



## BERMUDA INVESTMENT BUSINESS ACT – RECENT DEVELOPMENTS

March 2023

The Investment Business Act 2003 was materially amended by the Investment Business Amendment Act 2022 and these amendments came into effect on 27 July 2022 (collectively, the **IBA**).

The IBA, as revised, introduced some important changes to the investment business framework in Bermuda to better reflect the increasingly decentralised and geographically mobile operating model of investment providers. The aim of the revisions to the IBA regime is to enable the Bermuda Monetary Authority (**BMA**) to enhance its monitoring of the regulatory perimeter by streamlining the regulatory and supervisory framework of investment business and the revisions are part of the ongoing efforts to maintain Bermuda's reputation as a leading international financial services centre.

A transition period of 12 months was granted to enable existing investment businesses to either register or apply for a licence under the IBA unless (i) the activities being carried out are excluded pursuant to Part 3 of the First Schedule of the IBA (**Excluded Activities**) or (ii) the entity carrying out the relevant activities falls within the category of Non-Registrable Person (see below). This transition period expires on **28 July 2023** but applications must be submitted no later than **26 July 2023**.

### Principal Change

The key change under the IBA is that it removes the former licensing criteria of maintaining a place of business in Bermuda as previously only entities which carried on business investment from a physical place of business in Bermuda were *in scope* of the licensing regime.

The IBA now regulates the carrying on of investment business using the following threshold tests (**Threshold Tests**):

- a) by a Bermuda entity<sup>1</sup> whether in or from Bermuda or overseas; or
- b) by an overseas entity in or from Bermuda.

A schematic of the new IBA investment business regime is set out in **Annexure A**.

There is no definition of what '*in or from Bermuda*' means in the IBA and previous exemptions will no longer apply following the expiration of the transition period.

**Consequently, any investment provider whose investment activities were previously *out of scope* or otherwise only subject to exemption requirements, will need to consider whether their current investment activities will now fall within either of the two Threshold Tests.**

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<sup>1</sup> An entity which is formed or incorporated in Bermuda.

If the current investment activities do fall within either Threshold Test, then an investment provider will need to be either:

- (i) fully licensed under the IBA; or
- (ii) registered as a Class A Registered Person (see below); or
- (iii) registered as a Class B Registered Person (see below).

It is an offence to carry on investment business in or from Bermuda beyond the end of the transition period in breach of the requirements to be licensed or registered under the IBA and therefore existing investment providers must make an application by no later than 26 July 2023. Failure to file by the deadline could lead to significant fines and/or imprisonment.

The following are set out in **Annexure B** for ease of reference:

- definition of 'investment business' for the purposes of the IBA
- definition of 'investment activities' for the purposes of the IBA
- the types of instruments which fall within the definition of 'investments'

#### Other Changes

- **New category of Class A Registered Person:** - This new registration category is an alternative to a full licence however it is only available for an entity which is formed or incorporated in Bermuda (i.e. Bermuda entity) and carries on investment business outside of Bermuda (i.e. it does not maintain a place of business in Bermuda<sup>2</sup>) but is licensed, authorised or registered by an overseas 'recognised regulator'<sup>3</sup>. Otherwise the IBA licence requirement applies.
- **New Class B Registered Person:** - This replaces the former categories of persons who were eligible for an exemption under paragraphs 1 to 3 (inclusive) of the former Investment Business (Exemptions) Order 2004. The list of persons to whom the Class B Registered Person applies is now set out in Investment Business (Class B Registered Persons) Order 2022 and does not make any material changes to the persons who were previously 'exempt' (for example providing services privately to 20 or fewer persons or only to certain prescribed classes of persons, such as high-net worth investors, institutional investors, or investment funds).
- **New category of Non-Registrable Persons (NRPs):** - NRPs are entities which are licensed, registered, or authorised by the BMA under other regimes (such as investment funds) or do not need to be regulated due to their status as Bermuda Government or quasi-Government authorities or public bodies. The list of NRPs is set out in Investment Business (Non-Registrable Persons) Order 2022.

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<sup>2</sup> Section 13(4) of the IBA defines 'maintains a place of business' as:

- a) in the case of a sole trader, if that person carries on investment business from premises it occupies in Bermuda for that purpose; and
- b) in any other case, if it carries on investment business from premises it occupies in Bermuda for that purpose, at which it employs staff and pays salaries and other expenses in connection with that business.

<sup>3</sup> Is a regulatory authority recognised by the BMA to be empowered by law to supervise entities conducting investment business in a country or territory outside of Bermuda, which imposes standards equivalent to those established by, or under the IBA or any other statute on persons conducting investment business in Bermuda. It is expected that the BMA will recognise other competent authorities which are ordinary members of the International Organisation of Securities Commissions.

