



DESIGNATED BUSINESSES (REGISTRATION AND OVERSIGHT) BILL 2014

EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, the Minister for the Treasury, Hon. W. E. Teare MHK.

1. INTRODUCTION

- 1.1 These explanatory notes relate to the Designated Businesses (Registration and Oversight) Bill 2014. The Bill is promoted by the Treasury on behalf of the Financial Supervision Commission ("the Commission"). The notes have been prepared by the Commission in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
- 1.2 The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

2. BACKGROUND

- 2.1 This Bill proposes to confer responsibility on the Commission to monitor compliance on the part of certain non-financial businesses and professions ("designated businesses") with anti-money laundering and countering the financing of terrorism legislation ("AML/CFT legislation").
- 2.2 The Bill does not seek to make persons affected by its provisions licenceholders of the Commission. The Commission's role in licensing and supervising financial services licenceholders is distinct and entirely separate from its future role under the Bill. Designated businesses will not become 'regulated' by the Commission – and they will retain their current status with the various bodies (if any) responsible for their wider business, competence or other matters, such as the Isle of Man Law Society, the Department of Home Affairs, the Office of Fair Trading etc. Indeed, it was the need to distinguish between the two roles of the Commission that required the introduction of this Bill. The Bill aims to provide the Commission with the necessary powers and duties for its distinct new role. Throughout the Bill, the Commission has sought where possible to use terminology which is different from that used in financial services legislation to emphasise the different role the Commission has under the Bill.

- 2.3 The oversight contained within the Bill is required to ensure that the Island can comply with international standards. The Bill relates to designated businesses and this term includes money lenders, external accountants, lawyers and other businesses that do not fall within an existing regulatory framework, i.e. the business of providing financial guarantees and commitments and the business of financial leasing.
- 2.4 The Bill has been the subject of wide consultation and all comments have been addressed. The Bill is not expected to increase the expenditure of Government or require any additional public service human resources as the Commission has prioritised the need to administer the regime and conduct the oversight required under the Bill and has diverted resources from other areas to undertake this work. However, the income of Government will increase by virtue of fees charged to those persons required to register under the Bill. The Bill will place an additional financial and administrative burden on those designated businesses caught by the Bill.
- 2.5 It is anticipated that all clauses of the Bill will come into operation soon after Royal Assent. The Bill requires all secondary legislation made under the Bill to be subject to approval by Tynwald.
- 2.6 The Bill is considered to be compliant with the Human Rights Act 2001.

3. STRUCTURE OF THE BILL

The Bill is structured as follows -

- 3.1 **Part 1** (*clauses 1 to 6*) of the Bill is introductory, providing for the short title, commencement and interpretation, as well as detailing the functions of the Commission under the Bill and the delegation of such functions.
- 3.2 **Part 2** (*clauses 7 to 12*) of the Bill makes it an offence to carry on designated business without registration; provides details of the registration process and of the revocation and de-registration processes.
- 3.3 **Part 3** (*clauses 13 to 30*) of the Bill contains powers for the oversight of designated businesses. Division 1 provides for the submission of annual returns and collection of an annual fee; on-site inspections and investigations and the offences in connection with such on-site inspections and investigations; and gives powers to the Commission to request or require information and to obtain search warrants. Division 2 provides for the supply of information and the relevant offences in connection with such supply of information; the restrictions on disclosure of information; the requirement to report certain matters to the Commission; and the maintenance of a register of registered persons and the publication of information contained on the register. Division 3 includes powers to issue reports and recommendations following on-site inspections; the giving of directions; the imposition of civil penalties; the making of public statements; and the ability to seek injunctions and remedial orders.

- 3.4 **Part 4** (*clauses 31 to 37*) provides supplementary provisions covering the provision of information, advice and guidance by the Commission; appeals against the decisions of the Commission; and the liabilities of officers of bodies corporate. It also gives the Commission powers to make secondary legislation; contains transitional provisions for existing designated businesses and makes provision for a number of minor and consequential amendments which are detailed in Schedule 3.
- 3.5 **Schedule 1** relates to clause 4. It lists the types of designated businesses to which the Bill applies and also details the exemptions from the requirement to register under the Bill.
- 3.6 **Schedule 2** relates to clause 22(1)(b). It details the exceptions to the prohibition on disclosure of information.
- 3.7 **Schedule 3** relates to clause 37(1). It details minor and consequential amendments to the Financial Services Act 2008, the Insurance Act 2008 and the Proceeds of Crime Act 2008.

