Guide to the
Bermuda Insurance Market
GUIDE TO THE BERMUDA INSURANCE MARKET

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A. INTRODUCTION

It is fair to say the perception of the offshore financial world varies tremendously. On the one hand, a layman in Ohio or deepest England would have little or no understanding of the important role of offshore companies and would naively view any ‘offshore’ jurisdiction with suspicion. Sadly, this narrow observation is fuelled by sections of the international press which view any offshore jurisdictions as ‘tax havens’ or, worse, as somehow ‘dodgy’. On the other hand, this view can be starkly juxtaposed against professionals and large corporations throughout the world who are intimately knowledgeable and familiar with the crucial role of offshore jurisdictions in the world of finance.

Notwithstanding the contradictory perceptions of offshore jurisdictions, it is clear they are major players and a key element in international finance. Nowhere is this more clearly apparent than in Bermuda. Over the years, Bermuda has grown from a captive hub to the second largest reinsurance market in the world. Truly, Bermuda is a vibrant and competitive market where underwriters and executive officers are on the ground and actively binding risks in Hamilton.

In the face of the negative press coverage the question arises, how is it that a sector comprised of jurisdictions which are often painted as ‘tax havens’ or ‘dodgy’, should not only survive but thrive in the face of tremendous international public scrutiny? The truth is simply that every Fortune 500 company, most of the Fortune 1000 companies, and thousands of other enterprises and associations of individuals (or simply wealthy private persons and trusts) take advantage of the facilities offered by small islands and purpose-made international financial centres around the world. One has only to examine the annual reports of most listed companies to discover in the notes, or in the list of subsidiaries, that there are affiliates in Bermuda, Guernsey, Dublin or Luxembourg. However,
even that does not tell the whole picture. The sophisticated transactions to which offshore companies are frequently a central cog are not readily apparent from their public documents, but it is real, and it is very important to the financing of international business in a world of uncertainties about tax, creditworthiness, litigation and privacy in commercial transactions.

Of particular interest are the booming offshore insurance markets. Increasing numbers of captives are being formed in Bermuda, the Cayman Islands, Guernsey, Isle of Man, Dublin and Luxembourg. Likewise, an ever-larger portion of the world’s reinsurance business is being placed in Bermuda. As noted earlier, Bermuda is the second-largest reinsurance market behind only New York, underwriting billions of dollars worth of premiums each year. This is because offshore jurisdictions have been able to offer a sound regulatory and low-tax environment, with sufficient controls to maintain investor and public confidence.

But, what is meant by ‘offshore’? Surprisingly, this does not mean merely an island somewhere in the Caribbean or the English Channel. Indeed, there are a number of jurisdictions firmly anchored in a mainland somewhere, which, for some purposes, fall within the scope of offshore jurisdictions. For example, non-domiciled individuals resident in England enjoy a very favourable tax treatment and, for them, the United Kingdom is a tax haven! Further, Scottish limited partnerships can supply particular benefits to American investors by taking advantage of the double taxation treaty between the United Kingdom and the United States. In the Americas, land-locked states such as Vermont and Colorado and the Canadian province of British Columbia, have established themselves as captive domiciles giving special regulatory treatment to this category of company. Other places, such as Luxembourg, Dublin and Israel, are clearly physically onshore, but they have legislative facilities, which treat certain transactions differently from other major industrial jurisdictions and provide, to the residents of those other jurisdictions, an opportunity to profit. Indeed, Dublin is regularly considered an offshore jurisdiction, while clearly a member of the European Community.

Obviously, however, the word ‘offshore’ must have come from somewhere and, indeed, it was coined to describe the islands off the shore of the United States which, as early as the 1930s, offered locations from which American business people could conduct their international affairs and thereby minimise their tax and regulatory exposure back home. The term ‘offshore’ has come to be extended to any jurisdiction offering tax or regulatory advantages which are significantly different from those in the major economies. In relation to insurance, the principal offshore jurisdictions are Bermuda, the Cayman Islands, Luxembourg and Ireland. However, in understanding what an offshore jurisdiction is, one needs to look at the reasons why they developed.
B. REASONS FOR GOING OFFSHORE

1. Tax

For the professional, ‘offshore’ is now a structural tool in the efficient management of a company’s affairs. The principal efficiency (and the one which has given rise to the loaded expression ‘tax haven’) is, obviously, taxation. However, going offshore for ‘tax reasons’ does not mean to the legitimate businessperson tax evasion, as many wrongly suppose it does. The governments of the onshore economies have made escaping the tax net extremely difficult where the activities of a business or an individual’s income are wholly connected with one jurisdiction. However, it is where businesses are multinational or where income comes from a variety of jurisdictional sources around the world that being in a tax-neutral or low-tax jurisdiction has a number of significant advantages.

