



Explanatory Memorandum Insurance Amendment (Enforcement Powers) Act 2011

Background:

In 2009, a discussion paper was released for general consultation outlining a number of proposed powers to be added to the Insurance Act 1978. The paper indicated the Authority's proposed intention to add these powers to all of the regulatory acts in due course including the Banks and Deposit Companies Act 1999, the Trusts (Regulation of Trust Business) Act 2001, the Investment Business Act 2003 and the Investment Funds Act 2006. This proposal was based on the need to enhance the Authority's ability to address non-compliance with regulatory requirements.

In 2010, a consultation paper in broadly similar terms to the discussion paper was circulated, but including the proposal to add the proposed powers to all the regulatory Acts. This paper reiterated the position of the Authority that such powers were needed to bring the Authority closer to equivalence with other international regulators. The papers made a number of proposals and included adding the following powers to each Act:

Civil Fines: A proposed power to be able to impose a civil penalty for breaches of each regulatory act, as well as a power to fine for failures to file returns etc., on time.

The Regulation of Individuals: A proposed regime for banning individuals from specific functions in relation to regulated activities under each Act.

Injunctions: A proposal for a general power, modeled on section 62 of the Investment Business Act 2003, enabling the Authority to seek injunctions compelling or restraining certain conduct.

Publicity of Enforcement Actions: A proposal that the Authority be expressly authorised to publish any enforcement action taken.

The responses to the consultation paper primarily raised concerns about the power to publicise sanctions. This enforcement power is presently in place under the AML regulatory regime and has been used on one occasion.

In addition, when preparing the proposed changes for incorporation into a bill it was decided that a further power, based on Section 53 of the Investment Business Act, would also be appropriate. This power, which amounts to public censure without further penalty, has been included in the proposal. It was also recognised that this was an opportunity to ensure uniformity between the Acts in terms of investigatory powers and accordingly the inspection powers have been revised.

Further, it was recognised that the addition of additional powers would require processes be developed to provide for uniform levels of procedural fairness across all regulatory powers. Thus, the proposed bill provides for the use of Warning Notices and Decision Notices before any regulatory action is taken, subject to matters of urgency.

The manner in which the Authority would use these powers will be set out in the statement of principles which will summarise the key criteria to be followed when exercising these powers. As well, the Authority will be issuing guidance on the enforcement process which will incorporate the new procedures to clarify when an enforcement action is underway and has progressed from a supervisory review.

Comments on the bill the Insurance Amendment (Enhancement of Enforcement Powers) Act 2011 (the “Bill”) are invited by **28th November, 2011** and are to be sent to **policy@bma.bm**.

The Draft Bill:

Based on the comments received regarding the proposed additional powers the attached Bill has been prepared and may be summarised as follows:

Clause 7 - Civil Fines

This provision enables the Authority to impose a civil fine for failure to lodge annual returns etc. The amount of the fine is identical to those presently provided under the Act. The current process which involves the insurer consenting to a penalty has been unduly complex. The proposal is to provide for an imposition of the fine with the Authority having discretion to consider whether or not to take such an action. The circumstances under which the Authority may exercise its discretion would have to be set out in the statement of principles.

Clauses 10-16 - Investigations

These provisions broaden the power of the Authority to conduct investigations into regulatory matters, including a power to investigate whether an officer is ‘fit and proper’, (see below). The power to investigate would extend to any activity which effectively requires registration under the Act. In addition, it provides for investigations into activities of groups. This provision clarifies the Authority’s powers to carry out investigations in addition to appointing an inspector.

Clause 17 - Directions

While the Bill does not directly affect the power to issue directions, it imposes procedural obligations to be met before directions can be given, (see below Part VIII B). **These provisions clarify that when giving a direction under section 32 or 32A, the Authority must issue a warning notice and a decision notice.** In relation to directions, these obligations will apply irrespective of whether it is an enforcement exercise or conducted by supervision.

