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Bermuda 2019 Special Report

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Carey Olsen's team of experienced lawyers are experts in Bermuda law and regulation. Our investment funds specialists advise fund managers, investment and private banks, institutional investors, boutique investment firms, insurance groups, pension funds, private equity houses and trust companies. We advise hedge funds, private equity funds, venture capital funds, ILS funds, credit and debt funds, clean tech funds, real estate funds, retail and listed funds and infrastructure funds.

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Bolstering Bermuda's funds industry

T

his *HFM Bermuda 2019* special report provides an update on the key trends, legislative updates and initiatives under-way within the fund domicile.

Bermuda continues to be a conducive environment for tech offerings. With its amenable regulator, fintech sandbox, and nurturing of tokenised funds and distributed ledger technology (blockchain), the island continues to attract fund managers who want to be at the leading edge of the industry.

The differences between establishing and maintaining a fund of this type are just one point of discussion throughout.

Keen to make Bermuda an even more viable destination for funds business, Bermuda's Economic Substance Act 2018 has changed the parameters for demonstrating economic substance, and depending on their strategies and fund types, what edicts managers must take heed of.

Bermuda's solvency II equivalency, however, should streamline any new obligations for most, as long as they adhere to some straightforward precepts regarding personnel and on-island activity.

ESG is a focus for the Bermuda Stock Exchange (BSX) this year, which is giving thought to the rising importance of ESG investing, greener initiatives, and how the regulator is facilitating such change within Bermuda's funds industry ecosystem.

This report will leave readers with a keen sense of the main issues and developments within one of the world's most forward-looking fund jurisdictions.

Ross Law

Report editor

The island continues to attract fund managers who want to be at the leading edge of the industry

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HFMWeek is published weekly by
Pageant Media Ltd
ISSN 1748-5894

Printed by The Manson Group

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Setting up a tokenised fund in Bermuda

Sarah Demerling and Natalie Neto, of Walkers Bermuda, outline the process of enacting and maintaining a tokenised fund in Bermuda

Imagine a world where asset management transactions and contracts are maintained in a decentralised form across different locations using distributed ledger technology (blockchain), all information securely and accurately stored using cryptography and accessed using keys and cryptographic signatures. This would allow subscriptions and redemptions to be processed by way of smart contracts and investor reporting being available in real time leading to greater transparency, better efficiencies and lower fees. These days, it feels that such a transformation is not so far away.

The Bermuda Government understands the power and disruptive potential of this technology and has identified an opportunity to be a pioneer in this space. Bermuda has leveraged its significant expertise in regulatory management under the supervisory oversight of the Bermuda Monetary Authority (BMA), Bermuda's sole financial services regulator and during 2018 introduced cutting edge digital asset business legislation 2018 (known as DABA) together with amendments to the Companies Act, 1981 and related token offering regulations to create a statutory framework for the



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Natalie Neto
Walkers

Natalie Neto advises fintech clients and investors on Bermuda's evolving ICO legislation and blockchain and digital asset framework, including the establishment, licensing and compliance obligations of digital asset businesses. Neto also advises on private equity investments, debt and equity capital markets transactions, banking and finance matters and has a wide depth of knowledge with respect to complex restructuring projects involving Bermuda companies, LLCs and partnerships, including redomiciliations.

regulation of token offerings and digital assets business activities in Bermuda.

This framework provides a unique environment that prioritises regulatory certainty, investor confidence and compliance with internal know your customer and anti-money laundering and anti-terrorist financing and sanctions compliance (AML/ATF) regulations. These benefits of certainty and stability are attracting the best structured fintech companies and funds which are becoming part of the Bermuda fintech ecosystem.

Tokenised funds

This article will consider the use of a Bermuda fund structure to enable investors to acquire tokenised

interests in a fund which represent the underlying assets, versus more traditional interests such as shares, units or partnership interests. Bermuda does not regulate funds which simply hold digital assets within their portfolio, although depending on the nature and level of the digital assets business activity conducted by the fund or the fund manager, consideration should also be given to whether a licence for such activity is required under DABA.

Tokenised funds may be caught by the Token Offering Legislation if the fund is considered to be offering digital assets for purchase or acquisition by the public. The term digital asset is very broadly defined and covers anything that exists in binary format and comes with the right to use it and includes a digital representation of value that is:

- used as a medium of exchange, unit of account or store of value (other than fiat currency)
- intended to represent assets such as debt or equity in the promoter
- otherwise intended to represent any assets or rights associated with such assets
- intended to provide access to an application, service or product by means of blockchain.

This would therefore capture most forms of issue or offering by a fund of interests in the fund that are intended to be represented in tokenised or digital asset form.

