



The Ministry of Finance and the Bermuda Monetary Authority

Consultation Paper

The Appeal Tribunal Framework

2nd June, 2021

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Background

1. The Ministry of Finance is responsible for appointing Appeal Tribunals for financial institutions in Bermuda regulated by the Bermuda Monetary Authority (the “Authority”). The framework was established to enable such institutions to appeal a decision made by the Authority. The proceedings of the relevant tribunals are carried out in accordance with the Regulatory Acts together with the relevant Regulations (See Annex I).

2. To ensure that the appeal is independent and fully transparent, the Ministry of Finance oversees the process. Accordingly, the Notice of Appeal must be copied to the Secretary in care of the Ministry of Finance. The Regulations grant the Minister a power to appoint any person to act as secretary to the tribunal. To date, this task has been performed by Ministry staff.

3. The details of the appeal process are prescribed by separate regulations made under a specific Regulatory Act. The first such regulation was the Banking Appeal Tribunal Regulations 2001 made under the Banks and Deposit Companies Act 1999. Subsequent appeal tribunal regulations have been enacted. In most cases, the enactment of such regulations followed the implementation of the principal Act.

4. The Appeal Framework sets out what financial institutions need to do to resolve issues with the Authority. It creates a regime that

ensures that financial institutions can challenge the decisions of the Authority in an orderly way. As with other aspects of the enforcement framework, the appeals process is meant to be exercised in a manner that is responsive to the breach.

5. Any decision to revise an appeal process must be considered carefully. The desire to ensure that an appeal is addressed in a timely manner, while maintaining the highest levels of quality advice, requires a well-organised structure that adequately provides for a full hearing of the issues.

6. Regulatory impact assessments are one of the critical building blocks of any risk-based regulatory system. Measuring the effect of an appeals tribunal has been difficult given the complexity of defining and measuring the Ministry's role in the appointment and administration of an appeal tribunal together with the assessment of costs to industry and the Authority of the current framework.

7. Against this backdrop, in 2019, the Ministry of Finance undertook a review of the operational aspects of the framework process and determined that enhancements are required to ensure that this aspect of Bermuda's enforcement framework operates as intended. The key findings of the review are summarised as follows:

7.1 There is a limited pool of persons in Bermuda who are able to contribute unspecified periods of time to matters related

to appeal tribunals. Of the four (4) cases referred to the Ministry of Finance, the time to resolution was well in excess of twelve months.

- 7.2 There are limited persons in Bermuda who are able to pass the conflict of interest test. Generally, a person is not eligible for appointment as chairman, deputy chairman, or a member of a tribunal if he is or has at any time during the period of two years ending with the date of his appointment been an officer, servant, or agent of the Authority or of any financial institution. Several appeals were delayed by months due to challenges launched by appellants in relation to this issue.
- 7.3 Panel members are required to have experience in financial services. Where a person is required to have experience in the relevant financial service business, the nature and scope of that experience has been challenged in the absence of a clear definition of the same.
- 7.4 The legal resources within the Government have many competing priorities and may be challenged, from time to time, to respond to the number of legal queries that may arise in relation to a particular case. This includes actions contemplated by and/or taken by the Minister and/or queries raised by a Tribunal.

7.5 In addition, an additional challenge has resulted from the need to find an appropriate location for the proceedings given the sensitive and highly confidential nature of the proceedings.

7.6 All of these factors had an impact on the cost of the process. It also affected the resources that had to be devoted to these matters.

8. In order to make the appeals process as efficient as possible, the Ministry of Finance considers that a different approach is required to meet regulatory objectives. Accordingly, the key changes to the appeals process affect two primary components of the existing framework:

- withdrawal of the Minister of Finance and industry participants from operational aspects of the regime; and
- the establishment of a new framework under the Courts.

The Current Framework for Appeals

9. Currently, financial institutions together with other specified persons, aggrieved by a decision of the Authority, may appeal against such decision to a tribunal constituted in accordance with the relevant Regulatory Act. A tribunal normally consists of 5 members – a chairman, a deputy chairman plus three other members. Current staff and/or

current agents of the Authority are not eligible for service on an Appeal Tribunal.

10. The Tribunal's secretariat is supported by the Ministry of Finance and the constitution of a relevant appeal tribunal is part of its mandate. However, in reaching its decision, an appeal tribunal is fully independent of the Government, and, in particular, the Ministry of Finance. There is no involvement of the Minister.

11. The laws about rights to appeal are set out in the Regulatory Acts and they can include but are not limited to the following decisions of the Authority.

- a decision to restrict/vary a licence;
- a decision to revoke and/or to cancel a licence;
- a decision to refuse an application;
- a decision to impose a prohibition order;
- a decision to publish a public censure statement; and/or
- a decision to impose civil penalties.

