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ASW 2012/2013

Corporate Round-Up





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Important Disclaimer

This publication is only intended to provide a brief overview of some legal issues in Bermuda. It is not intended to be a substitute for legal advice. Please contact Attride-Stirling & Woloniecki (“ASW”) if you require specific advice on any matters raised herein.

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Changes to Corporate Services Provider Regulation

2013 will witness a major shift in the role that corporate services providers (“CSPs”) currently perform within Bermuda’s international business community. The Corporate Service Provider Business Act 2012 (the “CSP Act”) came into effect January 1, 2013. In the context of company incorporation and partnership formation procedures, the CSP Act provides the framework for the transfer of vital Anti-Money Laundering (“AML”) and Anti-Terrorist Financing (“ATF”) functions currently performed by the Bermuda Monetary Authority (the “BMA”) to CSPs, hence the need to license and supervise CSPs.

Currently, the BMA receives details of proposed beneficial owners and undertakes pre-vetting on each Bermuda company formation and partnership registration application. Also, there is a requirement to obtain from the BMA Controller of Foreign Exchange permission for issuances and transfers and transfers of shares. The CSP Act will effectively remove these two BMA controls, which were perceived by onshore lawyers and the international business community at large as ‘Bermuda specific’ regulatory barriers. In doing so, the CSP Act brings the Bermuda incorporation regime in line with those of other leading offshore jurisdictions.

It should be noted, however, that the removal of these requirements to obtain government consent does not alter the rigorous vetting obligations that the Bermuda AML/ATF regime imposes. It simply transfers obligations from the government to the licensed CSPs. While most CSPs currently conduct thorough Know Your Client (“KYC”) checks on every prospective client, there will be an increased focus on the role of CSPs as gatekeepers when forming entities. In practice, however, CSPs will no longer have to forward personal declarations and KYC information to the BMA for onward vetting.

The Corporate Service Provider (Beneficial Owner) Regulations 2012 (the “CSP Regulations”) will clearly define the KYC obligations of CSPs. The consultation period in respect of the CSP Regulations closed on February 4, 2013. CSPs, including ASW’s affiliated corporate service provider, Compass Administration Services Ltd. (“CASL”), will need to apply for a licence under the CSP Act during the course of this year.

Registrar of Companies Goes Online

The Registrar of Companies (the “RoC”) is a Bermuda government department, which falls under the Ministry of Business Development and Tourism. It has the day to day responsibility of the administration of company incorporations, partnership registrations, company and partnership name reservations, company and partnership fees processing, as well as matters concerning insolvency and real estate. Although part of the incorporation process has been channelled through a BMA online portal for some years now, the RoC component of the incorporation process will soon have its own online registration system.

It is expected that the new RoC online process will add accuracy and speed to an already swift company incorporation process in Bermuda. Same day registrations are already a reality and with the online system, it will be possible to guarantee a date certain for any given incorporation.

ASW has discussed the merits of the new online portal with the RoC and through its corporate administration arm, CASL, will be testing the system during its initial pre-launch phase. This system places Bermuda at the forefront of the incorporation procedures.

Prospectuses and Public Offers in Bermuda

Proposals for reform of Part III of the Bermuda Companies Act 1981, as amended (the “Companies Act”) were tabled during the 2012 legislative year. It is expected that these amendments will be passed into law during the course of 2013.

Under the current prospectus regime, any company that offers shares to the public must publish and register a prospectus with the RoC pursuant to Part III of the Companies Act, regardless of whether or not the company has published a prospectus in an appointed jurisdiction. With dual-listings becoming increasingly popular, it is perceived that registration of a prospectus under the Companies Act, and the obligations placed on the directors of issuing companies under Part III of the Companies Act, are too onerous and duplicative in circumstances where the company has already undergone a strenuous verification exercise for the listing of its securities in an appointed stock exchange (i.e. the New York Stock Exchange, the London Stock Exchange, the Singapore Stock Exchange, etc.). The proposals for reform will amend Part III of the Companies Act to include exemptions from registration of a prospectus in Bermuda where such prospectus has already been published in an appointed jurisdiction.

Changes to BMA Disclosure Requirements

As part of the company and partnership formation process and in connection with ongoing transactions (i.e. the issue and transfer of voting rights and interests), the BMA must approve the registered and beneficial ownership of an entity, unless such vetting is undertaken by licensed CSPs (as discussed above). Effective February 18, 2013, the BMA changed the exchange control disclosure requirements for company and partnership formations and ongoing transactions.

