STROOCK
SPECIAL BULLETIN

New Bermuda Legislation Will Create a Novel Class of Bank to Service FinTech Companies

Legislation is Latest Step in Bermuda's FinTech Initiative

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As we reported in our July 3, 2018 *Stroock Special Bulletin*, Bermuda is determined to establish itself as the jurisdiction-of-choice for FinTech entrepreneurs, in particular those involved in initial coin offerings ("ICOs"), digital assets and virtual currencies. Having amended the Companies Act 1981 and the Limited Liability Company Act 2016 (collectively, the "ICO Act"), and having passed new legislation in the form of the Digital Asset Business Act 2018 ("DABA"), the Hon. E. David Burt, JP, MP (Bermuda's Premier and Minister of Finance) and his cabinet now are focused on creating a new class of bank to facilitate Bermuda's FinTech initiative.

The Bermuda Monetary Authority ("BMA") has spearheaded a bill that will amend the Banks and Deposit Companies Act 1999 ("1999 Act") to establish a new, restricted banking license that will encourage banks to provide banking services to the Island's FinTech companies. This legislation is vital, as to date Bermudian banks have been unwilling to provide their services to the Island's nascent FinTech startups. The Government of Bermuda and the BMA strongly believe that this bill, titled the Banks and Deposit Companies Amendment Act 2018 ("Restricted Banks Act"), will resolve this impediment to Bermuda's FinTech initiative.

I. The Restricted Banks Act

On July 27th, the House of Assembly passed the Restricted Banks Act and the bill now moves to the Senate for ratification. The Government of Bermuda and the BMA designed the Restricted Banks Act to allow international participants to satisfy a critical need for the Island's FinTech companies. Of particular importance are Clauses Two and Three in the Restricted Banks Act.

Clause Two provides that the BMA has broad discretion in regards to the new, restricted banking license. Under the Restricted Banks Act, the BMA may impose conditions on or restrict the services[1]

[1] Section 14(5)(a)(i)-(vii) of the 1999 Act authorizes the BMA to grant a banking license to institutions that provide the following minimum services to the public in Bermuda:

that may be provided under the new, restricted banking license, and may vary or revoke any such condition or restriction. Clause Two also provides that the Minister of Finance, acting on the advice of the BMA, by order may amend the Third Schedule, which specifies the persons to whom banking services may be provided.

Clause Three, which sets forth the Third Schedule, provides that banks licensed under Section 14(5)(a) of the 1999 Act may be authorized by the BMA to provide banking services to the following six categories of persons:

(a) who has submitted a Form No. 1 Application to the BMA, in accordance with the Companies (Forms) Rules 1982, to be registered under the Companies Act 1981; and has indicated on such form the intention to conduct digital asset business or undertake an initial coin offering in Bermuda;

(b) who has submitted a Form No. 1 Application to the BMA, in accordance with the Limited Liability Company (Forms) Regulations 2016, to be formed under the Limited Liability Companies Act 2016; and has indicated on such form the intention to conduct digital asset business or undertake an initial coin offering in Bermuda;

(c) who is licensed to conduct digital asset business in Bermuda under DABA;

(d) who has obtained the Minister of Finance's consent to undertake an initial coin offering under section 4A of the Companies Act 1981 or section 67 of the Limited Liability Company Act 2016;

(e) who is an affiliated company of a person mentioned in paragraphs (a) to (d); or

(f) who is an agent of, or is contracted to provide services for, a person mentioned in paragraph (c) or (d).

Essentially, the Restricted Banks Act grants the BMA broad authority to license banks to provide banking services to FinTech companies that are licensed under the ICO Act or DABA or that have obtained consent from the Minister of Finance to launch ICOs, as well as to their affiliated companies and to certain of their agents and service providers. The underlying objective of the Restricted Banks Act is to circumvent the Bermudian banks' reluctance to service FinTech companies, which thus far has hindered Bermuda's FinTech initiative.

II. Resolving the Current Impediment to Bermuda's FinTech Initiative

The Bermuda Bankers' Association has explained the domestic banks' reluctance to enter the ICO, digital assets and virtual currency markets, citing their "ongoing need to manage their risks to continue to operate in accordance with their existing correspondent banking relationships." Notwithstanding these valid concerns and the Bermudian banks' general aversion to risk in the wake of the global financial crisis, the Hon. E. David Burt is determined to propel Bermuda's FinTech initiative forward, having declared that Bermuda must evolve and innovate: "[The banks'] reticence, no matter how well-founded, cannot be allowed to frustrate the delivery on our promise of economic growth and success for Bermudians."

(i) current accounts in Bermuda dollars on terms which require repayment on demand;

(ii) the payment and collection of cheques, drafts and orders;

(iii) savings, deposit or other similar accounts in Bermuda dollars;

(iv) overdraft and other loan facilities in Bermuda dollars;

(v) either directly or indirectly, loans in Bermuda dollars secured on the mortgage of real property in Bermuda;

(vi) foreign exchange services; and

(vii) either directly or indirectly, credit card or debit card facilities[.]

The Hon. E. David Burt and his Progressive Labour Party believe that the implementation of the Restricted Banks Act will resolve the current impasse, declaring that the bill will "ensure that the [Bermudian] Government is able to effectively execute on its FinTech initiatives, as well as encourage responsible FinTech innovation that provides fair access to banking services and fair treatment of consumers." Importantly, there appears to be key bipartisan support for the Restricted Banks Act. James Jardine, the independent Vice President of the Senate, has stated that although the FinTech industry poses its own distinctive risks, he receives "some degree of comfort" from the BMA's involvement in the drafting of the Restricted Banks Act.

Ultimately, if Bermuda's FinTech initiative is to be successful, FinTech companies will require access to banking services on the Island like any other company authorized to conduct business by the BMA. The Restricted Banks Act should create a banking environment in which such access is possible.

III. With Increased International Competition for FinTech Business on the Horizon, the Time to Act is Now

Bermudian FinTech companies require access to requisite banking services as soon as possible, as, at this very moment, various other jurisdictions are working to surmount the same hurdle with their respective banking regulators. As is often the case with new technologies and new lines of business, first-movers will be well-positioned to attract a lion's share of the new FinTech business. For example, Bank Frick in Liechtenstein, Fidor Bank in Germany, and Bank Vontobel AG in Switzerland have been some of the first banks to service digital asset and virtual currency startups in Europe. Unsurprisingly, these three banks have begun to siphon FinTech business from neighboring European countries, who have been unable or unwilling to provide banking services to FinTech companies.

Appreciating the urgency in Bermuda, the Hon. E. David Burt has stated:

> It is a fact of business and a fact of life that survival and growth can only be achieved through an ability to evolve and innovate. Legacy industries the world over have lost that ability and the future belongs to those who can quickly lay a foundation for growth, respond to emerging trends and preserve a reputation for sound management in the process. For countries it is no different, Bermuda must be nimble or we will be left behind.

Based on this view, the Government of Bermuda and the BMA appear to be propelling the Island forward with a prudent and practical new class of banking license that is designed to support the development of the country's FinTech initiative.

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