Increasingly, tax analysis is now properly focused on setting off against each other the provisions of the tax laws of different jurisdictions, all or parts of which may govern aspects of a company’s business or a division within its global group. Sometimes, this is known as ‘treaty shopping’ or arbitraging the differences in tax regulations between onshore jurisdictions. One simply exploits territorial limits of fiscal systems for legitimate international business purposes. That is to say, the lack of worldwide harmonisation of fiscal systems, particularly with regard to unilateral and treaty relief measures, produces a situation where connecting factors, connecting persons, places and events to a tax consequence, are not merely of jurisdictional relevance, but may also give rise to problems of double taxation or, through a deliberate change of one or more parameters, permit the reduction of the global tax burden. It is the lack of uniformity which highlights that there is no intrinsic sanctity regarding taxation; revenue authorities create devices and it is perfectly proper to determine whether the devices apply in given circumstances. In this context, offshore jurisdictions offer significant tax minimisation opportunities since the location of a taxable person or taxable event in an offshore jurisdiction may:

• sever or interrupt the formation of a connecting factor with regard to one or more high tax jurisdictions; and/or
• reduce the tax burden falling on a taxable person with regard to a taxable event by one or more high-tax jurisdictions.

Notwithstanding the best efforts of the onshore governments, there are still ways in which residents can achieve some tax economies offshore, particularly where the legal form of the offshore vehicle, for example, a partnership, allows the enterprise to roll up profits, but the owners are treated as individuals for tax purposes so that they do not suffer double taxation; firstly, at the enterprise level and, again, at the personal level.
To escape the tax net where legally possible, is self-evidently desirable and it is clear that, where the criteria, which define the application of the taxing provisions, are not met, an opportunity exists to mitigate the effect of the tax. What is curious about the expression of high-tax countries’ attitudes is that they omit reference to state-owned companies who have offshore vehicles. For example, a French state-owned company set up a Bermuda captive insurer while the provinces and territories of Canada funded and approved a Bermuda insurer to write an insurance risk of national concern, which could not be written in either Canada or the United States. However, seeking the most efficient approach to tax is one of the principal reasons for going offshore, fraught though it may be with complexity, but there are many other reasons for going offshore which are not necessarily related to tax.

2. Regulations

Particular trades or businesses may wish to operate offshore so as to disentangle themselves from red tape at home. This is especially true of insurance companies, particularly captive insurance companies. Also, listed companies can reduce their complicated requirements on some exchanges by incorporating offshore. NASDAQ, for example, has more relaxed rules for foreign-incorporated companies. Likewise, the absence or simplicity of takeover codes in offshore jurisdictions has appeal to some. Within the offshore jurisdiction it is likely that there will be sufficient regulation to ensure propriety but a much reduced reporting and compliance burden, making life simpler and easier for business executives.

3. Ease

Offshore jurisdictions generally make it easy to form companies, although certain of the offshore jurisdictions have confidential disclosure of ownership requirements which makes the process slightly more complicated, but no slower. Also, ease extends to the type of entity to be created. Whereas in the United Kingdom or Canada it might be more of a struggle to incorporate a company limited by guarantee, it is very simple to do so offshore. Such ‘guarantee’ companies are attractive to some in that they have no equity owners and so escape some tax systems or sidestep anti-avoidance legislation.