Currently, all entities must submit to the BMA (or a licensed CSP) a personal declaration form (and supporting information) for each of the beneficial owners of the partnership or company who own 5% or more of voting interests or rights. In response to recent revisions to the international standards for identifying and disclosing information on beneficial owners, the BMA has changed the disclosure threshold from the current 5% and will now only require a personal declaration form (and supporting information) on beneficial owners holding 10% or more of voting interests or rights. We note, however, that personal declaration forms will still be required for each director and officer of a Bermuda company as part of the corporate administration KYC due diligence process. These changes to the disclosure requirements keep Bermuda aligned with international standards while maintaining the integrity of the vetting process for Bermuda partnerships and companies.

Future Legislative Change

Certain changes are being proposed to Bermuda’s partnership legislation, which essentially will bring the existing partnership legislation in line with Bermuda’s company legislation so as to permit partnerships to be statutorily continued into and discontinued from Bermuda. Additionally, proposals are being made that there no longer be a requirement for BMA approval for a change of general partner where the successor general partner is affiliated with the outgoing general partner. The relevance of the concept of “authorised share capital”, a reduction to Bermuda’s annual government fees and streamlining of the forms promulgated under the Companies Act are also being considered.

Funds Developments

Bermuda has been host to a growing fund industry for many years. The jurisdiction is a world-class fund administration centre and even where funds are not incorporated in Bermuda, they are frequently managed here. Currently, Bermuda has over 10,000 administered funds and 872 Bermuda-licensed funds (1,353 portfolios) with total net asset value at US\$160 billion. A number of Bermuda's funds are listed on stock exchanges around the world and they benefit from the reputational advantage enjoyed by Bermuda. Bermuda is a great place to incorporate a fund – it is competitive on pricing and it is now possible to incorporate a fund prior to applying for a licence under the Bermuda Investment Funds Act 2006 (the “Investment Funds Act”). Bermuda does not have any requirement for a local audit sign-off.

In 2012, an amendment was made to the Investment Funds Act creating a new class of investment fund, or a “Specified Jurisdiction Fund”. Such amendment permits the Ministry of Business Development and Tourism (the “Ministry”) in co-operation with industry and the BMA, to develop and issue orders recognizing the regulatory requirements of foreign financial markets in which securities of a fund domiciled in Bermuda may be marketed. By obtaining such an order, promoters, distributors and fund sponsors who use Bermuda domiciled funds may tailor their products to fit the regulatory requirements of their target markets. Using this authority, the Ministry issued its first order on June 8, 2012, namely the Investment Funds (Specified Jurisdiction Fund) (Japan) Order 2012 (the “Order”) and the accompanying Investment Funds (Specified Jurisdiction Fund) Japan Rules 2012 (the “Rules”). The Order and the Rules permit funds domiciled in Bermuda established pursuant to the Order to be marketed in Japan and it is intended that the Order and the Rules will clear up any existing uncertainty and provide Japanese distributors and promoters with additional comfort when offering securities in Japan.

ASW has information available on the process for setting up a fund in Bermuda available upon request.

Tax Information Exchange Agreements

A Tax Information Exchange Agreement (or a “TIEA”) is a bilateral information exchange agreement based on the model prepared by the Global Forum Working Group on Effective Exchange of Information of the Organisation for Economic Co-operation and Development (“OECD”).

The OECD, inter alia, promotes international co-operation in tax matters through exchange of information to address harmful tax practices. In June 2009, Bermuda was the first offshore jurisdiction to achieve ‘white list status’ with the OECD on the basis that it had successfully expanded its exchange of information network above the 11 TIEA threshold.

Pursuant to a TIEA, two non-treaty countries (i.e. countries that are not parties to a tax treaty) agree to exchange tax information relevant to the enforcement and administration of domestic tax laws in each signatory country. TIEAs contain provisions to protect the confidentiality of information. Specifically, information protected by client-attorney privilege cannot be disclosed and requests must relate to relevant tax investigations. To date, Bermuda has signed TIEAs with 35 countries.

In 2012, Bermuda signed TIEAs with seven countries including Singapore, Italy and Brazil. These recently signed TIEAs establish a modern and proven regime for tax dialogue between Bermuda and each of these jurisdictions and confirm Bermuda's commitment to a strong TIEA network. Bermuda companies have long been active in significant international transactions involving businesses and financial institutions from each of these jurisdictions. Bermuda is now increasingly attractive as a friendly domicile for multinational business activity.