There is also provision for enabling the Authority to take action in cases of urgency. Under such circumstances, the Authority may issue directions without a warning notice. However, the direction must include the reasons for the direction, and, while the direction can take effect immediately, the institution has 14 days in which to make submissions as to why the direction should be removed. There is also the right of immediate appeal. If such submissions are made, the Authority must, within 28 days of the date of such submissions make a decision to confirm or rescind its original decision or to impose a different direction or to vary the direction in a different manner. The decision has to be set out in a decision notice, containing reasons for the decision and details of the appeal process.

New Part VIA ‘Disciplinary Measures’: Civil Penalties, Public Censure, Prohibition Orders and Injunctions

Civil Penalty Power

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 Act. This power would not apply to breach of a provision of the Act that otherwise attracts a specified civil penalty such as that for late filing under certain sections of the Act. Significantly, penalties can be imposed for failures to comply with directions and a range of failures e.g., to notify of changes to directors, principal representatives, material changes and employing prohibited persons. The provision is similar to that in the Anti-Money Laundering legislation. The manner in which the Authority determines the fine to be imposed will be set in statement of principles as well as in guidance.

Public Censure

The Authority may publish a statement in circumstances where it considers that a registered person has contravened a requirement imposed upon it. This power is presently available under the Investment Business Act 2003. Although this proposal was not included in the consultation, the Authority is of the view that similar powers should be available for the regulation of all regulated entities.

This power enables the Authority to publish a statement regarding a breach of a statutory requirement. However, the Authority may only exercise this power after following due process which involves giving a warning notice, receiving submissions, considering them and giving a decision notice which includes the form of the statement. The statement will be, in effect, that the Authority has identified that a specific breach has occurred and describes the breach.

Prohibition Orders

This provision enables 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. The test for imposing a prohibition order on an individual is ‘fitness and propriety’. Criteria for the test will be set out in the statement of principles, although it must be recognised it is not possible to exhaustively identify what conduct could give rise to action under this provision. Broadly speaking, ‘fitness’ will be determined with

regard to competence and skill; “propriety” by integrity and reputation. It is anticipated that there will be close referencing to the code of conduct and other existing principles and guidance. In the current form, the order would not be limited in terms of time; however, a person shall have the right to apply to the Authority to vary or revoke a prohibition order. Factors to be taken into account in considering a variation or revocation would include whether the person undertook training, obtained a qualification or is deemed to possess a level of competence. A breach of a prohibition order will carry a criminal sanction as well as the capacity to seek civil penalty Orders, and licensed entities are required not to engage a person the subject of a prohibition order. Given the nature of the provision, it is not expected any Order would take effect until after the expiry of the appeal period. Before making an order, the Authority must follow the statutory process by giving a warning notice followed by a decision notice after representations have been made.

Injunctions

The Bill introduces the power vested in the Court to issue an injunction. The provision gives the Authority the power, similar to that in the Investment Business Act 2003, to seek court orders restraining or compelling specific conduct.

Clause 20 - Part VIIIB Notices

Due Process and Natural Justice

As noted, the Bill clarifies the process the Authority must follow when exercising the powers to impose directions and civil penalties, publish statements of public censure or make prohibition orders. These revised procedural requirements were not discussed as part of the consultation process, but have been included in the Bill to provide a standard approach for taking actions which conform to international standards of natural justice and due process.

Warning Notice

If the Authority concludes that grounds for the proposed action exist, then it shall issue a warning notice. A person must be given due process and the warning notice provides the first step. The notice must include details of the proposed action and the reasons for it. Following the warning notice, a person is granted the opportunity to make submissions to the Authority and has not less than 14 days in which to do so, prior to the issue of a decision notice.

Submissions

The Authority must consider any submissions made by a person before coming to its final conclusion and issuing a decision notice.

Decision Notice

The decision notice will confirm the action the Authority has decided to take, the date of effect, the reasons for the decision and shall inform the person of their right to appeal. If no action is to be taken by the Authority, then a notice of discontinuance shall be issued. A decision notice must be issued within 90 days.

Appeal Tribunal

A decision notice must indicate that the persons or institutions against whom a decision has been made have the right to appeal to the appeal tribunal.

Conclusion of proceedings

Where the Authority decides to discontinue an action, the Authority must give notice.