4. CLAUSE BY CLAUSE NOTES

4.1 Part 1 - Introductory

- 4.1.1 **Clauses 1 and 2** provide for the short title and commencement only. The Bill will come into operation on day(s) specified in subordinate legislation made by the Commission.
- 4.1.2 **Clause 3** provides definitions of the terminology contained in the Bill. The clause also defines which legislation is included in the concept of "AML/CFT legislation" and "relevant Act", providing for these definitions to be amended by the Commission by subordinate legislation, so as to ensure they remain current.
- 4.1.3 **Clause 4** defines designated businesses by reference to Schedule 1 which lists those designated businesses to which the Bill applies, it also provides for exemptions. The list of designated businesses and exemptions can be amended by subordinate legislation.
- 4.1.4 **Clause 5** sets out the functions of the Commission under this Bill namely to assess compliance with the AML/CFT legislation by designated businesses and to investigate potential breaches of the legislation that may give rise to criminal liability.
- 4.1.5 **Clause 6** provides the power for the Commission to delegate any of its functions under the Bill in circumstances and to persons it considers appropriate, with the exception of the power to make orders.

4.2 Part 2 – Registration

- 4.2.1 **Clause 7** makes it an offence for any person to carry on or hold themselves out as carrying on a designated business, in or from the Island, unless the person is

registered under the Bill and complies with the AML/CFT legislation. The clause also defines when a person is treated as carrying on a designated business both in and from the Island, for example from a permanent place of business maintained by that person in the Island or engaging in the Island in one or more of the activities which constitute a designated business. The expression "holding out" is clarified in sub-clause (3) as including the use of a website or page; an internet site or page; or an e-mail name or address, or the name, title or subject matter of an email which indicates that a person is carrying on a designated business in or from the Isle of Man.

- 4.2.2 **Clause 8** details the requirements for an application for registration, which must be in such form as the Commission may specify and be accompanied by such fee as may be prescribed. In addition, the clause requires the applicant to provide such additional information as the Commission may reasonably require and must also notify the Commission immediately of any alteration or inaccuracy of the information supplied, or of any event which may affect the application in a material respect.
- 4.2.3 **Clause 9** requires that, following consideration of an application for registration, the Commission must either register the applicant (with or without conditions) or refuse the applicant; and must inform the applicant of the decision. An applicant for registration must be a fit and proper person and, in considering an application for registration, the Commission will also have regard to the fitness of the applicant's specified persons. With regard to the assessment of fitness and propriety, the Commission will consider integrity and matters relating to AML/CFT legislation, rather than the conduct of the designated business (unless that relates to integrity or AML/CFT issues).
- 4.2.4 **Clause 10** empowers the Commission to apply conditions on a person's registration. The Commission is required to give the registered person notification of, and the reasons for, the attaching of any conditions or any change to such conditions.
- 4.2.5 **Clause 11** details circumstances when the Commission may revoke a registration granted under the Bill which include: if the person ceases to be a fit and proper person; provides false, misleading or inaccurate information to the Commission or fails to do certain things. Revocation would result in a registered person having to cease carrying on a designated business. The Commission must notify the registered person in writing, giving reasons for its decision to revoke the registration; and if the registration was revoked on the grounds mentioned in sub-clause (1)(d) (i.e. that the registered person has failed to comply with the AML/CFT legislation), the Commission may refer the matter to the Attorney General.
- 4.2.6 **Clause 12** details the circumstances when the Commission may de-register a registered person. This is an administrative rather than enforcement provision which enables the Commission to remove a registered person from the register if they have ceased to carry on a designated business and have requested to be removed from the register; or if the Commission is satisfied that the registered

person is no longer required to be on the register (e.g. if a registered individual has died).