4. Speed

Transactions, such as the formation of an insurance company, which can take months or years onshore, can be accomplished with astonishing speed offshore. This is not necessarily through lack of effective oversight, but rather because the offshore jurisdictions are specifically in the business of facilitating enterprise and, instead of taking a hostile bureaucratic approach, they engage industry professionals to review structures for them and dedicate civil servants to helping to achieve efficiencies. Generally, the lack of complex regulation speeds up affairs.
5. **Innovation**

The relative simplicity of the legislation in the truly offshore jurisdictions, namely the small islands, allows creative business executives to design new forms of commercial vehicles, whereas in their home jurisdictions the absence of enabling laws, or the strictures of collateral regulation, reduces the scope for innovation. In Bermuda, it is possible to obtain private legislation from the Bermuda Parliament to provide, for example, for bond-financed insurance companies, where the value of the bond tracks the underwriting performance of the company. Public legislation can also be introduced relatively quickly at the suggestion of overseas clients to provide, for example, for limited duration companies or cross-border amalgamations, all of which have value to such clients and which are seen to be in the public interest in that the smaller countries have ‘cutting edge’ statutes. Particularly useful are offshore systems, which can quickly adapt to developments in the United States, where the vogue is currently for United States tax transparency; hence, offshore responds with legislation providing for limited duration, unlimited liability companies and modern limited partnerships. The flexibility of the legal structures available offshore enables the practitioner to structure transactions so as to meet the requirements of two or more legal systems and thereby achieve tax or regulatory efficiencies.

6. **International Arbitration/Litigation**

It is a fact of life in commerce that there will be disputes. In international finance, the parties to a relationship may come from several different jurisdictions and it will be desirable to find a neutral middle ground where disputes can be resolved. The more sophisticated offshore jurisdictions have modern arbitration laws, as well as the high level of professional expertise required to litigate or arbitrate. The offshore jurisdictions which are British overseas territories, also have final appeal to the Privy Council.

7. **Finance and Securitisation Transactions**

In structured finance and asset securitisation transactions, it is almost inevitable that the facilities of an offshore jurisdiction will be employed to provide distance and creditor protection.

8. **Specialty Insurance**

Offshore jurisdictions, and particularly Bermuda, are renowned for their insurance industries. As stated previously, Bermuda is the second largest reinsurance market behind only New York. A principal reason for the success of Bermuda in attracting insurance and reinsurance companies to its shores has been a regulatory environment which fosters innovation and creativity in responding to the emerging needs of the insurance and reinsurance markets. Bermuda’s growth as an insurance and reinsurance centre has been as a direct result of crises or shortcomings in the established
markets onshore. As a centre of innovation, companies in Bermuda have been, and continue to be, able to provide risk financing solutions in circumstances where others have failed. From the development of mechanisms such as captives in the 1960s, through the formation of excess liability carriers ACE and XL and the development of finite risk reinsurer Centre Solutions in the 1980s, and through the formation of property catastrophe companies Mid-Ocean Re, PartnerRe, Endurance Re and many others over the last two decades, Bermuda has been, and continues to be, a centre for innovation in the insurance market. New alternative risk transfer solutions such as risk swaps, special purpose vehicles for exchange-traded catastrophe bonds and other insurance-related derivative products, are also finding fertile soil in which to germinate and develop their creative solutions to capacity and other crises which insurance markets, in particular, are having to face. Given Bermuda’s track record of success in being a place in which innovation and creativity can flourish, it stands well-placed to continue to fulfill this vital function to the global financial markets into the future.

9. Facilities and Infrastructure

Ironically, the largest criticism of the offshore world is that it is generally perceived that all offshore companies are simply paper entities and have no physical or actual presence in the offshore jurisdiction. In Bermuda, that perception is clearly misplaced and does not reflect reality. Bermuda is now an active and vibrant insurance market. In most cases, the large third-party carriers have major physical presences in Bermuda and the business is almost exclusively underwritten locally. As a result, over the years, Bermuda has developed a sophisticated services and business infrastructure where many of the world’s leading underwriters live and work. By way of example, all of the top accountancy practices and brokers have major presences in Bermuda. This is one of the principal reasons that following on from September 11th and Hurricane Katrina in 2005 most of the new reinsurance carriers (representing approximately US$30 billion of new capital) chose to incorporate and operate from Bermuda.
A captive insurance company can be defined as a ‘do-it-yourself insurance company’\textsuperscript{1}, which insures the risks and exposures of its parents and affiliates.\textsuperscript{2} While the captive is said to have been born in the United States in 1955,\textsuperscript{3} the concept developed and took root in Bermuda in the 1960s. Since then, captives have proved to be a very malleable tool, and have been utilised in a number of contexts to achieve many different risk financing objectives. Presently, the plethora of applications for both single-parent and multi-owner captives in the principal domiciles is a testament to the mutability of the concept.