Publication of Decision Notice

Under the Bill, the Authority may publish information concerning a decision made but must first inform the person concerned. Information may not be published where an appeal is pending. This is a wide power and is discretionary, i.e., the Authority can decide whether to publish or not in each case. The Bill does not provide for specific criteria to be used to decide when to publish, but criteria will be set out in the statement of principles. It is anticipated that in cases of serious contravention, public policy will generally dictate that publication of the relevant decision should occur.

In certain cases the Authority does not have discretion and must publish its decision such as in the case of cancelling a registration or issuing a prohibition order. Such publication is necessary to protect the public, or, in the case of the prohibition order, to ensure other potential employers are aware of the order being made.

Summary/Indictable Offences

Presently breaches of the Insurance Act 1978 are indictable or summary offences except where expressly stated. With this proposal, all breaches of the Act will be subject to civil penalty or civil fine and only the more serious breaches may be a criminal offence, in particular carrying on insurance business without a licence or obstructing the Authority in carrying out its functions.

Clause 23 makes it clear that if a person is convicted of a criminal offence for breaching a provision of the Act then the person will not be liable for civil penalty.

As well, the amount of the fine which may be imposed for a criminal offence has been raised from \$5,000 to \$50,000 for summary offences and from \$15,000 to \$150,000 for indictable offences unless otherwise provided.

General

While the Bill deals only with the Insurance Act 1978, almost identical bills are being prepared in relation to the Banking, Investment Business, Funds and Trusts sectors, as the Authority moves towards uniformity in the powers available to it.

7 November 2011

A BILL

entitled

Insurance Amendment Act 2011

**(ENHANCEMENT OF ENFORCEMENT POWERS)
ACT 2011**

A BILL

ARRANGEMENT OF SECTIONS

1	Short title	6	Section 14
2	Interpretation		amended
3	Section 1	7	Section 18A
	amended		amended
4	Section 2A	8	Section 29A
	amended		amended
5	Section 6A	9	Section 29C
	amended		amended

10 Section 30 repealed and replaced	22 Section 55 amended
11 Section 30A amended	23 New section 55A added
12 New section 30A added	24 Consequential amendments
13 Section 30B amended	
14 Section 30C amended	
15 Section 30J amended	
16 Section 32 amended	
17 New sections 32B to 32L added	
18 Section 41 amended	
19 Section 44A amended	
20 Part VIIIB added	
21 Section 51 amended	

WHEREAS it is expedient to enhance the powers of the Authority to effectively regulate the insurance industry in Bermuda and to meet appropriate international standards; provisions are made for imposition of civil penalties, the making of prohibition orders and other disciplinary measures including injunctive relief, for the giving of notices in relation to exercise of disciplinary measures and for the publication of decisions under the Insurance Act 1978

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 Insurance Amendment (Enhancement of Enforcement Powers) Act 2011.

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

PART 1

INSURANCE ACT 1978 AMENDED

Interpretation

2. In this Part, the “principal Act” means the Insurance Act 1978 and references to “the Act” and “this Act” shall have a corresponding meaning.

Section 1 amended

3. Section 1 of the principal Act is amended by inserting in their alphabetical order the following –

“decision notice” means a notice prepared in accordance with section 44G;

“warning notice” means a notice prepared in accordance with section 44F”.

Section 2A amended

4. Section 2A (1) of the principal Act is amended –

- (a) in paragraph (f) by deleting “and” at the end thereof; and
- (b) by inserting the following new paragraph after paragraph (g) –
 - “(h) in exercising its powers –
 - (i) under section 32D to impose a civil penalty;
 - (ii) under section 32F to censure publicly;
 - (iii) under section 32H to make a prohibition order; and
 - (iv) under section 44I to publish information about any matter to which a decision notice relates.”.

Commentary: *This clause would amend section 2A 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 a 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 6A amended

5. Section 6A of the principal Act is amended by repealing subsection (4).

Commentary: section 6A(4) of the Act makes provision for prudential rules to provide for summary offences for making false or misleading statements or returns. The proposed provision would repeal this section as new provision has been made in clause 15 of this bill for a general offence of issuing or supplying false or misleading documents or information.

