



The Ministry of Finance and the Bermuda Monetary Authority

CONSULTATION PAPER

**Proposed Amendments to the Exchange Control Act 1972 and
Exchange Control Regulations 1973**

1st February 2018

1. Bermuda has undertaken identification and vetting of beneficial owners of corporate and legal entities for over 70 years. Although this process has been driven by other statutory purposes, including a need to meet exchange control objectives and to identify owners of companies at the time of formation, the outcome has been that Bermuda has developed and maintained a repository of information about beneficial ownership pertaining to legal entities registered in Bermuda.
2. With this experience, Bermuda has developed, and over time refined, transparency policies related to legal persons and arrangements. Bermuda has also made international commitments to implement standards to further enhance transparency.
3. It is in this context that the Ministry of Finance (the Ministry) in consultation with the Bermuda Monetary Authority (the Authority), is recommending that legislative changes be made to the Exchange Control Act 1972 (the Act) and the Exchange Control Regulations 1973 (the Regulations). These proposals must be viewed in conjunction with recent amendments made to the Companies Act 1981 via the Companies and Limited Liability Company (Beneficial Ownership) Amendment Act 2017, with those amendments in keeping with the Bermuda Government's commitments under the Bermuda-UK Exchange of Notes and Technical Protocol of 9th April 2016, and in compliance with current Organisation of Economic Co-operation and Development (OECD) and Financial Action Task Force (FATF) international standards and global initiatives. Such standards and initiatives relate to obtaining and maintaining adequate, accurate and current records, and filing information with a central authority, on beneficial owners of legal entities including those persons with significant control over such entities. These amendments will enable the Authority to secure the information required to meet these standards in a central location.
4. As well, it is proposed to amend the Act to enhance powers of the Exchange Controller (the Controller) to enforce the regulations including introducing new sanctions.
5. Industry is invited to comment on the proposed amendments as set out below and respond by 21st **February 2018**. Comments should be sent to the Bermuda Monetary Authority addressed to policy@bma.bm. Please use the consultation comments summary form provided on the BMA website.

Discussion

6. There has been increased emphasis globally on the accessibility of information on the persons who own and control legal entities formed and registered in a jurisdiction. Bermuda has long been proactive in collecting information on owners and controllers as part of its due diligence process for forming companies and partnerships. This public policy has been managed through the exchange control regime and supplemented by information held by regulated entities subject to AML/ATF regulations. However, to ensure that the jurisdiction's

regime continues to meet expectations, the Government has adopted legislation to require companies and limited liability companies to hold a register of beneficial owners. This register will include information on natural persons:

- who own shares or interests in a legal entity, both voting and non-voting;
- who exercise control over the legal entity by any means;
- where there is no person identified as being in control or owning significant shares or interests, then the persons who otherwise control the entity directly or indirectly; and
- where there is no person who falls under any of these categories then the individuals who are senior managers.

These criteria are the same criteria for carrying out customer due diligence by AML/ATF regulated entities under the Proceeds of Crime (Supervision of Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008.

7. The Authority's vetting process in respect of the proposed beneficial owners of companies, principally performed in the context of its exchange control duties and adapted for partnerships, has enabled it to protect the integrity of Bermuda. Based on the growing international focus on transparency, it is now proposed that further modification be made to the exchange control regime with similar changes expected to the partnership legislation in relation to individuals holding interests in partnerships. Specifically, the Ministry and the Authority are proposing that the changes identified within this paper be made to the Regulations in order to meet new expectations. These changes will be accompanied, as may be necessary, by revisions to the Notice to the Public ("General Permissions") issued on 1st June 2005, by the Authority under the Act.
8. The intention is not to significantly alter the regime, but rather to refine its requirements. Bermuda has used 10% as a permission threshold under the exchange control regime for many years, but it must be noted that this only applied to voting shares (referred to as equity security in the Regulations and associated General Permissions), being issued/transferred to non-resident owners.
9. There will be no change to the current 10% permission threshold applicable to voting shares or interests being issued/transferred to non-residents but the information to be filed with the Controller will be expanded to capture persons who exercise control by other means of the entity and, if necessary, "senior managing officials" where there is no beneficial owner otherwise identified. As well, requirements will be clarified in respect of non-voting shares (referred to as securities, other than equity securities) and interests at the same threshold of 10% or more. At present, there is ambiguity regarding how permissions related to non-voting securities or interests are managed. To address this gap there will be an express condition for General Permissions related to non-voting shares and interests. Again, where there are no beneficial owners identified holding voting shares or non-voting shares at the 10% threshold, there will be a requirement to identify persons who otherwise exercise control by any other means or senior managing officials.