12. As the prudential regulator for ten (10) different kinds of financial institutions, the Authority's appeal framework has been adjusted to accommodate the particular characteristics and risks of each sector. Accordingly, some Acts include additional rights to appeal; other Acts are more limited in scope. However, all the tribunals have common features:

- a. Appeals are heard, in private, as and when they arise.
- b. Each Tribunal consists of a chairman, who is legally qualified and two other members from the panel members who have knowledge and experience relevant to assist in their consideration of a particular case.
- c. The Chairman is responsible for the management of the Tribunal and provides guidance on practice and procedure. The Chairman's responsibilities are set out under the relevant Regulations that set out the procedures of the Tribunal. It is the Chairman's job to consider each appeal and to make any decisions or directions about the appeal before it comes to a Hearing.
- d. There is a right to appeal to the Court on a question of law arising from a decision of a Tribunal, and a further appeal from the Court to the Court of Appeal, with leave.
- e. Tribunal decisions are published in the Official Gazette.
- f. Notwithstanding the above, a Tribunal is required to protect commercially sensitive information or information given to the appellant or the Authority in confidence and for that purpose may make any necessary amendments to the text

of the decision to conceal the identity of the appellant or the source of any such information.

- g. A tribunal may give such directions as it thinks fit for the payment of costs or expenses by any party to the appeal.

13. Under the Regulations, the Ministry of Finance provides operational and secretarial support to the Appeal Tribunal through the Regulatory Unit.

14. In accordance with the regulations, a Tribunal may adopt its own procedure.

15. A tribunal may give such directions as it thinks fit for the payment of costs or expenses by any party to the appeal.

Proposed Enhancements for Appeal

16. As a leading international financial services center, our economy not only relies on appropriate fiscal policies but also on transparent and sound supervisory frameworks. Effectiveness and efficiency are also seen as key matters to be given consideration.

17. Building on the good work already undertaken by the Treaty Unit and the Registrar of Companies, in relation to the handling of appeals, the Ministry of Finance will continue to support objectives that further

strengthen our regulatory framework. The Treaty Unit appeals framework was put in place in 2013, pursuant to the U.S.A – Bermuda Tax Convention Amendment Act 2013. The Registrar of Companies principal appeals framework was put in place in 2017 under the Registrar of Companies (Compliance Measures) Act 2017. For the purposes of the commitment set out earlier, the following policy changes are being considered:

- Matters which fall under the remit of the Minister of Finance will be transferred to the Court;
- Where relevant, Appeal Tribunal Regulations will be established for each Regulatory Act;
- Matters related to the notice periods, the determination of an appeal, and decision-making powers will remain largely unchanged except for the references to Minister of Finance as well as the number of documents to be filed with the Registrar of the Court;
- Additional changes will be required to address matters related to costs, procedures and evidence.
- Further appeals on a point of law shall remain with the Court of Appeal.

Costs

18. The Regulatory Acts contain a general provision that the relevant tribunal may give such directions as it thinks fit for the payment of costs or expenses by any party to the appeal. By contrast, Order 62/3 of the Rules of the Supreme Court (“RSC”) provides that, if the Court decides to make any order as to the costs of any proceedings, the Court shall order costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

19. It is of vital importance to the Authority that no order be made as to costs against the Authority unless it can be shown that the Authority acted improperly in making its decision.

20. The Ministry takes the view that this is a reasonable request in view of the fact that the Authority is required to demonstrate that it is always capable and willing to address misconduct in firms using a multifaceted approach.

Confidentiality

21. The Regulatory Acts contain a publication provision which limits the ability of the Authority to publish any information in relation to

matters set down in a Decision Notice whilst the matter is pending an appeal.

22. In order to preserve the objective of these provisions, which is to preserve the confidentiality for the reasons outlined earlier herein, it is proposed that the name of the entity filing the appeal should be kept anonymous.

23. Provisions related to commercially sensitive information or information given to the appellant or the Authority in confidence shall therefore remain confidential.

Conclusion

24. The Ministry of Finance acknowledges that the Government's withdrawal from the appeals process will impact both the Authority and the Courts, particularly in the areas of oversight and implementation. By repositioning the framework in the manner outlined, those who should be held to account for particular regulatory actions or failures, should be clear to the public, industry and politicians. In this case, the fundamental consideration should be the clarity of regulatory resolution processes as opposed to the withdrawal of the Ministry of Finance from the enforcement process.

25. In addition to the above, as a general principle, the Ministry of Finance takes the view that a regulatory environment with lower costs,

both direct and indirect, is to be preferred over one which imposes higher costs. The consequence of transitioning to a lower cost mode is not only the expeditious execution of the appeals process, but also a marked reduction in the challenges to an effective enforcement regime.

Request for Comment

26. The present consultation will inform the Ministry of Finance on remaining obstacles as well as the range of possible enabling actions that it could take to ensure a smooth and orderly transition from oversight by the Government to oversight by the Courts.

27. The financial services sector together with other interested parties are invited to submit their views on the proposals set out in this Paper. Comments should be sent to the Ministry of Finance and addressed to pburrows@gov.bm or to the Bermuda Monetary Authority and addressed to policy@bma.bm no later than 2nd July, 2021.

Existing Regulations

- Banking Appeal Tribunal Regulations 2001
- Corporate Service Provider Business Appeal Tribunal Regulations 2013
- Credit Union Appeal Tribunal Regulations 2013
- Investment Business Appeal Tribunal Regulations 2004
- Insurance Appeal Tribunal Regulations 2011
- Trust Business Appeal Tribunal Regulations 2004

Regulations not yet in existence but required

- Digital Asset Business Act 2018
- Digital Asset Issuance Act 2020
- Fund Administration Provider Business Act 2019
- Money Service Business Act 2016