Exemptions

The Token Offering Legislation applies to token offerings that are made available to more than 35 investors but exempts private token offerings with fewer investors. Offers which are of a private character or which are restricted to persons whose ordinary business involves the acquisition, disposal or holding of digital assets are also out of scope.

Do I need to establish a Bermuda company to issue tokenised fund interests?

No person is allowed to issue an initial token offering in or from within Bermuda unless that person is a Bermuda company or LLC that is registered with the Registrar of Companies (ROC) in Bermuda. Before a company or LLC can commence a token offering, the consent of the Bermuda Minister of Finance (Minister) is required.

Process of conducting a token offering

A tokenised fund that proposes to launch a token offering in Bermuda must publish and file an offer document (often based on the White Paper). The offer document does not need to be filed where the digital assets are listed on an appointed stock or digital asset exchange if the rules of the relevant exchange do not require it to be filed or, generally, where the company or LLC is subject to the rules of a competent regulatory body which does not require filing.

The contents of the offer document must include the following:

- the registered or principal office of the promoter
- the officers of the promoter
- the proposed business of the entity
- a description of the project and proposed timelines
- the amount of money equivalent the token offering intends to raise
- the allocation of the amounts intended to be raised amongst the classes of issuance

- any rights or restrictions on the digital assets being offered
- timings of opening and closing of the offering of the digital assets
- a general prescribed token offering risk warning
- a statement as to how personal information will be used.

Ongoing obligations

The Token Offering Legislation requires that the company or LLC has in place appropriate measures to comply with applicable AML/ATF requirements. The Token Offering Legislation sets out those actions that would be deemed to be 'appropriate measures' for these purposes, the required timing for identification and verification of participants, record keeping and requirements concerning an internal compliance audit.

Tokenised and conventional fiat hedge funds similarities

There are many similarities when setting up any fund. Be it tokenised or traditional, service provider diligence is key. You need to work with knowledgeable partners (auditor, attorney and administrator).

As with any investment fund, structuring your fund in the most favourable manner is of utmost importance. If any of the investors are located outside of the US and/or are US tax exempt, offshore jurisdictions, such as Bermuda, often form part of the fund structure. Carefully describing the fund's strategy and paying close attention to disclosures, making sure they are drafted broadly enough to evolve with the asset class is key. Consideration needs to be given to the liquidity of the fund and side pockets for illiquid investments serve as well in the digital asset universe as they do in the fiat world.

Differences include the challenge of finding a suitable custodian to hold any digital assets securely and in compliance with Bermuda DABA requirements (if applicable) and getting auditors comfortable to verify the existence and valuation of digital assets.

Tokenised fund structures

A tokenised fund can be established as an open-ended or closed-ended

Bermuda exempted company or LLC.

- **Open-ended:** This structure is more common for those managers looking to pursue an investment strategy which focuses on trading in cryptocurrencies or other forms of digital assets. These strategies tend to be more liquid in nature and investors are able to redeem their investment at their own initiative. These structures are therefore open-ended and similar to a traditional hedge fund. As a result, pursuant to the Investment Funds Act need to be registered or authorised with the BMA as either a private fund (less than 20 investors) or a professional fund (open to qualified participants and having prescribed service providers) or authorised, most commonly, as an institutional fund (qualified participants and prescribed service providers).
- **Closed-ended:** This structure is more common for those managers looking to pursue an investment strategy which focuses on long-term investments in digital asset start-ups or projects. These strategies tend to be illiquid in nature and investors are unable to redeem their investment without the manager's consent. Closed-ended funds do not currently need to be registered with the BMA.

Service providers

In general, a Bermuda fund will need an investment manager, a fund administrator, a registrar, an auditor and a custodian or prime broker, unless an exemption is available and approved by the BMA. It is not necessary to appoint a local director but the fund will need to have at least one local service provider, which can be the corporate service provider that provides the registered office in Bermuda.

Summary

With regulatory certainty and a government that is constantly very actively working to facilitate fund structuring and investment in digital assets, Bermuda is once again showing its ability to innovate and become a market leader in this transformative space. **HFM**

An independent provider of fund administration services to the offshore and domestic hedge fund and investment fund industry



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We offer administrative services for a range of fund structures, including hedge funds, fund-of-funds, private equity funds, Insurance-Linked Securities funds, and crypto asset funds. Our solutions are based on a flexible, cost-effective, secure, scalable model which ensures we can accommodate all levels of administration requirements.