In Bermuda, captives writing general business may be classified in either Class 1, 2 or 3, depending on the particular programme for the captive. A single-parent or ‘pure’ captive, which underwrites only the risks of its parent and affiliates, would be classified as Class 1. A multi-owner captive, or a single-parent captive which writes less than 20\% of unrelated business would fall within Class 2. Any captive which writes less than 20\% of unrelated business would fall within Class 3, although the higher the proportion of unrelated business underwritten by a company, the less the ‘captive’ moniker can be said to apply.

Traditionally, captives have been established to provide customised solutions to risk financing needs which were not available in the commercial insurance markets. Captives thrive particularly in hard markets, where commercial insurance is difficult to obtain at cost-effective rates. However, a high number of formations continued in the 1990s\textsuperscript{4} throughout the prolonged soft market for traditional insurance. Such persistence indicates that the alternative risk transfer (ART) market continues to employ creative and customised uses for captives which stretch the boundaries of the traditional paradigm.\textsuperscript{5}
While certain of the alternative market applications, like captives, may now be conventional, the alternative market in which the captive concept was born and reared remains a place where creativity can flourish and novel solutions to risk financing problems can be fashioned. Such creativity has been enhanced by segregated accounts legislation culminating in the Segregated Accounts Companies Act 2000 (SAC Act).6

This chapter explores the most common reasons to form a captive. It then goes on to consider current trends and future developments in the captive industry.

B. REASONS TO FORM A CAPTIVE

Various reasons have been advanced for the establishment of captive insurance companies. As a general matter, many medium to large organisations or groups of organisations have found that the conventional insurance markets have failed to meet their financial needs, especially in terms of price, service, cover and capacity for certain types of risk. In making the decision to form a captive, they have often been compelled by the same reasons that have fuelled the growing captive movement worldwide. These reasons include the following:

1. **Reduction of the Costs of Risk Management**

The price of insurance cover purchased in the conventional market typically reflects a significant mark-up to pay for the insurer’s acquisition costs (including marketing costs and commissions paid to brokers), administration costs, overheads and other expenses as well as a portion of the insurer’s profit. The fact that premiums are paid to the insurer in advance also represents a lost opportunity on the part of the insured to earn investment income on such premiums, as well as any underwriting profits that may arise on the insurance transaction itself.

While the establishment of the captive insurance company cannot eliminate these costs, it certainly can reduce them. The extent of the reductions will depend on the captive’s own loss experience and claims handling costs, as well as the degree to which the captive form of self-insurance serves to promote cost consciousness and efficiency within the insured organisation.

Captive owners can also benefit from the ‘economies of scale’ by providing insurance to subsidiaries and operating units within their group. Further, where a particular line is written by a captive, the parent is better able to isolate and pay for unbundled insurance products and services in the commercial market, ‘stripping down’ unnecessary or cost ineffective products from what is to be purchased commercially.
2. **Stabilisation of Pricing**

Where the insured enjoys a stable and reasonable loss experience from year to year, a captive affords the ability to price insurance cover accordingly. By contrast, the conventional insurance market will often set prices in relation to broad industry classifications, and thereby fail to reflect key differences in loss experience among individual insureds. The result is the incurrence of a financial penalty in the form of price volatility consequent upon general market conditions and the actions of other insureds over whom the organisation has no control. In addition to the stabilisation of pricing over time, there are also advantages to be realised in terms of the organisation’s financial planning and control functions. Because the owner of a captive can determine rates, this also allows for pricing to be more responsive to a good loss experience on a particular line or policy.

3. **Provision of Cover Where Otherwise Unavailable**

From time to time, depending on market conditions, the conventional market is unwilling or unable to provide cover for certain risks, especially in respect of liability and casualty loss. The establishment of a captive (or group captive) to write such lines or to provide additional capacity or customised solutions will often hold the answer to structural market problems within the insurance industry. Examples of cover which have at times been unavailable or difficult to obtain on satisfactory terms, include product liability, oil pollution, hazardous waste, strike insurance, punitive damages, workers’ compensation, health care and medical malpractice. Whenever insurance cover is either unavailable or overpriced, the feasibility of a captive is enhanced.