4.3 Part 3 – Oversight

Division 1 – Returns, inspections and investigation

- 4.3.1 **Clause 13** requires that a registered person must, for each year of registration, submit to the Commission an annual return, as specified by the Commission, together with such annual fee as may be prescribed.
- 4.3.2 **Clause 14** provides the power for the Commission to undertake on-site inspections and investigations (its main oversight function) to assess the extent to which the registered person meets the requirements of the Bill; the AML/CFT legislation; and its own procedures for compliance with the legislation. The clause details the powers of entry and access to premises and permits the Commission to inspect and/or copy the books, accounts and documents of a registered person. The powers under this clause may also be exercised in relation to a person whom the Commission reasonably suspects of carrying on a designated business when not a registered person. Any person who intentionally obstructs the Commission while acting in execution of its powers under this clause is guilty of an offence.
- 4.3.3 **Clause 15** provides the power to enable the Commission to request any person whom it reasonably believes may hold information that it requires for the performance of its functions under this Bill to provide that information. If a request is made under this clause, the Commission may issue a direction under clause 26, which would include a statement of reasons for its issue, to secure that effect is given to this request. This power may also be used if the Commission suspects that an unregistered person is carrying on a designated business. A statement given by a person in response to a direction may not be used in evidence against that person in respect of any criminal proceedings except where the proceedings allege contravention of clause 22 – restrictions on disclosure of information. Breach of a direction may result in a civil penalty or revocation of the registration.
- 4.3.4 **Clause 16** enables the Commission to apply to a justice of the peace (which, by virtue of the Justices Act 1993, includes justices of the peace appointed by the Governor, along with the Deemsters and the High Bailiff) for authorisation to require a person whose affairs are to be investigated or any other person whom the Commission reasonably believes has relevant information, to attend before the Commission at a specified time and place to answer questions or provide information or documents that appear to the Commission to be relevant to the investigation. The Commission may retain the documents for as long as necessary or take copies or extracts of them and may require the person producing them to provide an explanation of any of them. Powers under this clause are exercisable to enable the assessment of compliance with AML/CFT legislation. A person who fails to comply with a requirement is guilty of an offence. A statement given by a person in response to a requirement under this clause may not be used in evidence against that person in respect of any criminal proceedings except where

the proceedings allege contravention of clause 22 – restrictions on disclosure of information.

- 4.3.5 **Clause 17** enables the Commission to lay information on oath to a justice of the peace to seek a warrant in circumstances where the Commission reasonably believes that a person has failed to comply with an obligation under clause 16 to provide documents which are on the premises specified in the information; or it is not practicable to serve a notice under clause 16; or the service of such a notice might seriously prejudice the investigation. The warrant will authorise any named person, accompanied by a constable, to enter using reasonable force; search the premises; and take possession of any documents appearing to be of the description specified in the information or, in relation to any other documents, the Commission may take any other steps in order to ensure that such documents are preserved and not interfered with. Also, where the Commission discovers documents which appear to contain evidence in relation to any offence, it may take possession of those documents or take steps to ensure that such documents are preserved and not interfered with.
- 4.3.6 **Clause 18** provides for offences in connection with inspections and investigations.

Division 2 - Information

- 4.3.7 **Clause 19** requires a registered person to notify the Commission of any change in the information provided in relation to an application for registration. It also requires a registered person to notify the Commission if they have ceased to carry on a designated business.
- 4.3.8 **Clause 20** confirms that a registered person who fails to notify the Commission of any change in the information provided in relation to the application for registration without reasonable excuse is guilty of an offence. In addition, any person who, recklessly or otherwise, provides information or makes a statement that the person knows to be false or misleading in a material particular is guilty of an offence.
- 4.3.9 **Clause 21** confirms that a person is not under an obligation under the Bill to disclose any information subject to legal privilege within the meaning of section 13 of the Police Powers and Procedures Act 1998.
- 4.3.10 **Clause 22** protects information about sensitive matters such as business affairs that is obtained under the Bill. Such information (“restricted information”) may only be disclosed with consent or for a reason specified in Schedule 2 to the Bill, which relate to investigations and the performance of functions by specified entities.
- 4.3.11 **Clause 23** places a requirement on auditors carrying out functions, under this Bill or otherwise, to report prescribed matters to the Commission. The clause permits the Commission to prescribe such matters following consultation with the Treasury, Department of Home Affairs and any body or bodies that represent the interests of auditors in the Island.