10. The proposed amendments will enhance the exchange control regime by:

- Clarifying the requirements for approvals for transfers and issues of securities relating to the beneficial owners for holders of voting shares;
- Embedding conditions for filing information about beneficial owners as part of General Permissions including where the service provider is a corporate service provider with an unlimited licence;
- expanding the disclosure requirements to include other types of controllers rather than only members with voting rights; and
- monitoring changes in the “ultimate beneficial owners” of persons holding 10% or more, and filing such changes.

11. Annexed hereto, as Appendix 1, is the draft Exchange Control Amendment Regulations 2018 and the Exchange Control Amendment Act 2018, which sets out the proposed amendments to the Regulations.

12. These amendments, together with the amendments to the Companies Act 1981 and Limited Liability Companies Act 2016 and the requirements imposed on corporate service providers to carry out customer due diligence will together provide the legal framework for ensuring that Bermuda meets the international standards for transparency and access to information regarding beneficial owners of legal entities formed in Bermuda. Appendix 2 sets out how the different legislative requirements will be applied. As noted previously, similar changes are intended to apply to partnerships.

BENEFICIAL OWNERSHIP

LEGISLATION	PARTY AFFECTED	DEFINITION OF BENEFICIAL OWNERSHIP	REGULATORY ACTION	THRESHOLDS	ONGOING MONITORING
Exchange Control Regulations	Companies with foreign owner	Definition of Beneficial Ownership follows FATF criteria as set out in section 4 of POCA Regulations. POCA Regulations 2008 with threshold at 10%	Permissions: Provide information on beneficial owners at time of transfer or issue of shares covers voting and non-voting shares approvals required under certain conditions	The threshold is 10%. If the company has no shareholders at 10%, then the controller will need to know persons actually exercising control.	Verify changes to ultimate beneficial owners and file with Controller No approvals required
Companies Act 1981 & Limited Liability Companies 2016	All companies	Companies & LLC's - Definition of beneficial ownership follows FATF criteria as set out in section 4 of POCA regulations with threshold at more than 25%	Ownership Registry: Registry of beneficial owners including owners of voting and non-voting shares, controllers file the information with the BMA	The threshold for the registry is more than 25%. Where no persons holding more than 25% of shares, then registry must identify other persons in "control" or senior management.	Company must verify information on registry is accurate and file changes with the Controller.
POCA Regulations 2008 Application to CSPs	All CSPs	Definition of Beneficial Ownership follows FATF criteria as set out in section 4 of POCA Regulations.	Customer Due Diligence: Identify individuals who own or control the customer. Carry out customer due diligence on beneficial owner of customers, including companies / partnerships for whom the CSP provides services. Demonstrate to the BMA as supervisor relevant CDD is carried out with documentation.	10% or more voting or non-voting interests. If no holders of shares or interests, then persons in control	CSP must carry out ongoing monitoring of the ownership of customers.

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EXCHANGE CONTROL AMENDMENT REGULATIONS 2018

BR / 2018

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The Minister of Finance, in exercise of the powers conferred by section 2 of the Exchange Control Act 1972, makes the following Regulations:

Citation

1 These Regulations, which amend the Exchange Control Regulations 1973 (the “principal Regulations”), may be cited as the Exchange Control Amendment Regulations 2018.

Amends regulation 2

2 The principal Regulations are amended in regulation 2 by inserting in the appropriate alphabetical order the following—

“beneficial owner” has the meaning given in regulation 3A;

“company” means a company to which these Regulations apply;

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“individual” means a natural person;

“minimum required information” has the meaning given in section 98C of the Companies Act 1981;

“relevant legal entity” in relation to a company means—

- (a) any legal entity that is incorporated, formed or registered (including by way of continuation) in Bermuda or elsewhere; and
- (b) any legal arrangement,

which would be a beneficial owner of the company if it were an individual.”.