4. **Access to Reinsurance Markets/Capital Markets**

Because reinsurers generally only deal with insurance companies, a captive affords direct access to the international reinsurance markets. In bypassing conventional insurers in this manner, the ultimate insured is spared the frictional costs of the primary insurance companies discussed above. Indeed, the savings associated with eliminating the costs of the conventional insurer will generally outweigh (by a considerable margin) the incorporation and other start-up costs of a captive. It is also the case that a captive can earn ceding commissions from the reinsurer for introducing the reinsurer to the ultimate insured.

Additionally, a captive will provide a platform for accessing some of the new capital market and advanced risk financing transactions that are structured through reinsurance arrangements.

5. **Improved Cash Flow Benefits**

The ability of a captive to generate investment income from unearned premiums received is often a critical advantage of forming a captive. This is especially so where the premiums are paid in
advance and losses are paid out over a lengthy period of time (which in turn depends on the kinds of risks insured). A captive also allows the organisation to recapture underwriting profits otherwise left to the commercial insurers. The owners of the captive have the ability to choose and control the investment portfolio for premiums paid in. To the extent that investment income can accumulate in a tax-free domicile like Bermuda, there will be additional funds available to pay losses and a corresponding reduction in the need for further funding of the captive by its parent (the ultimate insured).

6. **Reduction of Government Regulations and Interference**

By contrast to the rigorous insurance regulation in most industrialised countries, an offshore domicile can provide a relatively less onerous, yet responsible, regulatory framework. In Bermuda, this has been described as a system of shared regulation, whereby the public and private sectors co-operate with a view to achieving the most appropriate level of policyholder protection, while at the same time, permitting the captive to grow and prosper. Though the form of such regulation is described in some detail elsewhere in this Guide, it should be noted here that there are no relevant exchange control regulations. Consequently, income arising from net underwriting results, together with enhanced investment performance, can be returned to the parent in the form of dividends or lower insurance premiums.

7. **Ability to Customise Insurance Programmes**

For all practical purposes, a captive has complete freedom to insure any risk it chooses and to customise the terms and conditions of its policies. Indeed, the opportunity to do so (for example, by either including or eliminating common policy exclusions like those for certain types of personal injury in a general liability policy) can often lead to improved loss control efficiency within the captive and promote greater awareness of the factors which commonly give rise to losses.

8. **Opportunities for Improved Claims Handling and Control**

A captive is also free to establish its own claims handling policies and procedures. This has obvious advantages such as the reduction of the time taken to process and pay claims. Generally, the captive option gives the corporation (its parent) more flexibility to control the destiny of its risk management budget. A profitable captive may even be able to loan assets back to the corporation.

9. **Creation of a Profit Centre**

To the extent that a captive might offer insurance cover to unrelated customers (sometimes in response to tax problems of the captive), it will have diversified into open market operations not unlike conventional insurers. Although there are special risks and capital requirements associated
with engaging in such business, in doing so it will have the potential to generate additional profits for its parent.

10. **Tax Advantages**

While specific tax advice should be sought in the parent company’s domicile before taking the decision to form a captive, there may be certain tax advantages associated with such a decision. These might include the tax free accumulation of underwriting and investment income (which may depend on, among other factors, the residence or citizenship of the owners or the source of the income). Another advantage may be the deductibility of premiums for tax purposes (as premium expense of the insured) and the avoidance of state premium taxes.

Although tax advantages may be of significance in the decision to form a captive, the better view seems to be that they should not be considered as the primary motivating factor.

The decision to form a captive will involve careful analysis of the factors and developments outlined above. This analysis should form part of an overall captive feasibility study, the main purpose of which is to make a strategic assessment of the parent company’s current insurance programme, including its risk exposures and record of losses. Thereafter, a host of additional matters (principally of an organisational nature) will need to be addressed, including the selection of the most appropriate local captive insurance managers (assuming, as is likely, the captive will not be self-managed), attorneys, auditors, actuaries and other service providers. Indeed, a visit to the chosen domicile will usually be advantageous, so that the full range of service providers can be interviewed and other helpful contacts made. Any member of the insurance team of Appleby would be pleased to facilitate the arranging of meetings with service providers.