4.3.12 **Clause 24** requires the Commission to keep and publish a register of information about registered persons. The Commission may continue to include information about a formerly registered person for up to one year after the person ceases to be registered.

Division 3 – Action and enforcement

4.3.13 **Clause 25** empowers the Commission to make reports of its findings following onsite inspections under clause 14 and to specify any action to be taken to rectify deficiencies in compliance with the AML/CFT legislation, together with a timeframe for such action. If the registered person fails to comply, the Commission may issue a direction under clause 26 to require the registered person to take the required action. Breach of a direction may result in a civil penalty or revocation of the registration.

4.3.14 **Clause 26** empowers the Commission to issue directions to registered persons to require that action to be taken in relation to designated business; to suspend the designated business or part of the designated business; or to provide the Commission with a report on any other matter. Such report must be in the format specified in the direction and prepared by a person with relevant professional skills either nominated by or acceptable to the Commission. Breach of a direction may result in a civil penalty or revocation of the registration.

4.3.15 **Clause 27** empowers the Commission to issue public statements in relation to any direction it has issued under clause 26; where the Commission believes that there has been a contravention of clause 7 (prohibition on carrying on designated business if not registered), clause 10 (conditions of registration), or the AML/CFT legislation; or where the Commission believes a public statement to be in the best interests of the public. If the public statement identifies any registered person, the Commission must serve notice on that registered person prior to issue. If the public statement identifies any other person, the Commission, if reasonably practical so to do, must serve notice on that person prior to issue.

4.3.16 **Clause 28** requires the Commission not to issue a public statement under clause 27 earlier than one month after the date of service of notice to the registered person or other person, unless each person identified in the public statement agrees to an earlier date; or the Commission decides on reasonable grounds that earlier issuance is necessary and the interest of the public outweighs any detriment to the persons identified in the statement. However, if an appeal is made to the Tribunal under clause 33, the Tribunal may order that the public statement should not be issued before a specified event or date.

4.3.17 **Clause 29** enables the Commission to apply to the High Court for an injunction where it believes that a person will contravene or repeat a contravention of clause 7 (prohibition on carrying on a designated business if not registered); a condition of registration attached under clause 10; a direction given under clause 26; or the

AML/CFT legislation. The Commission may also apply to the High Court for a remedial order.

4.3.19 **Clause 30** enables the Commission to prescribe civil penalties and apply these where a registered person has failed to comply with a condition applied by clause 10; failed to submit the annual return or any information required to be submitted with the return as required by clause 13; failed to pay the annual fee as required by clause 13; failed to give the notice required by clause 19(b); or failed to comply with a direction issued under clause 26. However, no penalty may be required if the Commission revokes or intends to revoke the registration under clause 11(1). Where the Commission intends to levy a civil penalty, it must give notice in writing to the registered person concerned giving notice of the decision, the amount of the penalty and the reasons for the decision. The Commission may, following consultation with the Treasury, the Department of Home Affairs and other affected persons, prescribe additional circumstances in which a civil penalty may be imposed. Civil penalties are paid into and form part of the General Revenue of the Island.

4.4 Part 4 - Supplementary

4.4.1 **Clause 31** empowers the Commission to publish such information and advice as it considers appropriate in respect of its functions under the Bill or any other matters which appear to the Commission to be desirable. Such information and advice may be published and offered for sale at a reasonable price.

4.4.2 **Clause 32** enables the Commission to issue and publish guidance for the purpose of establishing sound principles for compliance by registered persons with this Bill or the AML/CFT legislation. Such guidance may be published and offered for sale at a reasonable price. In determining whether a registered person's conduct amounts to a contravention of any requirement of the Bill, non-compliance with any aspect of the guidance or any relevant provision of a code issued under the AML/CFT legislation, may be taken into consideration. In any proceedings under this Bill or otherwise, any guidance issued under this clause is admissible as evidence if the Court or Tribunal conducting the proceedings considers it relevant.