Inserts new regulation 3A

3 The principal Regulations are amended by inserting after regulation 3 the following—

“Meaning of beneficial owner

3A (1) In these Regulations—

“beneficial owner”—

- (a) means any individual or individuals who own or control 10% or more of the securities, voting rights or interests in the company through direct or indirect ownership thereof;
- (b) if no such individual or individuals referred to in paragraph (a) exist or can be identified, any individual or individuals who, in relation to a company, exercise control by other means;
- (c) if no such individual or individuals referred to in paragraphs (a) and (b) exist or can be identified, the individual who holds the position of senior manager of the company,

and “beneficial ownership” shall be construed accordingly.

(2) In these Regulations—

“control by other means” includes the right to appoint or remove a majority of the board of directors of a company and the exercise of control over a company by any means other than control by ownership of any interest;

“senior manager” means the chief executive, managing or executive director or president of a company or other person holding such senior position in the company by whatever title known.

(3) Securities or voting rights held by an individual or individuals shall be an indication of direct ownership.

(4) Securities or voting rights held—

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- (a) by a relevant legal entity, which is under the control of an individual or individuals; or
- (b) by multiple relevant legal entities, which are under the control of the same individual or individuals,

shall be an indication of indirect ownership by such individual or individuals.”.

Amends regulation 12

4 The principal Regulations are amended in regulation 12 by inserting after paragraph (1) the following—

“(1A) For the avoidance of doubt, a request for permission of the Controller under paragraph (1) shall be made in such form as the Controller may direct and include the minimum required information relating to beneficial owners of the company.”.

Amends regulation 13

5 The principal Regulations are amended in regulation 13 by inserting after paragraph (1) the following—

“(1A) For the avoidance of doubt, a request for permission of the Controller under paragraph (1) shall be made in such form as the Controller may direct and include the minimum required information relating to beneficial owners of the company.”.

Inserts regulation 13B

6 The principal Regulations are amended by inserting after regulation 13A the following—

“Duty to update beneficial ownership information

13B Where there is a change of beneficial ownership of a company resulting in a person becoming a beneficial owner, the company shall in such form as the Controller may direct notify the Controller of the change and file the information relating to the beneficial owner with the Controller as soon as practicable after the company becomes aware of or is notified thereof, but not later than 14 days thereafter.”.

Revokes and replaces regulation 25A

7 The principal Regulations are amended by revoking regulation 25A and substituting the following—

“Company engaging corporate service provider

25A (1) Subject to paragraphs (2) and (3), where a company that has issued or is issuing a security is a company registered under the Companies Act 1981 and has its registered office at the registered office of a corporate service provider

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licensed to hold an unlimited licence under the Corporate Service Provider Business Act 2012 at which the company is required to keep and maintain its register in accordance with section 65 of the Companies Act, that company shall have a general permission of the Controller under regulation 41 for the purposes of regulations 12, 13(1)(a), 14, 15, 17, 19,20 and 23 for the—

- (a) issue or transfer of securities;
- (b) transfer of coupons;
- (c) substitution of securities; and
- (d) nominee holdings of security.

(2) In accordance with regulation 41, the Controller may impose such conditions as he considers appropriate on such general permission.

(3) Where a company—

- (a) issues any security at the time of its registration or formation, continuation in Bermuda or conversion, as the case may be, the company shall in such form as the Controller may direct file with the Controller the minimum required information relating to the beneficial owners in respect of such securities as soon as practicable but not later than 14 days after such issue of securities;
- (b) subsequently issues, or transfers, any security resulting in a change of beneficial owner of the securities or voting rights in the company, the company shall in such form as the Controller may direct notify the Controller of such change and file the minimum required information relating to the beneficial owner as soon as practicable after the company becomes aware of or is notified of such issue or transfer, but not later than 14 days thereafter.

(4) Paragraph (3)(b) shall not apply to transfers where such transfer of security results in a change of beneficial owners of the securities or voting rights in the company, if the beneficial owner becomes a shareholder of the company as a result of such transfer.