Section 14 amended

6. Section 14 of the principal Act is amended by repealing subsection (3A).

Section 18A amended

7. Section 18A of the principal Act is amended –

(a) in subsection (1) by deleting the tailpiece and substituting the following–

“it shall be liable to a civil penalty calculated in accordance with subsection (2).”;

(b) by repealing subsection (2) and substituting –

“(2) For each week or part of a week that an insurer fails to comply with a requirement imposed on it by subsection (1), it shall be liable to a civil penalty not exceeding –

(a) \$500, in the case of a breach by a Class 1, Class 2, Class A or Class B insurer;

(b) \$1000, in the case of a breach by a Class 3, Class 3A, Special Purpose Insurer, Class C, or Class D insurer; or

(c) \$5000, in the case of a breach by a Class 3B, Class 4 or Class E insurer;

and the civil penalty applicable to an insurer falling within more than one paragraph shall be the higher penalty.”;

(c) by repealing subsections (3) and (4); and

Commentary: *This clause would amend section 18A of the Act by decriminalising breaches of the filing requirements for filing statutory statements and returns, and substituting civil penalties for non-compliance with those requirements. As the imposition of the penalty would be a matter for the Authority, the actual amount that will be imposed would depend on the view that the Authority takes of the reasons put forward for failure to comply, and the Authority’s enforcement policy.*

Section 29A amended

8. Section 29A of the principal Act is amended –

(a) by repealing paragraph (b) of subsection (1) and substituting the following –

“(b) require the registered person or designated insurer to provide the Authority with a report, in such form as may be specified in the notice, by the registered person’s or designated insurer’s auditor or underwriter or by an accountant or other person with relevant professional skill on, or on any aspect of, any matter about which the Authority has required or could require the registered person or designated insurer as the case may be, to provide information under paragraph (a).”;

(b) by repealing subsection (2) and (3);

(c) in subsection (4) by deleting “to make a report under subsection (2)” and substituting “appointed by the registered person or the designated insurer, as the case may be, to make the report required under subsection (1)(b)”.

Commentary: *this provision seeks to remove an anomaly under section 29A whereby a registered person or designated person is required to produce published and unpublished reports. In order to ensure consistency amongst the regulatory acts, a new provision has been substituted that would require the registered person or the designated insurer to produce reports on an aspect of their business as would be required by the Authority. Such a provision is common to the other regulatory acts (BDIC, IBA, etc).***Section 29C is amended**

9. Section 29C of the Principal Act is amended by deleting “29A(2)” where it appears in subsections (1) and (2) and replaced by “29A (1)(b).”

Section 30 repealed and replaced

10. Section 30 of the principal Act is repealed and replaced by the following -

“Investigations on behalf of the Authority

30 (1) If it appears to the Authority desirable to do so in the interests of policy holders or potential policy holders of an insurer or an insurance group the Authority may appoint one or more competent persons to investigate and report to the Authority on —

(a) the nature, conduct or state of the insurer’s or insurance group’s business or any particular aspect of it; or

(b) the ownership or control of the insurer or insurance group;

and the Authority shall give written notice of any such appointment to the person concerned.

(2) If a person appointed under subsection (1) thinks it necessary for the purposes of his investigation, he may also investigate the business of a person who is or has at any relevant time been a member of the group of which the person under investigation ("A") is part; or a partnership of which A is a member.

(3) Where a person appointed under subsection (1) decides to investigate the business of any person referred to in subsection (2) he shall give that person written notice to that effect.

(4) It shall be the duty of every person who is or was a controller, officer, employee, agent, banker, auditor, accountant or barrister and attorney of an insurer or insurance group which is under investigation by virtue of subsection (1) or a person who is under investigation under subsection (2) or any person appointed to make a report in respect of a registered person or designated insurer under section 29A (1) (b) —

(a) to produce to the persons appointed under subsection (1), within such time and at such place as they may require, all documents relating to the person concerned which are in his custody or power;

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- (b) to attend before the persons so appointed at such time and place as they may require and answer questions relevant to the investigation as the persons appointed under subsection (1) may require; and
 - (c) otherwise to give those persons all assistance in connection with the investigation which he is reasonably able to give;

and those persons may take copies of or extracts from any documents produced to them under paragraph (a).