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- Our administration services span five priority areas:
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 - Regulatory services
 - Registrar and shareholder services
 - Tax information services
 - Financial statement preparation
- Services extend from assistance and support on the initial structuring and set-up of the fund, through to timely and accurate end-to-end fund administration

IMS NAV system

- All aspects of our fund administration services, including trade capture, cash processing and reconciliation, and regulatory compliance functions, are integrated into our leading-edge, proprietary IMS NAV system
- The system provides both the front-end, customer-facing platform as well as the back-end, information processing capabilities
- Net asset value reporting is available on a daily, weekly, monthly or other custom basis

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FUND ADMINISTRATION

THIRD-PARTY ADMINISTRATION

Responsible investing gaining momentum

Greg Wojciechowski, of the Bermuda Stock Exchange (BSX), gives thought to the rise in relevance of ESG initiatives for investors



Q How is the BSX embracing this shift in investor appetite for ESG considerations?

A Earlier this year the Bermuda Stock Exchange (BSX) launched an environmental, social and governance (ESG) initiative in line with the World Federation of Exchanges' sustainability principles (WFE) and is dedicating ESG as a priority in 2019 with the aim to empower sustainable and responsible growth for its member companies, listings and the wider community.

The BSX has embraced the WFE's five sustainability principles: to educate participants in the exchange ecosystem about the importance of sustainability issues; promote the enhanced availability of investor-relevant, decision-useful ESG information; actively engage with stakeholders to advance the sustainable finance agenda; provide markets and products that support the scaling-up of sustainable finance and reorientation of financial flows; and establish effective internal governance and operational processes and policies to support their sustainability efforts.

Stock exchanges are at the intersection between capital market participants and their increasing responsibility to ensure business practices are geared toward positive environmental, social and governance practices making them ideally positioned to assist and improve performance on ESG disclosure, so that participants are better able to benefit from the ever-increasing flow of investment being directed towards the sustainable economy. With 250 market infrastructure providers, 48,000 listed



Greg Wojciechowski
BSX

Prior to joining the BSX in 1993, Greg Wojciechowski held management positions at three large US brokerage firms where he focused on brokerage administration and operations in international and global markets. Wojciechowski received a bachelor of arts degree from the University of North Carolina in Charlotte. He studied International Business at The University of Copenhagen under Denmark's international studies programme and has studied French and international relations at the Université D'Aix-Marseille in Aix-en-Provence France.

companies and \$70.2trn in equity market capitalisation, the WFE members have the size and bandwidth to effect real change in all aspects of ESG.

At the BSX, we are committed to encouraging partnerships and adoption of best practices in responsible investment for sustainable development. While we are formalising an action plan to develop a sustainable exchange, we are bolstered by the fact that Bermuda has long been the home to early adopters of innovative solutions to natural catastrophe risk enhancing resilience and mitigating risk exposure throughout the globe.

Q What listings on the BSX are ESG-compliant and what can the BSX offer the hedge fund market in this arena?

A The BSX has carried out a review of our listings and many entities are already active or moving towards making ESG part of their business model.

For example, Aurum, a Bermuda-based manager with a number of BSX-listed hedge funds, launched their embedded impact solution in 2002, which provides investors with an opportunity to both make investment returns and also make a difference through positive impact. The advisory fee generated from the fund

supports a number of non-profit organisations, principally Synchronicity Earth, a registered charity that supports the conservation of biodiversity, ecosystems and species at risk around the world. To date, Aurum's embedded impact solution has generated approximately \$8.5m for over 70 organisations in 40 countries.

The BSX is a leading market for the listing of investment funds, debt and insurance-related securities, as well as those of small to medium enterprise companies. The Exchange's significant growth over the past several years is due in large part to its innovative and commercial approach. For instance, the BSX is able to offer listed issuers speed to market, with many listings taking as little as two weeks to complete.

The BSX works with the Bermuda Monetary Authority (BMA) and Bermuda Business Development Agency (BDA) to ensure Bermuda's stellar reputation as a world-class centre for excellence is constantly and consistently enhanced through regulation, collaboration and innovation.

Q What makes investing in the reinsurance and insurance-linked securities (ILS) markets ESG-compliant?

A The BSX is the world's leading exchange for the listing of ILS which are acknowledged as sustainable development investments. Bermuda issuance leads the world in this sector and of the 950 securities listed on the BSX, ILS comprises 349 listed issuers with \$33.2bn in market capital outstanding. As investors look to grow their holdings in asset classes

linked to social and responsible investments, this creates an increased pool of investors in these securities which are helping to narrow the “protection gap” which are uninsured and underinsured risks.

Pension fund investors from several jurisdictions have highlighted the social and environmental aspect of ILS and catastrophe bonds as they provide financing and liquidity when natural disasters strike. ILS, a non-correlated asset class, is also recognised as being a sustainable investment according to the United Nations’ Sustainable Development Goals (SDGs) by helping build resilience to disasters and climate change. As a leader in ILS, Bermuda will play an increasingly important role in assisting communities around the world to adapt and recover from natural disasters, a changing climate and the resulting impact on vulnerable communities. Many of the BSX’s listings, especially in the ILS sector, are well advanced in developing products that move the sustainable finance agenda forward.