Special Purpose Insurers

Due to the growth in special purpose transactions and securitizations, the Bermuda Insurance Act 1978 (the “Insurance Act”) was amended in 2008 to create a new class of insurer: the special purpose insurer (an “SPI”). SPIs continue to be a key area of growth in Bermuda and in 2012 a total of 27 new SPIs were registered by the BMA. Compared with other jurisdictions, SPIs in Bermuda are cost effective and tax efficient and are based on the principles of English common law, where the rights of all parties are clearly understood, recognised and constantly upheld. Recognizing the importance of the SPI structure, the BMA has recently reduced the registration fee for an SPI from BD\$11,600 to BD\$6,000.

Generally (although the BMA will consider exceptions), an SPI is established for the purpose of entering into a single insurance contract. In order to fund its obligations under the contract, an SPI will issue some form of debt to investors (i.e. notes) in an equal amount to the SPI’s maximum liability under the insurance contract. The notes will be limited recourse notes and provide that the SPI’s obligation to pay interest and principal to the note holders diminishes (and is subordinate to) an amount equal to the amount the SPI pays under the insurance contract. The main features of an SPI are:

- An SPI will only be permitted to write special purpose business (defined in the Insurance Act as insurance business under which an insurer fully funds its liabilities to the persons insured through a debt issuance where the repayment rights of the providers of such debt are subordinated to the rights of the person insured or some other financing mechanism approved by the BMA or through cash or time deposits);
- The minimum paid-up share capital only needs to be US\$1.00;
- An SPI must maintain sufficient assets to meet its insurance obligations given the size, business mix, complexity and risk-profile of the SPI; and
- The SPI will be restricted from entering into any other business agreements except those which are related to its special purpose business.

ASW has a detailed brochure with the process for setting up an SPI available upon request.

Solvency II Equivalence – An Update

Bermuda was in the first wave of applicants seeking equivalence with Europe’s Solvency II Directive and Solvency II continues to be a driving force for change to insurance regulation in Bermuda.

What is Solvency II?

Solvency II is a fundamental review of the European Union (the “EU”)’s capital adequacy regime, which aims to provide revised capital requirements and risk management standards for insurance and reinsurance providers in the EU with the paramount objective of providing adequate protection of policy holders and beneficiaries. Solvency II has a three pillared approach consisting of quantitative requirements (i.e. the amount of capital), governance and risk management requirements (i.e. internal review of controls) and disclosure and transparency requirements (i.e. education of stakeholders).

Timing of Implementation in Europe

Solvency II was intended to come into effect in Europe in 2012. Concerns over the preparations of some EU member states and the European insurance industry have delayed implementation until January 2014. Recent comments by the European Insurance and Occupational Pensions Authority (“EIOPA”) and the European Commission (the “EC”) indicate that the EU is committed to moving forward with Solvency II and, although the January 2014 implementation date may be pushed back, a definitive timetable will be agreed with the possibility of earlier implementation of some Solvency II elements.

Bermuda's Progress Towards Solvency II Equivalence

The BMA has embraced the principles of Solvency II and embarked on a multi-year regulatory change program seeking equivalence as a "third country". This last year has seen the BMA progress deliberately to address the advice provided in October 2011 by EIOPA to the EC on Bermuda's pursuit of Solvency II equivalence (the "EIOPA Report").

The EIOPA Report was generally supportive of Bermuda's progress with its insurance regulation enhancements and confirmed that the segmented approach proposed by the BMA will meet Solvency II equivalence, subject to certain qualifications. In its business plan for 2013, the BMA confirms that Bermuda will not apply any Solvency II-type regime to the captive sector. Pursuant to the segmented approach, Solvency II equivalence would apply to commercial insurers in Bermuda (Class 3A, 3B, 4, C, D, and E insurers) and captive insurers (Class 1, 2, 3, A and B insurers) would be exempt and would continue to be regulated by the existing system. The BMA has indicated that captives wishing to opt into Solvency II equivalence may apply for reclassification of their existing licence.

Qualifications in the EIOPA Report are largely covered off by regulation which is now in place or is to be phased in by the BMA over the next few years (i.e. Insurance Code of Conduct, Prudential Standards (Enhanced Capital Requirements ("ECR")) and Group Supervision Rules). Due to the delays of Solvency II implementation in Europe, the BMA has announced that it will delay the legal enforceability of the group ECR until a date to be determined by the BMA in consultation with industry and the ECR and the eligible capital rules for the long-term insurers until January 2014. Further the concern in the EIOPA Report that there is no mandatory division in Bermuda of insurance and non-insurance businesses into separate companies was addressed by amendments to the Insurance Act 1978 effective January 1, 2013.

