

Central Bank of The Bahamas

Consultation Paper

PU- 46-0709



**Proposed Amendments to the Banks and Trust
Companies Regulation Act, 2000**

Policy Unit

Bank Supervision Department

June 13th, 2009

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Summary of Key Amendments Proposed to the Banks and Trust Companies Regulation Act, 2000

I. BACKGROUND

As the regulator of banks and trust companies in The Bahamas, the Central Bank of the Bahamas keeps under review the effectiveness of the various regulatory tools at its disposal including the legislative instruments which set out the parameters of the Central Bank's authority. The Central Bank has undertaken a review of the Banks and Trust Companies Regulation Act, 2000 (BTCRA) and is proposing several amendments which the Bank believes will strengthen the regulatory framework for its licensees and will give the Central Bank more flexibility and wider powers to address supervisory issues. In order to better facilitate the day to day business of its licensees, the Bank also seeks, through the proposed amendments to remove some requirements which, in today's business environment appear to be impractical.

II. OVERVIEW OF PROPOSED AMENDMENTS

Set out below is a summary of key amendments proposed to the BTCRA:

1. Amendment of section 2

Amendments are proposed to the definitions of the words "bank" and "deposit". The definition of "bank" is being changed to reflect the definition in the Central Bank of The Bahamas Act, 2000. The definition of "deposit" is being changed to more closely reflect the definition in the Protection of Depositors Act, 1999. Certain payments are however excluded from the proposed definition, (such as payment of a deposit to secure real property) and are not to be regarded as deposits for the purposes of the BTCRA.

2. Amendments to section 6

These amendments are intended to remove the requirement for licensees to obtain the prior approval of the Governor to issue certificates of deposit by deleting the reference to such certificates from section 6. The requirement for approval to issue the shares or other securities of a licensee will, however, continue.

3. Amendments to section 8

These proposed amendments will give the Central Bank the discretion to permit licensees to publish their financial statements on their websites, on the Central Bank's website or in such other forum and in such format as the Bank may allow.

This proposed amendment also contains new provisions which are included as a consequence of the proposed amendments to section 12 which seeks to expand the role and duties of auditors.

4. *Amendments to section 10*

These amendments seek to clarify the process for the imposition by the Bank of a civil penalty for a licensee's failure to publish its annual statements or forward a special return required by the Central Bank. This amendment should be read together with the proposed new section 24A(2). Each time a fine or penalty is incurred, the Bank will be required to issue an Order to the relevant licensee requiring the fine or penalty to be paid. The procedure for imposing fines is similar to the procedure under section 21 of the Central Bank of the Bahamas Act, 2000.

5. *Amendments of section 18*

The amendments proposed to section 18 seek to:

- expressly allow the Bank to appoint a receiver-manager where it is desirable for the receiver to operate a licensee as a going concern;
- permit the appointment by the Bank of a temporary manager of any licensee which, in the Bank's opinion, is inter alia, carrying on business in a manner detrimental to the public interest;
- expressly require licensees that are being wound up by a person other than the Bank to provide the Bank with a copy of the winding up petition and other relevant documents;
- entitle the Bank to appear at the hearing of the petition; and
- authorize the Bank to have its appointed representative attend creditors' meetings and meetings to discuss compromises or arrangements.

6. *Insertion of new sections 18A, 18B, 18C and 18D*

These proposed new provisions seek to:

- allow licensees to surrender their licenses, as opposed to having them revoked and provides for consequential action on the part of the Bank;
- set out the powers of the Bank on appointment of a temporary manager of a licensee;

- authorize the Chief Justice to establish procedures in relation to applications for the winding up of licensees under sections 18(6) – (9), 18A(2) and 18B(4)(b); and
- authorize the Bank to publish any action it takes under sections 18(1)(a) – (f) and (h) and section 18A.