Forward-thinking ILS fund managers, hedge funds and asset managers based in Bermuda embraced ESG a long time ago; they have cemented credentials, impressive track records and remain committed to a high-impact sustainable agenda.

As an example of the growing acceptance of reinsurance and ILS structures, at the end of May 2019, the California Legislature approved a bill that allows the purchase of reinsurance and ILS to cover wildfires and other natural disasters such as floods and earthquakes in the state. In the last few years, California has been hit by some of their worst wildfires ever and as of April 2019, losses had surpassed \$12bn.

It is clear that as the market evolves, and investors become more comfortable using ILS structures to mitigate risks, this market will only increase in offering protection against climate change related natural catastrophes across the globe.

Q What other ESG initiatives are happening in Bermuda and how is the BSX involved?

A Bermuda is susceptible to natural disasters such as hurricanes, and is no stranger to protecting

exposure through its effective, reliable infrastructure and resilient building codes. Bermuda hosted the Ocean Risk Summit last year with collaboration of business, including Aurum, one of the BSX’s listed issuers I mentioned earlier, government and scientists to discuss responses to unprecedented changes occurring in the ocean.

In June, Bermuda signed an agreement with globally recognised institutions to create the Bermuda Ocean Prosperity Programme, which aims to establish a 90,000 sq km Marine Protected Area (MPA) as part of the Bermuda Government’s Blue Economy initiative.

In the next few years ESG ratings will be as important as financial considerations for investors

Established in 1997, Bermuda-based Nephila Capital is one of the earliest adopters and largest investment managers specialising in reinsurance risk. Two years ago they launched Nephila Climate, which in June 2019, issued a special report on using risk transfer to achieve climate change resilience. The report concluded: “As climate change drives more interest in mitigating and hedging growing risk exposure, and as word gets out how industries like electric power, agriculture, and renewable energy have hedged weather risks in a productive way for over a decade, it is a reasonable hope and expectation that Weather Risk Transfer and catastrophe coverage can be successfully and cost-effectively used for climate change adaptation by a wide range of public and private organisations.”

The BSX is also working to educate our stakeholders – our member companies, and our local population on the importance of ESG and how it impacts their lives now and increasingly in the future.

We believe Bermuda is uniquely positioned to enhance dialogue on promoting sustainable products and services as a respected and dependable jurisdiction recognised for our corporate governance, solvency standards and effective regulation

for the creation of innovative listed structures. The Bermuda Stock Exchange is also ‘greening’ our Hamilton headquarters and taking steps to improve energy efficiency, cutting down on waste, recycling and adopting a greener footprint.

Q What are some of your challenges and what does the future hold for the BSX related to ESG?

A One of the challenges is the lack of a consistent global standard for ESG ratings. However, this issue is being worked on. In the WFE’s 2018 *Sustainability Report*, 80% of exchanges carried out ESG disclosure in markets where reporting is encouraged or required.

Clear reporting according to standardised criteria will be a big benefit to investors, exchanges and listed issuers. This will require a co-ordinated effort from all stakeholders but progress is certainly being made. In the next few years ESG ratings will be as important as financial considerations for investors.

We are also increasing efforts to help educate the market on the options available to investors in Bermuda and through the BSX – investments that are helping mitigate, solve and prevent some of the biggest environmental, social and governance issues of our time. Current and future generations are demanding to know more about their investments and directing them towards ESG-focused companies and investments.

In 2006, when the UN-backed Principles for Responsible Investment (PRI) was launched, 63 investment companies (asset owners, asset managers, and service providers) with \$6.5trn in AuM signed a commitment to incorporate ESG issues into their investment decisions. By April 2018, the number of signatories had grown to 1,715 and represented \$81.7trn in AuM.

What is clear is that the capital markets will have a hugely important role in mitigating climate change, improving the social conditions for billions of people around the world and demanding improved governance from corporations.

The BSX is proud to be at the forefront of this investor revolution. **HFM**

New order: (Economic) substance and the Bermuda funds industry

Adam Bathgate, of Carey Olsen, assesses the shifting face of economic substance requirements in Bermuda

Bermuda was one of several international financial centres to enact economic substance legislation during the latter part of 2018. Along with these other jurisdictions, which included the British overseas territories of the Cayman Islands and the British Virgin Islands and the crown dependencies of Guernsey, Jersey and the Isle of Man, Bermuda introduced this legislation in order to meet the commitment it had made to address certain concerns raised by the European Union's Code of Conduct Group (Business Taxation) (the Code Group) in relation to the need for relevant businesses to demonstrate economic substance in Bermuda. This article explores the ways in which Bermuda's Economic Substance Act 2018 (the ESA) could impact the island's funds industry.