(5) For the purpose of exercising his powers under this section, a person appointed under subsection (1) may enter any premises occupied by an insurer which is being investigated by him under this section; but he shall not do so without prior notice in writing.

(6) A person exercising powers by virtue of an appointment under this section shall, if so required, produce evidence of his authority.

(7) Unless the Authority otherwise directs, the insurer under investigation shall pay to the Authority all expenses of, and incidental to, the investigation.

(8) Any person who —

- (a) without reasonable excuse fails to produce any documents which it is his duty to produce under subsection (4);
- (b) without reasonable excuse fails to attend before the persons appointed under subsection (1) when required to do so;
- (c) without reasonable excuse fails to answer any question which is put to him by persons so appointed with respect to an insurer which is under investigation or a person who is being investigated by virtue of subsection (2); or

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- (d) intentionally obstructs a person in the exercise of the rights conferred by subsection (5);

shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both.

(9) A statement made by a person in compliance with a requirement imposed by virtue of this section shall not be used in evidence against him in criminal proceedings.

(10) Nothing in this section shall require the disclosure or production by a person of information or documents which he would be entitled to refuse to disclose or produce on the grounds of legal professional privilege in proceedings in Bermuda.”

Commentary: *this clause seeks to repeal section 30 and replace it with an updated version of the power to appoint inspectors that is found in other regulatory acts. It would ensure consistency with the other regulatory acts in relation to the powers of the Authority to appoint an inspector to investigate any aspect of an insurer’s or insurance group’s business where the Authority considers that it is desirable to do so in the interests of the policyholders – for example, where the Authority has prudential concerns which it thinks need to be enquired into to reimburse the Authority for the expenses of the investigation as is currently provided in section 30(5).*

As is currently the case under (section 30 (5)), the person being investigated may be required to pay. His power would apply to groups as it applies to insurers as the Authority in its capacity as group supervisor must ensure that a group is compliant with various requirements of the legislation. However the powers to impose sanctions under proposed subsection (5) will not be exercisable by the Authority against persons outside of Bermuda.

Section 30A amended

11. Section 30A of the principal Act is amended by –

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

“Power to require production of documents”

(b) renumbering it as section 30AA;

(c) 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 30A (“the person under investigation”) or any person connected with the person under investigation –” ;

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

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

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

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

“(7) For the purposes of this section, a person who is connected with the person under investigation (“A”) includes any person if he is or has at any relevant time been—

(a) a member of A’s group;

(b) a controller of A;

(c) a partnership of which A is a member.”.

Commentary: This clause would renumber section 30A as section 30AA and would make consequential amendments to it in light of the new provisions on investigations under proposed new section 30A. But it also enlarges the power to apply it to persons connected with persons under investigation. “Connected persons” is defined in proposed subsection (7).

New section 30A added

12. The principal Act is amended by inserting the following section after section 30 –

“Investigations of suspected contraventions

30A (1) The Authority may conduct an investigation if it appears to the Authority that-

- (a) a person may have contravened section 3 or section 9;
- (b) a registered person or a designated insurer may have contravened a requirement 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 32H (8).

(2) The power conferred by subsection 1(b) of this section may be exercised in relation to a former registered person but only in relation to –

- (a) business carried on at any time when the person was a registered person; or
- (b) the ownership or control of a former registered person at any time when it was a registered person.

Commentary: *this proposed new section seeks to widen the provisions for investigations by the Authority beyond the current*

scope of investigating non-registered persons who are conducting a registerable activity. 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 regulated under this Act. Further the power to investigate would extend to investigating former registered persons in relation to businesses carried on at a time when they were registered, and in investigations in relation to the ownership and control of former registered persons at a time when they were registered.