A few further concerns will need to be addressed by the BMA prior to Solvency II equivalence being granted, including that there is no legal requirement in Bermuda for an insurer to have its head office and registered office in the same country, and the BMA will also need to make progress on its valuation standards. The BMA has published consultation papers for industry input in each of these areas.

Opportunities from Solvency II Equivalence

Solvency II equivalence is by no means assured, but when the challenges surrounding compliance and obtaining "third country" status are overcome, commercial insurers domiciled in Bermuda may see a competitive advantage over other non-EU insurance company domiciles that have opted not to take up Solvency II, such as the Cayman Islands and Guernsey. Specifically, Bermuda-domiciled commercial insurers may write business within the EU without additional regulatory hurdles (i.e. heightened collateral requirements and additional capital) and have an enhanced ability to move funds in and out of the EU. Bermuda may also see a competitive advantage as a captive formation jurisdiction over certain EU jurisdictions, which could see their captives subject to full compliance with Solvency II. Embracing Solvency II but limiting its application to commercial insurers bolsters Bermuda's reputation as a top tier offshore domicile. Further, achieving Solvency II equivalence will support Bermuda's position as a reputable, forward-looking jurisdiction which strives to strike the proper balance of protecting insurance policy holders and supporting its captive and commercial insurance market.

About ASW and CASL

ASW is a leading, specialist corporate and commercial law firm based in Bermuda. Our barristers and attorneys bring many years of experience in both Bermuda and a number of foreign jurisdictions and a wealth of expertise across a spectrum of specialised legal areas. We pride ourselves on the first class work we do for our clients both locally and internationally.

Key members of ASW's corporate team are as follows:



Neil Horner, Head of Corporate

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Neil Horner is Head of Corporate at ASW. He joined ASW in March 2003. Prior to joining ASW he worked in leading law firms in London and New York (Neil is qualified in both jurisdictions) and in Frankfurt. He was called to the Bermuda Bar in 2004. Neil holds two first class honours degrees from Cambridge and an LLM from the University of Chicago Law School. Neil specializes in corporate, (re) insurance, funds and commercial law with extensive experience working on large commercial and corporate finance transactions with particular emphasis on the (re)insurance and financial services sectors. He was heavily involved in advising investors participating in the Class of 2005 start-ups and also recently acted on the acquisition by a large US private corporation of an NYSE-listed corporation. Neil has written extensively and contributed the chapters on Bermuda Insurance regulation and segregated account companies to the 2nd edition of O'Neill & Woloniecki's "The Law of Reinsurance".



Federico Candiolo, Counsel

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Federico Candiolo joined ASW in December 2008 as corporate counsel. Prior to joining ASW, Federico practiced for two years in the corporate commercial department of one of the leading firms in the Cayman Islands, focusing on corporate finance, capital markets and investment funds work. During the preceding five years, he was at a large commercial firm in London where he worked on numerous banking and corporate finance transactions with significant experience in acquisition finance and property finance. He has experience in all aspects of offshore finance, investment funds, capital markets, asset finance and corporate reorganizations. Before qualifying as a solicitor in England and Wales and in the Cayman Islands as an attorney-at-law, Federico was admitted to the bar of the city of Buenos Aires, Argentina. Federico has particular experience in banking and corporate finance, investment funds, asset finance, insurance regulatory work and captive formations.



Kim Willey, Counsel

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Kim Willey joined ASW in 2011 as corporate counsel. Prior to joining ASW, Kim was a member of the corporate law group in the Vancouver office of the leading Canadian law firm, Fraser Milner Casgrain LLP. While at FMC, Kim was a senior associate practicing in the areas of corporate and securities law with an emphasis on drafting commercial agreements, corporate finance and mergers and acquisitions. Kim also regularly advised public issuers on general corporate and securities law matters including Canadian stock exchange listings, continuous disclosure obligations and other regulatory compliance issues. Kim's transactional experience includes domestic and cross-border public and private corporate finance transactions representing issuers and underwriters as well as merger and acquisitions transactions. Kim has particular experience in offshore corporate structuring and transactions and insurance regulatory work and captive formations.