7. *Amendment of section 19*

The Central Bank is not prohibited from entering Memoranda of Understanding with foreign Supervisory Authorities as the BTCRA is silent on this issue. This amendment seeks to expressly empower the Central Bank to enter memoranda of understanding with other Supervisory Authorities for the purpose of consolidated supervision.

8. *Inclusion of new subsection 23(3)*

The purpose of this amendment is to extend the time for commencing prosecutions for summary offences committed under the BTCRA from the current maximum of six months from the commission of the offence provided under the Criminal Procedure Code.

9. *Inclusion of new section 24A*

This new section empowers the Central Bank to order a person to pay a prescribed fine where, inter alia, offences against regulation 8 of the Financial Intelligence (Transactions Reporting) Regulations, 2000 and the provisions of the Financial Transactions (Wire Transfers) Regulations, 2009 have been committed. The proposed section also sets out the procedure to be followed by the Central Bank when seeking to impose a fine.

10. *Amendment of the Third Schedule*

This proposed amendment will permit licensees that are incorporated as international business companies to set-off the incorporation fee payable under the International Business Companies Act against licence fees payable under the BTCRA. Currently, only licensees incorporated under the Companies Act can make such deductions.

11. *References to Governor*

It is also proposed that all references to “Governor” in the principal Act be replaced by references to “the Central Bank” except in sections 13, 19(6), section 19 (8) and (9) as proposed herein and sections 20 and 24.

III. CONSULTATION PERIOD

The Central Bank invites comments on the proposals in this consultation paper. Comments should be forwarded to the Policy Unit, in the Bank Supervision Department by October 14, 2009.

Comments may be submitted in writing via email, post mail or fax to the following address:-

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***** END *****

ANNEX

NO. of 2009

AN ACT TO AMEND THE BANKS AND TRUST COMPANIES REGULATION ACT

ENACTED BY THE PARLIAMENT OF THE BAHAMAS

**Short title
and
commencement.**

1. (1) This Act which amends the Banks and Trust Companies Regulation Act, may be cited as the Banks and Trust Companies Regulation (Amendment) Act, 2009.

(2) This Act shall come into force on such date as the Minister may appoint by Notice in the Gazette.

**Amendment
of section 2
of the
principal
Act.**

2. amended -

Section 2 of the principal Act is

(a) by the repeal of the definition of "bank" and the replacement thereof with the following:

"bank" means any person lawfully carrying on banking business including the accepting of deposits of money withdrawable by cheque;"

(b) by the insertion in its appropriate alphabetical position of the following -

"deposit" means-

(i) the unpaid balance of money or its equivalent-

(a) received or held by an institution from or on behalf of a person in the usual course of business and for which the institution has given or is obliged to give credit to that person's checking, savings, demand or time account, or for which the institution has issued a certificate, receipt, cheque, money-order, draft or other instrument in respect of which it is primarily liable;

(b) but does not refer to the unpaid balance of money or its equivalent received or held in relation to the provision of property (other than currency) or services or the giving of security; and for the purposes of this Act, an unpaid balance of money or its equivalent is referable to the provision of property or services or the giving of security if, and only if:

- (i) it is paid by way of advance or part payment under a contract for the sale, hire or other provision of property or services, and is repayable only in the event that the property or services is or are not in fact sold, hired or otherwise provided;
- (ii) it is paid by way of security for the performance of a contract or by way of security in respect of loss which may result from the non-performance of a contract; or
- (iii) without prejudice to (b), it is paid by way of security for the delivery or return of any property, whether in a particular state of repair or otherwise.

- (c) such other payments as the Bank may by regulation prescribe;"

Amendment of section 6 of the principal Act.

3. Section 6 of the principal Act is amended in subsection (1) by the deletion of the words "or certificates of deposit" appearing in that subsection.

Amendment of section of the principal Act.

4. Section 8 of the principal Act is amended -
(a) in subsection (1) by-

(i) the deletion of the words "in the Gazette";

(ii) deleting the comma immediately following the words "as shown by the books of the licensee"; and

(iii) deleting the words "and the auditor of the licensee shall have the right of access at all times to the books, accounts and vouchers of the licensee".