C. **CURRENT TRENDS AND FUTURE DEVELOPMENTS IN CAPTIVE INSURANCE COMPANIES**

In the search to provide additional value to clients, innovative entrepreneurs are turning to captive insurance vehicles. This development marks a sea change from the traditional use of a captive as a single shareholder or group vehicle for risk control and risk financing purposes. The new uses of captives by manufacturers, banks and retailers are by far the fastest growing sector in the captive industry. Since 2000, Class 3 insurers have been the fastest growing category of new formations, with many of these insurers being, in fact, wholly-owned by a group insuring its own clients. Thus these are not ‘captives’ at all in the true sense, but rather companies operating as profit centres in relation to the clients of the owner. In essence, entrepreneurial business enterprises are forming captives to make a profit by solving the business problems of their own companies and clients using an insurance vehicle.
The effect is to enhance their product and to cover the risk exposure of the clients on the products which they sell. The range is far and wide; from beer, to tools, to mobile homes, to mortgages, to package delivery services and mobile telephones. The insurance lines which are being offered vary. There are product warranties being issued through a captive owned by a computer manufacturer, whereby purchasers of computers can obtain insurance coverage to finance the disaster recovery charges should the computer fail. Likewise, manufacturers of mobile telephones can provide replacement cover to their clients through a captive owned by the manufacturer. Makers of mobile homes can cover property and casualty, and liability exposures. In the area of credit life, banks can cover loans with credit life policies. Indeed, anyone offering credit can attach insurance coverage. Thus, retailers or utilities, or anyone with a billing system, can sell insurance coverage to protect both themselves and their clients against the burden of outstanding receivables.

In the franchise business, hamburger or pizza outlets, clothing chains and beauty products, can enhance their core products, namely the franchise system, by adding to the mix insurance against property and casualty risks or workers’ compensation and other insurance lines. The dealers, suppliers and subcontractors, or other folk with whom a manufacturer has a relationship which is capable of being enhanced by an insurance product, can benefit from coverage brokered to them by the manufacturer out of his own captive. Coverage can extend to credit risks, or property cover for equipment out on sale or return.

Aside from the client programmes, captives are also being used by American companies who face two tax issues. The first, and more problematic one, is the sheltering of profits, which cannot ordinarily be done these days, with minor exceptions. The second is the deductibility of premiums, which is worth about 6% of casualty programmes, where much of the effort of the captive sponsors turns on IRS acceptability of the captive, particularly if there is no unrelated business. Thus, in relation to profit sheltering, captives look for ways to write non-related business so as to build up profit in the captive offshore, in a structure which passes the non-controlled foreign corporation tests onshore. In relation to deductibility, most companies take the deduction and wait to be challenged.

One way of writing third-party business is to write one’s own employment benefits. Employees are ‘not related’ to the parent company, as the beneficiary is the employee and not the employer, so that advantage can be taken of the deduction. The matter is, however, complicated by the Employee Retirement Income Security Act legislation in the United States. Effectively, the party purchasing the employee benefits cannot do business with a ‘party of interest’ — ie, where the provider is more than 50% controlled by a related company. Thus, any employee benefit arrangement needs examination by the United States Department of Labor. The good news is that it is possible to obtain clearances or exemptions from the Department of Labor (specifically a PTE79/41 Exemption). Where it is not possible to provide for United States-based employees, it may, nevertheless, be possible to provide for the international work force of multinational corporations. Thus, pensions and employee incentive schemes can be run from an offshore-based captive. This has been done by British banks and manufacturers and increasingly by multinational conglomerates.
Equally recondite are the wholly new risks which are being underwritten by captives for their parent companies. These risks include international tax leveraging, whereby companies are taking advantage of the different tax rates applicable to the multinational operations of the parent. Some jurisdictions do not attack the deductibility of premiums into a captive. For example, if one were to have a German operation, one would put premium into the captive which would only be taxed at the United States tax rate in circumstances where the German equivalent tax would be higher. Some captives are also writing foreign exchange risks, whereby a multinational would protect itself in its foreign exchange exposures using a captive to access the reinsurance markets. Likewise, multinationals can seek protection for commodity pricing or the economic damage caused by loss of licences in overseas markets which, of course, is analogous to other forms of political and export credit risks. Just as risky, obviously, are self insurances against product recall and environmental pollution. A final and highly esoteric new use of a captive is in the realm of securitisation. Captives would serve as a vehicle for consolidating their parent group’s risks which would then be securitised and taken to the capital markets with the group history serving to justify pricing and risk profile for a bond issue or an equity investment. Finally, the growing popularity of segregated accounts not only for Class 3 insurers, but also for use in connection with insurance programmes written by Class 2 insurers and pure captives is testament to the flexibility and creativity available under the SAC Act for captive programmes. Registration under the SAC Act allows quick entry and exit for insurance programmes and avoids the incorporation and liquidation formalities and costs associated therewith.