Bala Nadarajah, Special Legal Consultant

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Bala Nadarajah joined ASW in October 2002, having previously worked at another Bermuda law firm. Prior to that he worked with the Attorney General's Chambers (Bermuda), was legal adviser to Bermuda's Ministry of Finance, Registrar of Companies and Insurance, Bermuda Monetary Authority, and Insurance Advisory Committee from 1979 to 1986 during which period he assisted in drafting Bermuda's insurance regulations and in the consolidation of the Companies Act 1981. From 1986 to 1993, he was "Of Counsel" to two Washington, DC law firms, advising Bermuda's Ministry of Finance and captive insurance, insurance, reinsurance and other corporations involved in international commercial transactions.

In addition, an associate specialising in mergers and acquisitions, corporate finance and private equity and venture capital from a leading UK law firm, will be joining ASW in spring 2013. This associate also has experience of advising clients on the corporate aspects of insolvency and restructuring matters and recently completed a secondment to the Global Restructuring Group of the Royal Bank of Scotland Plc.

ASW works closely with its affiliated corporate services provider, Compass Administrative Services Limited (CASL) to provide a comprehensive range of administration services to Bermuda's exempted and local companies (including insurance, reinsurance, segregated accounts and holding companies), exempted and local partnerships. CASL employs chartered secretaries and other experienced professional administrators to provide efficient, practical and quality service to its clients. Key members of CASL's team are as follows:



Christiane Kenny-Post, Consultant

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Christiane Kenny-Post joined CASL in 2002. She specializes in the corporate administration of Bermuda captive insurance, reinsurance and segregated accounts companies and has extensive knowledge and experience in acting as company secretary and providing advice and guidance to international clients and their advisors on relevant corporate secretarial practices and procedures. She holds an Honours Bachelor of Commerce in Business Administration from the University of Windsor, Ontario, Canada and her Associate of Chartered Secretaries and Administrators (Chartered Secretary designation). She is a member of the Institute of Chartered Secretaries and Administrators (Canada) and the Canadian Society of Corporate Secretaries.



Christina Swan, Senior Corporate Administrator

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Christina Swan has extensive experience in corporate governance and board administration, including the management of corporate and securities filing requirements internationally. Prior to joining CASL, Christina was a Corporate Secretary and compliance professional providing corporate secretarial and securities compliance services for a number of private and publicly traded companies in various industries. Christina is a graduate of the Capilano University Paralegal Diploma Program (1995) and holds an associate degree in Criminology. In addition, she spent nine years as a paralegal, half of which was with a large well-known Canadian national law firm in the area of corporate securities. She is a member of the Canadian Society of Corporate Secretaries (former Provincial Chapter Coordinator) and an affiliate member of the Institute of Chartered Secretaries and Administrators (Canada) – Bermuda branch.



Camilla Hall, Consultant

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Camilla has significant experience in the incorporation and ongoing administration of exempt insurance and reinsurance companies and professional services firms in Bermuda. Camilla ensures her clients meet required statutory and regulatory standards of corporate governance in Bermuda which includes the maintenance of statutory books including minutes of board and shareholder meetings, register of members, register of directors and officers, attending to share transfers and issuances, monitoring of changes to relevant legislation and the regulatory environment and liaising with associated service providers and regulatory authorities in Bermuda. Camilla holds a BA Honours English Language and Literature from the University of Leeds (2003) and a Bermuda Corporate Secretarial Practice I & II with grades of distinction. She is a graduate member of The Institute of Chartered Secretaries and Administrators, UK and a member of The Institute of Chartered Secretaries and Administrators (Canada) - Bermuda Branch.



Allison Forte, Senior Corporate Administrator

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Allison is a Chartered Secretary by profession and has over seventeen years of extensive experience as a corporate secretary in multiple jurisdictions. She specialises in the determination and overall direction of corporate administration of international and local companies in Bermuda by ensuring that statutory, regulatory and legal obligations under corporate legislation are within the guidelines established by the companies and the board of directors. Allison also ensures that companies are in compliance with Bermuda law and similar governing and regulatory bodies. Prior to joining CASL, Allison worked as a Corporate Administrator for a large offshore law firm in Bermuda, a Corporate Administrator for a top tier accounting firm in Barbados and as a Corporate Secretary for an offshore bank in Barbados. Allison holds a BSc in Management (Honors) and a MSc in Project Management & Evaluation (Distinction). She also holds several other corporate secretarial designations. She is a Fellow Member of the Institute of Chartered Secretaries and Administrators Canada and member of the Institute of Chartered Secretaries and Administrators Canada – Bermuda Branch