(5) Where there is a change in indirect ownership or control of a company resulting in a change of beneficial owners of the securities or voting rights in the company, the company shall notify the Controller of the change and file the information relating to such change with the Controller as soon as practicable after the company becomes aware of or is notified of the change, but not later than 14 days thereafter.

(6) Nothing in this regulation shall be construed as limiting or otherwise restricting the effect of any other general permission granted by the Controller in relation to the company.”

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Amends regulation 42A

8 The principal Regulations are amended in regulation 42A by numbering that provision paragraph (1) and by inserting after paragraph (1) the following—

“(2) Where notification by such person is required pursuant to these Regulations, the person shall notify the Controller (in such form as the Controller may direct) as soon as practicable and not later than 14 days after any such issue or transfer of the securities or transfer of coupons made by the company. ”.

Inserts regulation 46A

9 The principal Regulations are amended by inserting after regulation 46 the following—

“Request for information

46A (1) Notwithstanding regulations 47, 47A and 47B, the Controller may by notice in writing served on any person in respect of whom these Regulations apply require the person—

- (a) to provide the Controller (or such person acting on behalf of the Controller as may be specified in the notice), at such time or times or at such intervals or in respect of such period or periods as may be so specified, with such information as the Controller may reasonably require for the performance of his functions under these Regulations;
- (b) to provide the Controller with a report, in such form as may be specified in the notice, of any matter about which the Controller has required or could require that person to provide information under these Regulations.

(2) A person shall forthwith on receipt of notice under paragraph (1) give written notice to the Controller of any fact or matter of which the person becomes aware which is likely to be of material significance for the discharge, in relation to the company, of the Controller’s functions in relation to beneficial ownership.

(3) The Controller may issue guidance which prescribes the facts or matters which are likely to be of material significance for the discharge of the Controller’s functions in relation to beneficial ownership under these Regulations.”.

Inserts regulations 49A, 49B and 49C

10 The principal Regulations are amended by inserting after regulation 49 the following—

“Power to impose civil penalties

49A (1) The Controller may impose a penalty on a company which fails to comply with any filing or notification requirement of Part IV of these Regulations.

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(2) The maximum amount of the civil penalty that may be imposed under paragraph (1) is such amount not exceeding \$25,000 as the Controller considers appropriate.

(3) For the purposes of paragraph (2), “appropriate” means effective, proportionate and dissuasive.

(4) The Controller shall not impose a penalty where there are reasonable grounds for him to be satisfied that the company took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.

(5) In deciding whether a company has failed to comply with a requirement of the regulations or a notice the Controller shall consider whether the company followed any relevant guidance which was at the time issued and published in the Gazette.

Procedure for imposing civil penalties

49B (1) Where the Controller proposes to impose a penalty he shall give the company notice (a “warning notice”) of—

- (a) his proposal to impose the penalty and the proposed amount;
- (b) the reasons for imposing the penalty; and
- (c) the right to make representations to the Controller within a specified period which may not be less than 28 days.

(2) After considering any representations made by the company, the Controller shall decide, within three months from the end of the period specified in paragraph (1)(c), whether to impose a penalty.

(3) The Controller shall give the company notice (a “decision notice”) of—

- (a) his decision not to impose a penalty; or
- (b) his decision to impose a penalty and—
 - (i) the amount of the penalty;
 - (ii) the reasons for his decision; and
- (c) the right to appeal the decision.

Appeals: penalties

49C (1) Any person aggrieved by a decision of the Controller to issue a civil penalty may appeal to the Supreme Court against that decision and on such an appeal the Court may—

- (a) set aside or affirm the civil penalty in whole or in part; and
- (b) give such directions as the Court thinks fit including, if the Court is satisfied that the civil penalty unfairly affects the protection of the rights of third parties, such directions regarding the rights of

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third parties or persons with a security interest over the relevant interest as the Court considers just.

(2) A decision appealed against under this regulation shall not have effect—

- (a) until the end of the period within which the appeal can be brought; and
- (b) if such an appeal is brought, until it is determined or withdrawn.”.