These powers would be exercised in conjunction with internal policies and procedures for enforcement. Such policies would establish the procedure that would be taken for escalating and referring matters (from supervisors) to L&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 30B amended

13. Section 30B of the principal Act is amended –

- (a) in subsection (1) by deleting the words beginning with “or laid by” and ending with “section 30A”, and substituting “that the Authority is conducting an investigation under section 30A”;
- (b) in subsection (1)(a) by deleting “that that person” and substituting “ a person ”;
- (c) in subsection (2)(a) by deleting “the person mentioned in subsection (1)” and substituting “the person under investigation”.

Commentary: *Like the earlier clause, this clause could make consequential amendments to section 30B in light of the new provisions on investigations (set out in new section 30A).*

Section 30C amended

14. Section 30C of the principal Act is amended by repealing subsection (1)(b) and substituting “(b) under sections 30 and 30A.”

Section 30J amended

15. Section 30J of the principal Act is amended by repealing subsections (6) and (8).

The offence sections are being repealed where it is intended that only a civil penalty would be imposed.

Section 32 amended

16. Section 32 of the principal Act is amended by repealing subsections (7) and (9).

Commentary: *For the purposes of developing the framework for enforcement and publication of decisions, it is necessary to provide for due process (provisions for the making of representations by the effective party, for their consideration by the decision maker and for the giving of reasons for a decision) in relation to the issue of directions. Current subsection (7) is inadequate. It would be repealed; and the new s32B and 32C, 44F to 44H would provide a procedure for notices etc.*

Sections 32B to 32L added

17. The principal Act is amended by adding the following sections after section 32A –

“Procedure for giving directions

32B (1) If the Authority proposes to issue directions under section 32 or 32A, it must give a warning notice to the registered person or, as the case may be, the designated insurer.

(2) If the Authority decides to give directions, it must give a decision notice to the registered person, or as the case may be, the designated insurer.”

Commentary: *this clause makes provision for giving notices: it would require that a warning notice must be given where the Authority concludes that there are grounds that would warrant the issue of directions. The warning notice would be the first step in the process. Proposed section 44F would set out the terms of a warning notice.*

Directions in cases of urgency

32C (1) No warning notice need be given under section 32B 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.

(2) In any such case the Authority may by notice in writing to the person concerned give a direction.

(3) Any such notice shall state the reason for which the Authority has acted and particulars of the rights conferred by subsection (4) and section 44A.

(4) Any person to whom a notice is given under this section of the giving of a direction may within the period of 14 days beginning with the day on which the notice was given make representations to the Authority.

(5) After giving a notice of directions under subsection (2) and taking into account any representations made in accordance with subsection (4) the Authority shall decide whether –

(a) to confirm or rescind its original decision; or

(b) to impose a different direction or to vary the direction in a different manner.

(6) The Authority must within the period of 28 days beginning with the day on which the notice was given under subsection (2) or, where representations have been made under subsection (4), 28 days beginning

with the day on which the representations had been received, give the person concerned a decision notice.”.

Commentary: *this clause makes new provision for giving directions in cases of urgency. In such cases, no warning notice would be given prior to the giving of the direction. But a person to whom a direction has been given in cases of urgency may appeal the direction to the tribunal. Following the giving of such a direction the Authority would be required to issue a notice giving its reasons and providing an opportunity for the person concerned to make representations. The Authority would then be required to give a decision notice.*

PART VIA

Disciplinary Measures

Power to impose civil penalties for breach of requirements

32D (1) Except as provided in sections 14 (3) and 18A, 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 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 under subsection (1) 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.

(4) The power to impose a penalty under this section shall not apply to designated insurers, except where the power is exercised in relation to non-compliance with a direction given under section 30JB or 32A.

Commentary: *This proposed section seeks to introduce new provision for disciplinary measures. It would empower the Authority to impose civil penalties*

for registered persons – and in limited circumstances for designated insurers for failure to comply with any requirement, or prohibitions imposed by this Act, Regulations and so on. 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 filing under sections 18A(4) and 14 (3). In that case, the penalties specified for late filing in sections 18A(4) and 14 (3) 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 must 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 in relation to a breach of a requirement of the Act etc; 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 procedure

32E (1) If the Authority proposes to impose a civil penalty, it must give the registered person a warning notice.