In summary, Bermuda is seeing more varied developments and increased use of traditional captives. These developments seek to convert risk into reward; to involve entrepreneurs in trade and commerce knowing their customers and their own insurance risks; and to find a business solution for which a captive can ‘capture’ the profit.

Endnotes:


2. Ibid.

3. *The day the Captive was born, The Fred Reiss Story* by Tony Forster © 2002.

4. For example, new insurance company formations in Bermuda numbered between 85 and 100 for each of the years 1994 through 1998, a period of soft prices for commercial insurance.
The prolonged period of new captive formations in the face of a sustained soft market in the 1990s indicates that unavailability of cost-effective insurance capacity is not the sole reason why companies decide to take an insurance function ‘in house’. Another important factor in the decision is that risk managers understand the risks their businesses face and believe their experience in risk management can be applied to insurance.

See Chapter 16.
CHAPTER 3
RENT-A-CAPTIVES AND THE USE OF SEGREGATED ACCOUNTS

A. RENT-A-CAPTIVES

Bermuda has long been recognised as the domicile of choice for the world’s captive insurance industry. One reason for Bermuda’s pre-eminence is the success of arrangements which may be structured under its insurance laws to offer alternatives to more conventional risk management options available in the ‘traditional markets’.

A ‘captive’ is a closely-held insurance company whose insurance business is primarily supplied and controlled by its owners — in the sense that the owners have and exercise direct involvement and influence over the company’s major operations, such as its underwriting, claims management and investment policies — and in which the original insureds are the principal beneficiaries.1 The ‘rent-a-captive’ represents an evolution of the ‘captive’ insurance company, and has been employed for specialised situations for nearly as long as more standard forms of captives have been operated.

A rent-a-captive programme can be structured so that effectively unrelated parties may participate in the underwriting profits generated by the risks which they insure (or arrange to insure) via the captive. In addition, rent-a-captive policyholders (or the owners of such policyholders) may, by negotiation, secure a significant degree of influence over both the investment of underwriting reserves maintained by the captive in respect of the programmes with which they are associated, and the rate of the ‘flow of funds’ through the captive (in the sense of the timing of permitted distributions). Such advantages over traditional insurance arrangements have long been the hallmark of the rent-a-captive, and in recent years innovations in Bermuda insurance laws have extended the options for structuring rent-a-captives, leading to a resurgence of interest in their use.

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1. **What is a Rent-a-Captive?**

A rent-a-captive is a company, typically established in an offshore domicile like Bermuda, which 'rents' its capital, surplus and legal capacity to engage in underwriting activities (i.e., its insurance licence) to policyholders who are not its voting shareholders. The rent-a-captive will often provide its policyholders (or 'programme participants') with required administrative services. As such, the term 'rent-a-captive' applies to any arrangement where the insured party obtains benefits equivalent to those provided by standard forms of captives, without actually participating in ownership or management.²

One of the principal characteristics of a rent-a-captive is that the account established for each programme participant is segregated in some manner from accounts established for other programme participants. This is done to achieve a separate accounting basis for the insurance business attributable to each programme participant. Such segregation may be accomplished administratively by the rent-a-captive itself, or there may be a full legal segregation which results in statutory protection from losses attributable to other programme participants.

2. **Advantages of a Rent-a-Captive**

Rent-a-captive programmes have long been acknowledged as alternatives to commercial insurance which offer more cost-effective and flexible risk management solutions, particularly with regard to workers' compensation but also for general liability, automobile liability and professional liability programmes.