(b) by the repeal of subsection (3) and the replacement thereof with the following:

"(3) Such statements shall be published in such form and manner and shall contain such particulars as the Central Bank may from time to time direct."

Repeal of section 10 of the principal Act.

5. Section 10 of the principal Act is repealed and replaced by the following:

"10. (1) If any person or licensee-

- (a) fails to comply with the requirements of section 8 within a period of four months of the end of its financial year; or
- (b) fails to comply with the requirements of section 9 for forty-two days after the date appointed by the Central Bank under section 9 for so doing,

the licensee or person so in default shall be liable to a penalty of two hundred and fifty dollars for every day of such default.

Provided that the Central Bank may extend the time for sending any information or documents required under this section for such further period not exceeding sixty days as the Bank agrees.

(2) The Central Bank may where it is satisfied that a person or a licensee is in default of the requirements of section 8 or 9, order the person or licensee to pay the penalty prescribed in section 10(1) for every day during which the failure to comply occurs.

Amendment of section 12 of the principal Act.

6. Section 12 of the principal Act is repealed and replaced by the following:

“Appointment, powers and duties of auditors.

12. (1) The appointment of the auditors of a licensee shall be notified to the Central Bank within fourteen days of the appointment;

Provided that the Central Bank may at any time require the replacement of an auditor by notice in writing delivered to the usual place of business of the auditor and licensee.

(2) An auditor of a licensee shall have the right of access at all times to the

books, accounts and vouchers of the licensee and shall be entitled to require from the licensee such information and explanations as he reasonably considers necessary for the performance of his duties as auditor.

(3) An auditor of a licensee shall give the Inspector immediate written notification of the following matters -

- (a) his intention to resign before the expiration of his term of office as auditor;
- (b) his intention not to seek to be re-appointed as auditor; and
- (c) a decision to include a modification of his report on the licensee's financial statements and in particular, a qualification or denial of his opinion, or the statement of an adverse opinion.

(4) An auditor or former auditor of a licensee, shall give written notice to the Inspector of any fact or matter of which he has or had become aware and which is likely to be of material significance for the discharge, in relation to the licensee, of the functions of the Inspector under this Act.

(5) Without prejudice to the generality of section 24, regulations made under that section shall prescribe the facts or matters which are likely to be of material significance for the discharge of the Inspector's functions under this Act.

(6) An auditor or former auditor who fails to comply with this section shall be guilty of an offence and shall be liable on summary conviction to a fine of \$25,000.

(7) This section shall apply to any matter of which an auditor or former auditor of a licensee has or had become aware in his capacity as auditor and which relates to the business or affairs of the licensee or any related company.

(8) In this section "related company", in relation to a licensee, means -

- (a) a parent company, subsidiary company or associate company of that licensee;
- (b) a subsidiary company of a parent company of that licensee;
- (c) a parent company of a subsidiary company of that licensee; or
- (d) a company in the case of which a controlling shareholder of that licensee, either alone or with any associate or associates, holds 10 per cent or more of

the shares or is entitled to exercise, or control the exercise of more than 10 per cent of the voting power at a general meeting.

**Amendment
of section
13 of the
principal
Act.**

7. Section 13 of the principal Act is amended--

- (a) in paragraph (b) of subsection (2) by
 - (i) the deletion of the word "or" immediately after the words "for the purpose of satisfying himself that the provisions of this Act" and the replacement thereof with a comma;
 - (ii) the insertion immediately after the words and symbols "Financial Transactions Reporting Act, 2000" of the following:

"or the provisions of any other relevant law."

- (b) by the repeal of subsection (5) and the replacement thereof by the following:

"(5) No duty of confidentiality to which an auditor or former auditor of a licensee may be subject shall be regarded as having been breached by reason of his

communicating in good faith to the Inspector, any information or opinion which is relevant to the functions and responsibilities of the Inspector under this Act, whether or not such information or opinion is provided in response to a request made by the Inspector.”