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

Commentary: This clause sets out the procedure for imposing fines. The Authority must give a warning notice first, followed by a decision notice. Proposed sections 44F and 44G make provision for the contents of such notices.

Public censure

32F (1) If the Authority considers that a registered person 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 registered person.

(3) The power to publicly censure shall not apply to [registered persons that are acting in the capacity as] designated insurers.

Public censure procedure

32G (1) If the Authority proposes to publish a statement in respect of a registered person under section 32F, it shall give the registered person a warning notice.

(2) If the Authority decides to publish a statement under section 32F (whether or not in the terms proposed), it shall give the registered person a decision notice.

Commentary: *these clauses 32F and 32G provide 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 insurer or other registered person would be censured by the publication of a statement by the Authority stating that that person has contravened a requirement of the legislation. Before doing so however, the Authority would be required to follow the procedure set out in sections 32F and 32G. 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 90 of the Investment Business Act 2003 and the intention is to roll this out to apply to all sectors.

Prohibition orders

32H (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 registered by the Authority under this Act ('a regulated person').

(2) The Authority may make an order ("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) A registered person must ensure that no function of his, 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 Order.

(7) The Authority must 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) 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 registration or other authority by the Authority under any provision of this Act;

“specified” means specified in the prohibition order.

(9) 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.

Commentary: *The proposed section 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 Insurance Act.*

As this provision is being 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’s policy in relation to amendment or lifting of the ban. The prohibition order will not on the face of it be subject to any qualifications or conditions. This obviates the need for persons 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, underwriting,

actuarial and risk management functions (which are notifiable under section 30JA of the Act.) 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 registered insurer ;*
- a named insurer,*
- any registered insurer of a specified class (e.g. class 3A or class 4 insurer).*

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 we have 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 our 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

insurance companies 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 32K (2) might do so if, for example, it is satisfied that by virtue of the person obtaining appropriate qualification and relevant experience, that person is able to satisfy the criteria for fitness and propriety that he had lacked earlier.

Prohibition Orders: procedures

32I (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 makes provision for a procedure for making prohibition orders. If the Authority proposes to make such an order it must first 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 the appeal tribunal under section 44A.*

Proposed sections 44F and 44G deal with the contents, etc. of warning notices and decision notices.

Applications relating to prohibition orders: procedures

32J (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 makes provision for a procedure for the making of applications to vary or revoke a prohibition order, requiring the Authority to serve appropriate notices. Depending on the action that the Authority takes, it is required to issue a decision notice.*

Determination of applications for variation etc.

32K (1) The Authority may grant an application made under section 32J 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 proposed section permits the Authority to revoke or vary 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

32L (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;

it may make an order restraining him from disposing of, or otherwise dealing with, any assets of his which it is satisfied he 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 proposed section makes provisions for 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 can 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)).*

Section 41 amended

18. Section 41 of the Principal Act is amended by repealing subsections (2) and (3) and substituting the following subsections-

(2) If the Authority proposes to cancel the registration of an insurer under subsection (1)(b) it must give the insurer a warning notice.

(3) If the Authority decides to cancel the registration of an insurer under subsection (1)(b) it must give the insurer a decision notice.

Section 44A amended

19. Section 44A of the principal Act is amended -

(a) by repealing paragraph (b) of subsection (1) and substituting the following paragraphs -

“(b) giving a direction under sections 32, 32A or 32C;

(ba) imposing a civil penalty under section 32D;

(bb) publishing a statement in respect of it pursuant to section 32F (public censure)";

(b) in subsection (2) by adding "or (b)" after the words "subsection (1)(a)" in paragraph (a).

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

"(3A) Any person in respect of whom a prohibition order has been made under section 32H may appeal to the tribunal."

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

Commentary: *This clause would amend the grounds of appeal to the appeals tribunal to allow an appeal against any direction given under section 32, 32A and 32C; against a civil penalty imposed under proposed section 32D; against publication of statements under proposed section 32E on public censure; and against the making of prohibition orders under section 32H.*

Part VIIIB added

20. The principal Act is amended by adding the following Part after Part VIIIA-

"PART VIIIB

NOTICES

Warning notices

44F (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.