A new category of NRPs are persons who are licensed under the Digital Asset Business Act 2018 (**DABA**) to carry on digital asset business where such persons provide investment services ancillary to the digital asset business for which those persons are licensed.

- **New Investment [Activities][Business] Sandbox Licence:** - This licence will permit licensees to carry on one or more investment activities in a 'test' manner and encourages the innovation of investment business.
- **Other New Investment Activity:** - A new investment activity of the '*Promotion of Investments to the Public*' has been introduced.
- **Convergences with other licensed activities in Bermuda:** - Convergences between the IBA and DABA have been streamlined (as noted above) and insurance marketplace providers registered under the Insurance Act 1978 who arrange deals in investments in connection with their insurance business are not captured within the definition of investment activities.
- **Reporting:** - Reporting requirements for entities which are in *in scope* of the IBA have been enhanced and new rule making powers for the BMA have been introduced.

#### Excluded Activities

The list of Excluded Activities is set out in Part 3 of the First Schedule to the IBA and includes investment activities by groups, firms, joint enterprises, employee share schemes, trustees, and personal representatives.

#### Licensed or Registered

Persons wishing to be licensed or subject to this licensing requirement under the revised IBA will apply for a standard licence to carry on one or more investment activities which may be issued subject to such limitations as may be imposed by the BMA. The grant of a test licence will be determined using the BMA's General Regulatory Sandbox and Innovation Hub Application and Approval Guidelines.

Registration as a Class A or Class B Registered Person will involve the making of an application to the BMA to be registered in the appropriate category and will involve compliance with the applicable regulatory requirements of that category and certain ongoing reporting. In the case of Class B Registered Persons given the nature of their clientele it is expected that these requirements will remain proportional and mainly comprise submission of an annual return and confirmation of compliance with minimum criteria. It is also expected that the BMA will be flexible in allowing for modification or disapplication of certain aspects of the regulatory framework in instances where the BMA deems it is appropriate, including those related to holding client money.

The minimum criteria for licensing and registration are (*inter alia*):

- Controllers/officers are fit and proper persons.
- Investment providers to observe proper corporate governance policies & processes.
- Business to be conducted in a prudent manner.
- Full cooperation where there is consolidated supervision.
- investment providers must demonstrate integrity and skill.

### Mind and Management in Bermuda

Each licensed person must maintain a place of business in Bermuda as its principal place of business.

In the case of a Class A Registered Person it is recognised that it may not have the necessary mind and management in Bermuda and it is therefore required to appoint an individual in Bermuda to serve as its point of contact. That person is required to maintain an office in Bermuda and there are a number of obligations under the IBA which include notifying the BMA of various material changes.

In the case of a Class B Registered Person, it has a similar requirement to licensed persons regarding a principal place of business but this will be determined on a proportional basis.

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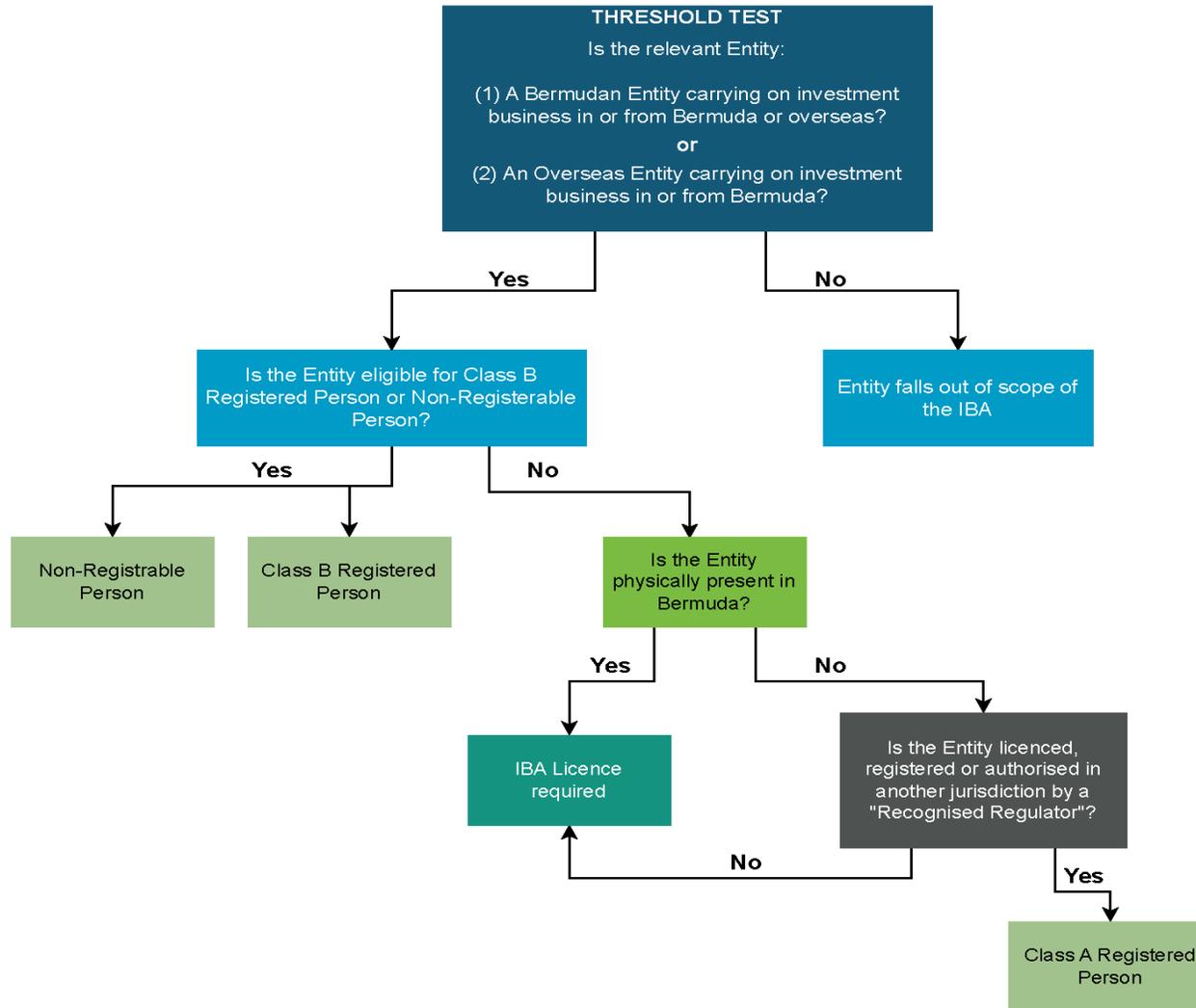
If you have any queries on the revised IBA regime and its applicability, then please do not hesitate to contact the BeesMont team members below who are able to assist with your queries or your usual contact at BeesMont.