Background

In 2017 the Code Group assessed the tax regimes of 92 countries against its good governance criteria regarding tax transparency, fair taxation, and implementation of measures to combat base erosion and profit shifting (Beps). The Code Group acknowledged that most offshore financial centres had cooperated with the assessment and implemented international tax transparency and Beps measures.

As part of the fair taxation assessment, the Code Group assessed jurisdictions with low or zero rates of corporate income tax against its



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criterion 2.2, which states: "The jurisdiction should not facilitate off-shore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction."

The Code Group expressed concerns that these "criterion 2.2 jurisdictions" might not impose adequate legal substance requirements on entities doing business in or through them and that their tax regimes were therefore potentially harmful if they encouraged international businesses to engage in jurisdictional arbitrage and benefit from low or zero tax rates by artificially transferring profits to jurisdictions imposing little or no corporate income tax. In late 2017 Bermuda and other criterion 2.2 jurisdictions committed to enact laws by the end of 2018 to address the Code Group's concerns.

Affected entities

The ESA applies to companies to which the Companies Act 1981 applies, which would include an overseas company with a permit to engage in business in Bermuda, a limited liability company formed under the Limited Liability Company Act 2016, or an exempted partnership, an exempted limited partnership

or an overseas partnership that has elected, or elects, to have separate legal personality under the Partnership Act 1902. Most Bermuda fund managers and investment funds are formed as exempted companies or as exempted limited partnerships; the latter will not be subject to the ESA if they have not elected to have separate legal personality.

Relevant activities

In the summer of 2018, the Code Group published a scoping paper setting out its expectations in terms of what economic substance legislation should address in order for the criterion 2.2 jurisdictions to satisfy their commitment to enact laws by the end of 2018 to address the Code Group's concerns. This scoping paper identified "at least banking, insurance, fund management, financing, leasing, headquarters, and shipping" as being activities in respect of which substance requirements should apply.

The ESA was duly extended to entities engaging in a "relevant activity", which for these purposes is banking business, insurance business, fund management business, financing business, leasing business, headquarters business, shipping business, distribution and service centre business, intellectual property holding business and conducting business as a holding entity. It will be noted that, while the activities of investment funds do not form part of this list, those of fund managers do.

Fund management

The Economic Substance Regulations 2018 made under the ESA provide that “an entity engages in fund management if it manages investments for funds and in respect of which a licence is required in accordance with the Investment Business Act 2003 or for which a licence would be required if such activity were taking place in Bermuda”.

Not all Bermuda-based fund managers will be subject to the ESA. The Investment Business Act 2003 (the “IBA”) imposes a licensing requirement on Bermuda entities engaging in “investment business” (which term includes both managing investments and giving or offering, or agreeing to give, investment advice) from a physical place of business in Bermuda, unless subject to an exemption order made by the Minister of Finance.

While Bermuda entities operating from a place of business outside the jurisdiction are not, therefore, subject to this licensing requirement, they will nevertheless be required to meet the ESA’s economic substance requirements if their place of business being outside Bermuda is the only reason why they do not require a licence under the IBA.

However, certain investment businesses are exempt from the licensing requirement under the Investment Business Exemptions Order 2004. Among those exempted under this order are persons (other than market intermediaries) who provide investment services exclusively to certain categories of client, including, among others, high income private investors, high-net-worth private investors, sophisticated private investors, bodies corporate with total assets of at least \$5m, and bodies corporate, partnerships and trusts whose shareholders, members and beneficiaries respectively fall into one or more of those categories. Most investment funds will fall into one or both of the latter two categories, meaning many Bermuda fund managers do not require a licence under the IBA and, as such, will not fall within the ESA’s scope.

Substance requirements

To the extent a fund manager is subject to the ESA, it will need to

demonstrate compliance with the economic substance requirements in the legislation. The ESA provides that these are satisfied if:

- the entity is managed and directed in or from Bermuda;
- the relevant activity’s core income-generating activities are undertaken in Bermuda;
- the entity maintains an adequate physical presence in Bermuda;
- there are adequate full-time employees with suitable qualifications in Bermuda; and
- adequate operating expenditure relative to the relevant activity is incurred in Bermuda.

To the extent a fund manager is subject to the ESA, it will need to demonstrate compliance with the economic substance requirements in the legislation

For a fund manager, the “core income generating activities” to be undertaken in Bermuda include taking decisions on the holding and selling of investments; calculating risk and reserves; taking decisions on currency or interest fluctuations and hedging positions; and preparing relevant regulatory or other reports for government authorities and investors.

At the time of writing, industry was still awaiting the publication of guidance notes on these requirements and how they might apply in respect of each relevant activity. Affected managers will, in any event, be expected to demonstrate satisfaction of these requirements in the annual economic substance declaration to be filed with the Registrar of Companies.