4.4.3 **Clause 33** empowers the Financial Services Tribunal (established under the Financial Services Act 2008) to hear appeals in respect of designated businesses rather than establish a separate Designated Businesses Tribunal. Persons aggrieved may appeal to the Tribunal that the decision of the Commission was unreasonable having regard to all of the circumstances of the case. Appeals may be made in respect of a refusal to register a person (clause 8); the attaching of conditions to a registration or varying those conditions (clause 10(2)); the revocation of registration (clause 11(1)); the issue of a direction (clause 26); the refusal to revoke or vary a direction (clause 26(3)); the issue of a public statement (clause 27); or the imposition of a civil penalty (clause 30). A decision of the Tribunal is binding on the Commission and the applicant, however, the decision may be appealed on a question of law to the High Court.

4.4.4 **Clause 34** clarifies that, where an offence under this Bill is committed by a body corporate and it is proved that the offence was committed with the connivance of

an officer of the body corporate or was attributable to the negligence of that officer, the officer as well as the body corporate is guilty of the offence.

- 4.4.5 **Clause 35** enables the Commission to prescribe by order any matter that may be prescribed under this Bill which may contain such transitional, consequential, incidental or supplementary provisions as may be necessary or expedient. Such orders (other than an order under clause 2) shall not have effect unless approved by Tynwald.
- 4.4.6 **Clause 36** provides transitional provisions for those persons carrying on a designated business immediately before clause 7 (prohibition on carrying on a designated business if not registered) comes into operation. The transitional provisions apply for a six month period during which the person carrying on the designated business must apply for registration. Once application has been made, the person may continue to carry on the designated business until such time as the registration application is determined or any appeal has been determined or withdrawn.
- 4.4.7 **Clause 37** relates to minor and consequential amendments and refers to Schedule 3.

4.5 Schedules

- 4.5.1 **Schedule 1** is enabled by clause 4 and defines the designated businesses for the purpose of the Bill which include estate agents; audit services; external accountants; lawyers; the business of lending; the business of financial leasing; the business of providing financial guarantees and commitments; and dealing in goods or services of any description where a transaction or series of linked transactions involve accepting a total cash payment (in any currency) of at least €15,000 or equivalent.

This Schedule also contains exemptions from the requirement to register under the Bill. The exempt persons include those persons carrying on designated business which are already regulated for financial services, insurance or gambling by the Commission, the Insurance and Pensions Authority ("IPA") or the Gambling Supervision Commission.

- 4.5.2 **Schedule 2** is enabled by clause 22(1) and lists the exceptions to prohibition on disclosure of restricted information.
- 4.5.3 **Schedule 3** is enabled by clause 37 and contains minor and consequential amendments to the Financial Services Act 2008 ("FSA 08"), the Insurance Act 2008 and the Proceeds of Crime Act 2008 ("POCA").

The amendments to the FSA 08 include amendments necessary as a consequence of this Bill and, in particular, a specific reference to AML/CFT legislation is made to facilitate the Commission's AML/CFT oversight of existing licenceholders under the FSA 08 rather than this Bill. There is an amendment to section 34 to permit the Commission, in relation to its statutory functions, to enter into mutual assistance agreements with any regulatory body rather than be restricted to those relating to

its regulatory functions. This enables the Commission to enter into mutual assistance agreements with auditors and the professional bodies of designated businesses. Other amendments include changes to Schedule 2 to the FSA 08 in relation to disclosure of information to the Attorney General to address some deficiencies with the current wording which were identified during recent enforcement action. The opportunity has also been taken to include an explicit exception from restriction on disclosure to receivers, business managers and reporting accountants appointed under the FSA 08.

The amendments to the Insurance Act 2008 include amendments necessary as a consequence of this Bill and, in particular, a specific reference to AML/CFT legislation is made to facilitate the IPA's AML/CFT oversight of existing regulated entities under the Insurance Act 2008 rather than this Bill. The opportunity has also been taken to include two new exceptions to Schedule 6 to the Insurance Act 2008 in relation to disclosure of information to the Attorney General to address some identified deficiencies with the current wording which was identified during recent enforcement action and to ensure that the Insurance Act 2008 is consistent with the FSA 08.

The amendment to section 157(5) of POCA is urgently required as the current wording of the section prevents the regulator from bringing actions under the Company Officers (Disqualification) Act 2009 or taking other regulatory actions against individuals for breach of the Money Laundering and Terrorist Financing Code 2013.