- (c) by the repeal of subsections (7) and (8) and the replacement thereof by the following--

“(7) No civil or criminal liability shall attach to any Director, officer, employee or agent of the Bank;

(a) any person duly authorized by the Inspector under subsection (4); or

(b) any person duly authorized by the Central Bank under paragraphs (e), (f) or (g) of subsection (1) of section 18, subsection (9) of section 18 or subsection (3) of section 18B of this Act,

for anything done or omitted in the discharge or purported discharge of their respective functions under this Act unless it is shown that the act or omission was in bad faith.”

“(8). The Board of Directors may indemnify the Governor and the Governor may indemnify –

(a) any officer, employee or agent of the Central Bank;

(b) the Inspector;

(c) any person duly authorised by the Inspector under subsection (4); and

(d) any person duly authorized by the Governor under paragraphs (e) or (f) of subsection (1) of section 18, subsection (9) of section 18, or subsection (3) of section 18B of this Act, against the cost of defending their actions while so discharging their functions in good faith.”

**Amendment
of section 18
of the principal
Act.**

8. Section 18 of the principal Act is amended—

(a) in subsection (1) by –

(i) the insertion of the words “or receiver- manager” immediately after the word “receiver” wherever it appears in paragraph (f);

(ii) the insertion immediately after paragraph (f) of the following paragraph—

“(g) at the expense of the licensee assume the temporary management of the licensee if, in the opinion of the Central Bank, the licensee is carrying on its business in a manner detrimental to the public interest or to the interests of its depositors or other creditors or is either in

The Bahamas or elsewhere contravening the provisions of this or any other Act or of any order or regulations made under this Act, or any term or condition subject to which the licence was issued;

(iii) by re-lettering paragraph (g) as paragraph (h).

(b) by the insertion of the following subsections immediately after subsection (6):

“(7) Where a petition for the winding up of a licensee, or a person who has at any time been a licensee, is presented by a person other than the Central Bank, the Central Bank shall be served with a copy of the petition by the petitioner and may appear at the hearing of the petition, and the provisions of subsections (8) and (9) shall apply.

(8) A document which relates to a petition for winding up and which is required to be sent to a licensee or former licensee or any of their respective depositors, beneficiaries, or other creditors, shall, in addition, be sent to the Central Bank.

(9) A person appointed for the purpose by the Central Bank may-

- (a) attend a meeting of creditors of a licensee or former licensee;
- (b) attend a meeting of a committee established to discuss a compromise or arrangement; and

- (c) make representations as to any matter for decision at any such meeting.

Insertion of sections 18A, 18B, 18C and 18D.

9. The principal Act is amended by the insertion of the following sections immediately after section 18:

“Surrender of licence.

18A.(1) A licensee which has ceased to carry on the business in respect of which a licence was granted under the provisions of this Act, may apply to the Central Bank to surrender its licence if it-

- (a) has ceased to carry on such business, and produces evidence that it has repaid all deposits held by it and has transferred all trust assets held or administered by it; or
- (b) is being wound up voluntarily and produces evidence that it is solvent and able forthwith to repay all deposits held by it and all its other creditors and has transferred all trust assets held or administered by it,

and the Central Bank may thereupon, subject to such conditions as the Bank deems appropriate, approve the surrender.

(2) In the case of an application under paragraph (b) of subsection (1) the Central Bank may apply to the Supreme Court for the licensee to be wound up either by that Court or subject to its supervision, and on the making of such an order the provisions of the Companies Act, 1992 relating to the winding up of a company by or subject to the supervision of that Court shall, mutatis mutandis, apply.

Temporary management of licensees.