Investment funds

Funds themselves are not expressly made subject to the ESA, a position which is consistent with the Code Group’s position in its scoping paper that “...the usual substance requirements cannot automatically be applied to [collective investment vehicles].”

While funds per se are not made subject to economic substance requirements under the ESA, a fund may nevertheless fall within the ESA’s scope if it carries on one or more of the relevant activities as a business.

The requirement to carry on a relevant activity “as a business” should mean that a fund which engages in what might otherwise constitute a relevant activity on an occasional or one-off basis should be outside the scope of the ESA.

Conclusion

The introduction of the ESA, and similar legislation in other international financial centres, has the potential to represent a significant change to the manner in which businesses engaged in a relevant activity will operate.

While the ESA will not automatically apply to funds, a fund should nevertheless consider whether pursuing its investment strategy might constitute a relevant activity under the legislation.

And while fund management certainly falls into this category, not all fund managers will be affected. Even if a fund manager is required to comply with the ESA, Bermuda is fortunate in that a good number of investment managers have already elected to set up physical, staffed offices in the jurisdiction from which to run their businesses, and so it is anticipated that many fund managers will find they readily satisfy the requirements. **HFM**





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Cryptocurrency – an asset class in the making

Alain Fournier, of Kane Group, explores the asset potential of the cryptocurrencies market and discusses how recent legislative developments in Bermuda are helping to create a conducive fund environment

Q 2018 was in many ways a volatile period for cryptocurrency. How would you summarise current market dynamics?

A 2018 proved a reality check for the cryptocurrencies market. Yet, for any student of the history of securities markets, this was not a shocking or unexpected development.

The 2017 bubble for all its messiness and improbability also provided a huge opportunity for investors to fund viable and promising projects. Well-managed enterprises and promising technologies will for the most part survive and thrive moving forward.

On the flipside, the drop in crypto prices has proved beneficial to the overall crypto/digital-asset/blockchain industry, as it has helped cleanse the sector of dubious players, projects with mediocre economics and instances of fraud.

Until very recently, 2019 had been relatively uneventful from a pricing perspective. However, in the last month (June 2019) prices have started to rise again and with this, confidence in the crypto ecosystem. These swings in market prices are also correlated with trading activity and we have also seen an increase in activity starting from late April. Despite the losses of 2018, the crypto market offers strong potential for the savvy investment manager. From a purely fund investment perspective, the market is getting interesting again.

It is important to remember,



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however, that while cryptocurrency price developments tend to grab the headlines, simply judging the health of the digital asset industry solely by that data point is misleading. While this is a critical factor in assessing the viability and health of the crypto industry, it is important to also acknowledge the underlying technology and its myriad of possible use cases.

There are a multitude of crypto/blockchain initiatives and innovations that continue to see significant forward momentum. It's not all sunshine as some projects have been closed or scaled back, but that is unfortunately an inevitable part of the evolution of an emerging industry.

Q What are the factors currently affecting the amount of crypto-related funds under management?

A There are several factors currently affecting fund manager interest in the crypto asset class. Firstly, cryptocurrencies are still a relatively unknown entity. You have to remember that bitcoin itself is barely 10 years old and the crypto-fund industry is still in its infancy.

Misconceptions are therefore a significant barrier to overcome in

order to increase public interest. There is an onus on the crypto-fund industry to educate the public-at-large on the workings of the market and the potential it offers.

The make-up of the financial sector itself is also a factor. The fledgling nature of the asset class makes it a challenging sell for professional investors seeking buy-in from investment committees or similar bodies, particularly given its potential volatility. However, while the number of institutions willing to ride out the volatility is currently small, it is growing, spurred on by the expanding ecosystem of crypto asset investment service providers.

The third is slightly ironic in that there is very much a question on who you can trust and who is well and truly competent in the role of a crypto asset investment manager. The skillset of a successful manager will encompass what you think of as the traditional skills of an asset manager such as assessing the competitive aspect of the business, the addressable market, the competitive landscape, with an individual or team who can completely dissect forwards and backwards the underlying code of a project.

Q To what extent is Bermuda looking to create an environment conducive to the establishment of such funds?

A Bermuda is fully committed to the development of the crypto/digital asset sector. The government expects it to be a new pillar for the



There is an onus on the crypto-fund industry to educate the public-at-large on the workings of the market and the potential it offers

island's economy and aims to create an infrastructure and regulatory regime that becomes a global standard for the industry.

2018 saw the introduction of two significant pieces of legislation: the Digital Asset Business Act of 2018 and the Limited Liability Company (Initial Coin Offering) Act 2018. The government also amended the Banks and Deposit Companies Amendment Act of 1999 to make it easier for banks to transact business and offer cryptocurrency related services. While these laws don't specifically target the crypto/digital asset fund industry, they nonetheless have a significant impact on it.