Amends regulation 50

11 The principal Regulations are amended in regulation 50—

- (a) in paragraph (2), by deleting the words “two thousand dollars” and substituting “\$5,000”;
- (b) in paragraph (3), by deleting the words “ten thousand dollars” and substituting “\$25,000”.

Inserts new regulation 51A

12 The principal Regulations are amended by inserting after regulation 51 the following—

“Savings

51A (1) Nothing in the Exchange Control Amendment Regulations 2018 shall be construed as requiring a company to file in duplicate the minimum required information relating to its beneficial owners, if the company’s updated and current minimum required information relating to such beneficial owners is at the relevant time already filed with the Bermuda Monetary Authority under, or pursuant to, any other applicable statutory provision.

(2) Nothing in the Exchange Control Amendment Regulations 2018 shall be construed as affecting requirements relating to the provision of information (including information relating to beneficial ownership) by a company to the Controller at the time of the company’s application for registration or continuation in Bermuda or conversion under any applicable statutory provision.

(3) For the avoidance of doubt, the company shall otherwise comply with the provisions of these Regulations with respect to filing of updated and current minimum required information relating to its beneficial owners with the Controller.”.

Transitional

13 (1) In this regulation—

“commencement date” means the date of the coming into operation of the Exchange Control Amendment Act 2018;

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“company” means a company to which the Exchange Control Regulations 1973 applies;

“existing” means a company which exists on the commencement date.

(2) An existing company shall update or verify as the case may be (in such form as the Controller may direct) the minimum required information relating to beneficial owners thereof within the period of six months from the commencement date.

(3) The Minister (as that term is defined in section 1 of the Exchange Control Act 1972) may by order subject to the negative resolution procedure extend the period set forth in paragraph (2).

(4) Regulation 49A shall apply with any necessary modifications for the purposes of this regulation.

(5) Any application for permission made to the Controller in accordance with the Exchange Control Regulations 1973 and pending before the Controller immediately before the commencement date may be continued and determined in accordance with regulation 3A, depending on the status of each case.

Commencement

14 These Regulations shall come into operation on the same day as the Exchange Control Amendment Act 2018.

Made this day of 2018

Minister of Finance

A BILL

entitled

EXCHANGE CONTROL AMENDMENT ACT 2018

WHEREAS it is expedient to amend the Exchange Control Act 1972;

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 Exchange Control Amendment Act 2018.

Amends section 1

2 The Exchange Control Act 1972 is amended in section 1 by inserting in the appropriate alphabetical order the following—

“beneficial owner” shall have such meaning as may be prescribed;

“prescribed” means prescribed by regulations under section 2.”.

Amends section 2

3 The Exchange Control Act 1972 is amended in section 2—

(a) in subsection (1)—

(i) in paragraph (n), by inserting after the word “directions” the words “or notices”;

(ii) by inserting after paragraph (n) the following—

“(na) respecting the Controller's power to obtain information from any person to which this Act applies including, but not limited to, information relating to beneficial owners;

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- (nb) prescribing civil penalties, the procedure for the imposition thereof and for appeals;
- (nc) providing for savings and transitional matters;”;
- (b) in subsection (2), by deleting the word “and” at the end of paragraph (b) and by inserting after paragraph (b) the following—
 - “(ba) that a contravention or breach thereof shall be subject to the imposition of such civil penalty not exceeding \$25,000 as may be prescribed;”.

Commencement

4 This Act shall come into operation on such day as the Minister of Finance may by notice in the Gazette appoint.

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EXCHANGE CONTROL AMENDMENT BILL 2018

EXPLANATORY MEMORANDUM

This Bill seeks to amend the Exchange Control Act 1972 the “Act” in relation to the Controller of Foreign Exchange’s power to obtain information from persons, the imposition of civil penalties and connected purposes.

Clause 1 provides the title of the Act.

Clause 2 amends section 1 of the Act to insert new definitions.

Clause 3 amends section 2 of the Act to extend the regulation-making powers to include additional powers for the Controller of Foreign Exchange to obtain information from any person to which this Act applies and to enable additional provisions to be made, including provision for civil penalties.

Clause 4 provides for the commencement of the Act.

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