18B.(1) Whenever the Bank assumes the temporary management of a licensee, the Central Bank shall have full and exclusive powers of management and control of the licensee, including, without prejudice to the generality of the foregoing, power to-

- (a) continue or discontinue its operations;
- (b) stop or limit the payment of its obligations;
- (c) employ any necessary officers or employees;
- (d) execute any instrument in the name of the licensee; and
- (e) initiate, defend and conduct in the name of the licensee, any action or proceedings to which the licensee may be a party.

(3) The Bank may appoint any person to manage on its behalf a licensee in respect of which the Central Bank has assumed temporary management.

(4) Where the Central Bank assumes the temporary management of a licensee under section 18(1)(g), the Central Bank shall within ninety days of taking over the licensee--

- (a) restore the licensee to its board of directors or owners as the case may be; or
- (b) revoke the licence and apply to the Supreme Court for an order that the licensee be forthwith wound up by that Court in which case the

provisions of the Companies Act, 1992 relating to the winding up of a company by that Court shall, mutatis mutandis, apply.

Chief Justice may make rules.

18C. The Chief Justice may make rules governing the procedures in relation to the applications to the Supreme Court under subsections (6), (7), (8) and (9) of section 18, subsection (2) of section 18A and paragraph (b) of section 18B(4).

18D. Where the Central Bank is satisfied that the circumstances so warrant, it may at any time make public any action it has taken under paragraphs (a),(b),(c),(d),(e), (f) or (h) of subsection 18(1) or under section 18A and may publish notice of its actions.

Amendment of section 19 of the principal Act.

amended-

10. Section 19 of the principal Act is

(a) by the insertion of the following subsections immediately after subsection (7):

“(8) The Central Bank may in the exercise of its co-operative functions, with the approval of the Governor, enter into memoranda of understanding with Supervisory Authorities for the purpose of facilitating the consolidated supervision of its licensees.

(9) No memorandum of understanding may call for assistance beyond that which is provided for by this Act, or relieve the Central Bank of any of its functions or duties under this Act or under the Central Bank of The Bahamas Act.”

- (b) by the re-numbering of subsection (8) as subsection (10).

Amendment of section 23 of the principal Act.

11. Section 23 of the principal Act is amended by the insertion of the following subsection immediately after subsection (2):

“(3) Notwithstanding any provision in any enactment prescribing the period within which summary proceedings may be commenced, proceedings for an offence committed under this Act may be commenced at any time within the period of three months from the date on which evidence sufficient, in the opinion of the Attorney General, to justify a prosecution for the offence comes to his knowledge or within the period of twelve months after the commission of the offence, whichever period last expires; and for the purposes of this section a certificate purporting to be signed by the Attorney General as to the date on which such evidence as aforesaid comes to his knowledge shall be conclusive evidence thereof.

Insertion of section 24A in the principal Act.

12. The principal Act is amended by the insertion immediately after section 24 of the following section:

“Fines. 24A(1). The Central Bank may where it is satisfied that a person or a licensee-

- (a) has committed an offence against
 - (i) regulation 8 of the Financial Intelligence (Transactions Reporting) Regulations, 2000; or
 - (ii) the Financial Transactions (Wire Transfers) Regulations, 2008,

order the person or licensee to pay a fine not exceeding two thousand dollars;

(b) has contravened any regulations made under this Act, order the payment of such fine as may be prescribed under the relevant regulation.

(2) Where the Central Bank makes an order under this section or subsection 10(2) of this Act-

(a) the order shall be put in writing;

(b) the order shall specify the nature of the default or offence which the person or licensee committed and the penalty or fine imposed by the Central Bank;

(c) a copy of the order shall be given to the person or licensee; and

(d) the order may be enforced in the same manner as an order of the court."

**Amendment
of the Third
Schedule.**

13. The principal Act is amended in paragraph 4 of the Third Schedule by the insertion of the following words immediately after the words "the Companies Act":

"or pursuant to subsection (1) of section 176, and paragraph 3 of the Schedule to the International Business Companies Act".