The crypto asset sector is an emerging industry and the implementation of a transparent, flexible and business-oriented regulatory environment can help instil greater market confidence in the asset and help secure its longer-term investment status.

Moving forward, that flexibility will be essential to the growth of the market, as amendments to existing legislation and the introduction

of new legislation will likely be required to meet the ever-evolving needs of the digital asset industry.

There is also an onus on the private sector to be an industry advocate, promoting the ease of doing business in Bermuda and the dynamic business infrastructure that exists. It is then up to private enterprises to take advantage of this fertile business environment and create an ecosystem of services and companies that support and enhance each other.

Q Kane LPI plans to play its part in the sector's evolution and recently set up its CryptTPA solution. How do you see your role?

A Recently, PwC and Elwood Asset Management issued the 2019 *Crypto Hedge Fund Report*. It found that most crypto funds have under \$10m of assets under management – which concurs with research conducted by Crypto Fund Research.

Costs can have a significant impact on performance and the viability of the business before it gains traction. It's therefore understandable that crypto fund managers would be reluctant to engage third parties when it comes to directors, independent valuation of their portfolio and custody of their assets among other things. However, to secure external investor interest a crypto fund manager needs to weigh up these costs against the peace of mind these third parties bring.

We are conscious of this and our crypto fund accounting solution CryptTPA is built to address these challenges. What we have developed is a product designed to grow with the client. It provides a cost-effective proprietary solution developed on the Kane LPI software platform that is robust and flexible. Operating a scalable service model means we can accommodate all levels of administrative support across a range of fund services and respond quickly to a client's evolving needs.

We are a private firm with a long-term focus, so we are committed to establishing a strong presence in the sector. We view ourselves as trusted advisers and believe that if our client succeeds, we succeed and that informs all aspects of how we approach business.

Q How significant is the opportunity afforded by the crypto asset market from an administration perspective?

A We expect the crypto asset/digital asset fund space to grow significantly – particularly with the development of business-friendly regimes such as that being established in Bermuda. It is still very much an industry in its infancy, but momentum is starting to build. With the right infrastructure in place, and with sufficient investor awareness of the potential of this fledgling asset class, it could become a very important asset class. HFM

Bermuda's enhanced regulatory landscape

Alison Dyer-Fagundo, of Estera, takes a look at Bermuda's enhanced regulatory landscape in the age of economic substance



Bermuda continues to move forward in navigating the offshore and global regulatory environment and continues to be a leader in tax transparency, maintaining high levels of compliance, cooperation and information exchange. The recently implemented substance regulations are just another example of an enhancement to the existing robust Bermuda regulatory framework and the fact that Bermuda is a tax-neutral domicile is more clearly demonstrated today than ever before.

Bermuda's Economic Substance Act 2018 (the Act) and the Economic Substance Regulations 2018 (together, the Substance Regulations), became operative on 31 December 2018. The Substance Regulations are based on framework set by the European Union's Code of Conduct Group (COCG), with the general objective that jurisdictions should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect economic activity in that jurisdiction.

The Substance Regulations require Bermuda registered entities that fall within scope, to evidence adequate local resources, facilities and control over their relevant income generating activities.



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Economic substance and the insurance industry

There has been ongoing discussion around the insurance and funds industries on how the requirements of the Substance Regulations will be met. The Regulations state that an entity engaged in insurance activities complies with economic substance if it follows the requirements of the Companies Act 1981 (Companies Act) relating to corporate governance and the Insurance Act 1978 (Insurance Act), including the Code of Conduct.

It is no surprise that generally, Bermuda-licensed insurance companies are essentially compliant with the new substance framework given the structuring of the Bermuda domestic insurance legislative regime. Bermuda remains one of only two non-EU jurisdictions that enjoy Solvency II equivalency, which was granted by the European Commission in 2015. This demonstrates Bermuda's commitment to enhanced regulation and innovation and the EU's views on Bermuda's insurance regime being on par with their own.

At the same time as Solvency II equivalency was granted, Bermuda was approved as a qualified jurisdiction by the National Association of Insurance Commissioners, further distinguishing the jurisdiction.

There are three general classifications of insurance companies under the Insurance Act, each of which likely comply with the general aim of economic substance for various reasons. Commercial Insurers provide a full portfolio of insurance under the Insurance Act and must already comply with "Head Office" requirements, which are very similar to the requirements of the Substance Regulations.

Captive insurers do not have all the same requirements as commercial insurers under the Insurance Act, due their limited purpose. However, this bifurcation already existed when Solvency II was granted and therefore the EU, at the time, accepted the reasons for this difference in legislative regime. Regardless, the regulation of captive insurers under the Insurance Act is currently broadly considered sufficiently robust considering the limits placed on the business that can be written by captives.

