representations regarding the enforcement action and put forward alternative proposals. .

5. Timing of publication of Statement of Principles and Guidance Notes

Industry representatives expressed the view that SOP and Guidance Notes are critically important in describing and disclosing to industry how the Authority intends to use the proposed enforcement powers. As such, it was proposed that tabling of legislation be postponed until a draft SOP has been published. As well industry wanted more guidance from the Authority on the circumstances under which a direction would be issued to a Designated Insurer (the "DI").

The Authority agrees that in the unique circumstances of this initiative the Bill should not come into force until the SOP has been published. To that end, the Authority is preparing a SOP which is expected to be made at the time the Bill takes effect.

The Authority confirms that the circumstances under which a direction would be issued to the DI would be limited. A draft of the Guidance Notes, which will address concerns related to the DI, is being finalized and will be posted in the near future.

6. Minimum Criteria for Registration

The proposed broadened scope of criterion 1(1) of the Minimum Criteria, which reads as follows:

"Every person who is, or is to be, a controller or officer of a registered person is a fit and proper person to perform functions in relation to any activity carried on by the registered person",

has been raised as an issue because it is thought that 'any activity' could encompass non-related activity, non-related beyond the scope of the business.

The Authority's view is that the scope of this criterion has rightly been drafted broadly in order to cover the wide range of business activities that a registered person may be carrying on and thus recommends no change to the wording of the proposed amendment.

7. Directions in cases of urgency

The Bill permits no warning to be given in respect of the giving of a direction to a registered person, or as the case may be, a designated insurer in any case in which the Authority considers that the direction should be given as a matter of urgency.

The Authority received a query on whether the SOP would detail what constitutes a case of urgency in which no warning notice is provided. The Authority also received a request for clarification that in situations where no warning notice is given as a matter of urgency, the relief to be obtained by the Authority is limited to injunctive relief.

The Authority confirms that the SOP will detail what constitutes a case of urgency in which no warning notice is provided.

The Authority does not agree with the proposition that in situations where no warning notice is given as a matter of urgency, the relief to be obtained by the Authority ought to be limited to injunctive relief. For example, circumstances may require the immediate imposition of a restriction prohibiting the payment of dividends to avoid a loss of assets, or the immediate removal of a director where his ongoing activity places the operations of the entity at risk. It is the Authority's view that the legislative provisions enabling subsequent submissions and a final decision, (whether to retain the restriction or remove it), provides adequate natural justice and ensures the licensee has an opportunity to respond to the concerns. It is envisaged this particular power would not be used widely.

8. Submissions following receipt of Warning Notice

The Authority received a suggestion that the Authority expressly state in the Bill its obligation to consider any submissions made by a person after such person receives a warning notice of proposed enforcement action before coming to its final conclusion and issuing a decision notice.

The Authority agrees with this proposition and has revised the relevant section of the Bill to include such a requirement.

9. Mandatory delay before giving Decision Notice

A stakeholder recommended that there be included a provision in the Bill that a decision notice not be given for a specified time period after a warning notice is given.

The Authority does not support the proposal to include such a provision as the Authority would be required to make up its mind within 90 days after a warning notice was given in any event. To introduce a provision that a decision notice may not be given for a specified time period after a warning notice is issued would impose more layers of procedures, in the Authority's view. Furthermore, principles of natural justice dictate that the Authority must take time to consider fully any representations made before issuing a decision notice.

10. Investigations on behalf of the Authority

The Bill introduces a provision that gives the Authority the power to appoint an inspector to investigate any aspect of any insurer's or insurance group's business where the Authority considers it desirable to do so in the interests of the policyholders.

An industry stakeholder expressed concern that this provision does not protect proprietary business information and recommended that a new subsection be added to preclude third party access to such information.

The Authority's view is that this provision cannot and should not operate to exclude proprietary information as that is precisely the information the Authority needs. Further, the concern as to confidentiality should be satisfied by reference to sections 52 through 52C of the Insurance Act 1978 and section 31 of the Bermuda Monetary Authority Act

1969) which protect the security of the information. Any person appointed by the Authority to investigate is bound by these provisions.

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

Yours sincerely,

The Bermuda Monetary Authority