(3) The Authority may extend the period specified in the notice.

(4) A warning notice given under section 32 or 32A must specify the proposed terms of the direction.

(5) A warning notice about a proposal to publish a statement under section 32F must set out the terms of the statement.

(6) A warning notice given under section 32I must set out the terms of the prohibition.

Commentary: *this proposed section provides a procedure for the issue of warning notices under sections 32B, 32E, 32H and 32J. A warning notice is the initial step in an enforcement action. It is a ‘minded to’ take action 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 insurer, designated insurer or other registered person to make representations. The Authority could extend this period on application.*

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.

Decision notices

44G (1) A decision notice must —

- (a) be in writing; and
- (b) give the Authority’s reasons for the 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 44A.

(2) A decision notice shall be given within 90 days beginning with the day on which a warning notice under section 44F was given; and if no 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 44H.

(3) A decision notice about the giving of a direction under sections 32, 32A, or 32C must set out the terms of the direction;

(4) A decision notice about the imposition of a civil penalty under section 32D must state the date or dates of payment.

(5) A decision notice about public censure under section 32F 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 32H (2) 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 establishes a procedure for the issue of decision notices under sections 32, 32A, 32C, 32D, 32H and 32I.*

A decision notice would inform 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 action; and would inform the person concerned of his right to appeal to the appeal tribunal.

Subsections (2) to (6) make provision for the contents of decision notices in various cases.

Subsection (8) provides for a different action to be taken if, before the decision is given, the Authority decides to take a different action with the consent of the concerned person. This would apply for example in a case where the Authority decides to issue a direction under S32, but before issuing it, the insurer 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 actions

Notices of discontinuance

44H (1) Subject to section 44G(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

44I (1) Subject to sections 32F, 32H, and 44. the Authority may publish such information about a matter to which a decision notice as it considers appropriate.

(2) The Authority must not publish a decision under subsection (1)-

- (a) before notifying the the person concerned; and
- (b) pending an appeal under section44A.

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.

Section 51 repealed and replaced

21. Section 51 of the principal Act is repealed and replaced by the following-

“Notices

51 (1) Subject to subsection (3), any notice or other document required or authorised by or under this Act to be given to or served on any person may be given to or served on the person in question—

- (a) by delivering it to him;
- (b) by leaving it at his principal place of business; or in the case of service on officers, at the registered office or principal place of business of the company of which he is an officer.
- (c) by sending it to him at that address by facsimile, electronic mail or other similar means which produce a document containing the text of the communication.

(2) Any such notice or document may in the case of a company be given or served—

- (a) by delivering it to the company’s principal place of business or registered office in Bermuda; or
- (b) by sending it by registered post addressed to the company’s principal place of business or registered office in Bermuda.

(3) No notice or document required by this Act to be given or served on a competent authority shall be regarded as given or served until it is received; but such notice or document may be given by facsimile, electronic mail or other similar means which produce a document containing the text of the communication.

(4) In subsection (3) “competent authority” means any national authority empowered by law to supervise insurers and includes the Authority”.

Commentary: *This clause makes new provisions for the giving of notices under this Act.*

Section 55 amended

22. Section 55 of the principal Act is amended—

in subsection (1) by substituting “\$50,000” for “\$5,000” and “\$150,000” for “\$15,000”;

Section 55A added

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

“Civil debt and Civil Penalties

55A (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 32D in relation to the same matters.

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

***Commentary:** This provides a mechanism for the recovery of civil debt 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

24. Schedule 1 (which makes consequential amendments) has 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.*

SCHEDULE 1

(section 19)

1. The following provisions of the principal Act are repealed –
 - (a) section 6A(4)
 - (b) Rule 6B of Insurance (Prudential Standards) (Class 4 and Class 3B) Solvency Requirement Rules 2008
 - (c) section 8(5)
 - (d) section 8A(3)
 - (e) section 22(5)
 - (f) section 30JD
2. Paragraph (1) of the Schedule (Minimum Criteria) is amended 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”.