Special Purpose Insurers (SPIs) are the third general classification of insurers in Bermuda and similar to captives, most SPIs are not set up

in Bermuda purely for tax planning purposes, are licensed for a limited purpose and have a limited life span. Most of the business they write is 'fully funded' and little to no underwriting risk is retained by the SPI.

The main reasons for setting up insurance companies in Bermuda have traditionally been centred around regulations that are sensibly applied and allow for innovation; accessibility to regulators; a ready choice of talented insurance professionals including auditors, actuaries, lawyers and insurance accountants; and the island's excellent reputation in the global insurance and reinsurance market. Bermuda has always been a transparent and co-operative jurisdiction with 41 tax information exchange agreements (TIEAs) in place, including the TIEA with the United States which has been in place since 1986.

Economic Substance and the funds and investment industry

Investment funds were originally seen as out of scope of the Substance Regulations, as they are distinctively different from other entities. An investment fund is a supply of capital belonging to numerous investors and overseen by investment fund management companies. However, a Bermuda incorporated fund manager may still be subject to the requirements of the Act and will need to determine whether the requirements apply.

As a response to the Substance Regulations, and to enhance the regulatory framework that applies to exempted or excluded funds, a number of amendments were made to the Investment Funds Act 2006 (IFA). Among the amendments is the removal of the term 'Excluded Funds'. 'Exempted Funds' will now be called 'Professional Funds'. These funds included Class A Exempt Funds and Class B Exempt Funds. Additionally, Professional Funds and Private Funds will both be called 'Registered Funds'.

Pursuant to the amendments, funds that were previously exempted or excluded now come into scope of the IFA and have oversight from the Bermuda Monetary Authority (BMA), who can exercise greater supervision over the funds.

With the recent amendments, there are also additional benefits for fund managers to choose Bermuda as a domicile for their funds particularly in the case of ILS, where the underlying assets of the fund is already issued out of Bermuda.

Bermuda's attraction for ILS and funds

Bermuda continues to move forward in navigating the offshore and global regulatory environment and continues to be a leader in tax transparency, maintaining high levels of compliance, cooperation and information exchange. The Substance Regulations are just another example of an enhancement to the existing robust Bermuda regulatory framework.

Bermuda continues to be a leader in tax transparency, maintaining high levels of compliance, cooperation and information exchange

The Substance Regulations will provide businesses with more confidence when conversing with tax regulators in their own jurisdictions. Bermuda's response to the EU's requirements was without hesitation and the government is keen on maintaining and supporting Bermuda's reputation of a world-class jurisdiction.

To ensure that Bermuda remains an attractive domicile for investors and businesses, a recent amendment has been made to the Economic Substance Act. The Economic Substance Amendment Act 2019 (the Amendment Act) which comes into force on 1 July 2019 acknowledges the need to ensure a level playing field between the affected jurisdictions.

The Amendment Act amends the existing economic substance legislation by excluding, from the definition of entities within scope, those entities that are tax resident in a jurisdiction outside of Bermuda and excluded from Annex 1 of the EU list of non-cooperative jurisdictions for tax purposes.

Another recent amendment aimed to enhance transparency is the Beneficial Ownership Regulation. In

March 2018, the Bermuda Government enacted legislation requiring all companies to gather and maintain information regarding their beneficial owners. This legislation aims to extend the existing beneficial ownership regulation to meet standards of transparency set by the Financial Action Task Force and the Organization for Economic Co-operation and Development.

With enhanced regulations, regulators are continuing to evolve the insurance and fund industries. An example of this is the introduction of the BMA's new regulatory sandbox, which became available to new insurers in 2018. This new option is designed to provide an incubator for newly registered insurance companies with a need to test innovative ideas including the use of technology such as insurtech. The regulatory sandbox allows the insurer to operate within a 'regulatory lite' environment for a limited period of time, designed to allow the insurer to test the market and offer new insurance products, with an appropriate level of oversight from the BMA.

More recently, the BMA introduced a Consultation Paper which sets out a proposed regulatory regimes for new classes of Limited Purpose Insurers (including reinsurers) (LPIs) and a new category of an intermediary (insurance/reinsurance market place). The BMA proposes to introduce new classes of LPIs (a fully collateralised reinsurer class (Collateralised Insurers) and an innovation class (Class IIGB), for innovative business models utilising digital assets).

How can Estera assist with Economic Substance?

Estera is well positioned to assist clients to understand and respond to the applicable requirements, following the introduction of the Substance Regulations. Estera will determine if the entity has established tax residency in a jurisdiction which is subject to this new law. If the analysis is positive, a substance test will follow. The substance requirements differ depending on the type of relevant activity the entity performs. The tests include a gap-analysis versus the requirements for adequate control, people, facilities and expenditure. **HFM**

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