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# Annexure A

## Investment Business Act Regime Flow Chart – March 2023



## **Annexure B**

### **Certain IBA Definitions**

- Investment business – Section 3(1)(b) of IBA

Engaging in one or more investment activities by way of business

- Investment activities – Part 2 of First Schedule of IBA

There are six investment activities covered by the IBA:

- a) Dealing in Investments - Buying, selling, subscribing for, or underwriting, or offering or agreeing to do so, either as principal or agent.
- b) Arranging Deals in Investments - Making or offering, or agreeing to make:
  - (i) arrangements with a view to another person buying, selling, subscribing for or underwriting a particular investment, being arrangements, which bring about or would bring about the transaction in question; or
  - (ii) arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for, or underwriting investments.
- c) Managing Investments - Managing or offering, or agreeing to manage, assets belonging to another person where those assets consist of or include investments.
- d) Investment Advice - Giving or offering, or agreeing to give, to persons in their capacity as clients or potential clients, advice on the merits of their purchasing, selling, subscribing for or underwriting an investment, or exercising any right conferred by an investment to acquire, dispose of, underwrite or convert an investment.
- e) Safeguarding and Administering Investments – safeguarding and administering or arranging for the safeguarding and administration of assets belonging to another where:
  - i) those assets consist of or include investments falling within any of paragraphs 1 to 8 of Part 1 of the First Schedule to the Act; or
  - ii) the arrangements for their safeguarding and administration are such that those assets may consist of or include investments, and the arrangements have at any time been held out as being arrangements under which investments would be safeguarded and administered.
- f) Promoting of Investments to the Public – promotion to members of the public, including:
  - i) advertising or agreeing to advertise material or information which promotes an investment to members of the public;
  - ii) Issuing or agreeing to issue a prospectus, application for or proposal form in relation to an investment to members of the public; and
  - ii) distributing, circulating, or agreeing to distribute, circulate or make available, material relating to an investment to members of the public.

NB: For the purposes of determining whether an investment activity (such as dealing in or promoting investments) is being conducted '*continuously*' it is intended to differentiate instances in which an entity is in the business of conducting the activity generally, as opposed to doing so in a manner which may be considered one-off or exceptional. The BMA recognises this may require a judgement in assessing whether this activity is being conducted continuously and in doing so will take several factors into consideration, such as the nature of the business, the scale of the activity and the length of the period over which it is conducted.

- Investments – Part 1 of First Schedule of the IBA

There are eleven types of instruments falling under the IBA being:

- Debentures
- Instruments giving entitlement to investments
- Units in investment funds
- Certificates representing investments
- Options
- Futures
- Interests in a partnership
- Contracts for differences
- Long-term business
- Rights and interests in investments

NB: A digital asset derivative is not an “investment” and persons engaging in any investment activity under Part 2 with digital asset derivatives, are required to be licensed under the DABA to carry on such business, unless otherwise eligible for exemption from that regime.