A rent-a-captive programme offers programme participants many of the advantages of a wholly-owned captive, without requiring the insured party (or its owners) to make an equivalent commitment to fund the captive's start-up and management expenses. These advantages include the facility to customise the insurance programme and to control premiums, pricing and access to reinsurance. Establishment of the rent-a-captive in a select domicile (for example, Bermuda) permits access to favourable and responsible governmental regulation. Additionally, the rent-a-captive can often secure coverage for specialised risk when this is unavailable in the commercial insurance markets. However, the main advantage of rent-a-captives may lie in the programme participants being able to obtain a return of underwriting profit and investment income earned on the reserves held in their respective insurance programmes. Such returns will, of course, depend on the loss experience of the particular case.

Typically, each programme participant will retain a portion of its own risks, insuring the balance with the rent-a-captive. This arrangement creates powerful incentives to programme participants to be proactive with loss control and claims handling measures. Such measures will often be co-ordinated by agreement between the programme participant and the rent-a-captive, and perhaps with professional claims handling service providers.
3. Ownership and Corporate Structure

There are various ways to own and structure a rent-a-captive, depending on whether the proposed programme participants are single corporations, or a group or association. There may be tax and other factors to consider, from the standpoint of both the proposed programme participants and the sponsors of the rent-a-captive.

While it is possible to interpose a holding company between the rent-a-captive and the sponsors forming the rent-a-captive, the most common rent-a-captive structure involves the sponsors owning 100% of the voting shares of the rent-a-captive. The rent-a-captive reinsures each programme participant, in association with an issuing carrier, which issues the policies of insurance to the programme participants. The issuing carrier will usually be an insurance company which is licensed in the jurisdiction(s) in which the programme participants are resident. The programme participant will be afforded access to the rent-a-captive programme when it arranges for a policy to be issued by the issuing carrier and, in association with this, it will purchase one or more preferred non-voting shares in the rent-a-captive. Such shares will be purchased pursuant to the provisions of a shareholder agreement wherein the rent-a-captive agrees to cause a dividend to be declared to the owner of record of the preferred shares. Dividend payments will also be controlled by the shareholder agreement; for example, the annual payment date or the termination date of the particular programme might be indicated in an appendix. Dividends will be calculated according to a specific formula involving investment income earned and underwriting gain or loss. Payment of dividends will be subject to the availability of surplus funds (ie, surplus of the statutory reserve requirements) in the related account.

The shareholder agreement will provide for indemnification of the company by the programme participant. The indemnity is designed to protect the company in respect of any net underwriting losses, loss expenses and collateralisation expenses arising from the insurance programme. As collateral for this indemnity, the programme participant will usually agree to provide the company with a letter of credit (or substitute cash collateral).

The shareholder agreement will also provide for the payment by the programme participant of all premiums due to the rent-a-captive. Failure to do this will constitute a material breach of the agreement. The amount of any such non-payment, together with interest, may be deducted from any surplus reserves held for the account of the particular programme, or from any dividend due to the programme participant.

Dividends on the preferred shares issued to each programme participant will be declared and paid separately — ie, as a separate class or series. Such shares will also be redeemable at face value upon the termination of a programme. However, where the capital required for the particular programme has been ‘rented’ from the rent-a-captive, the shares will be redeemed less financing costs.³
Where a holding company is interposed between the rent-a-captive and the sponsors forming the rent-a-captive, the sponsors will typically hold 100% of the rent-a-captive, and the structure will not otherwise be different from the above.

Rather than issue preferred shares, some rent-a-captives simply enter into a form of profit sharing agreement with their programme participants. This is an alternative means by which programme participants may directly participate in the underwriting and investment income arising out of their respective programmes.

4. Segregation of Accounts

a. Private Act
Historically, a large number of rent-a-captives have utilised a Private Act of the Bermuda legislature to achieve legal segregation of the assets and liabilities of each insurance programme which they underwrite, so that there can be no ‘cross liability’ among programmes resulting from any untoward experience of one particular segregated account. Where the rent-a-captive is so structured (and depending on the language of the Private Act), the complete segregation of each programme participant’s account can be achieved, as the assets for each programme participant are thereby isolated and protected from the liabilities of other programme participants and the failure of the rent-a-captive itself.

The advantages of such a structure will be clear. Pursuant to the typical provisions of such a Private Act, a liquidator is, as a matter of law, bound to recognise the separate nature of the segregated account established for each programme, and may not apply assets identified as the assets of any one programme to pay claims of insureds under other policies issued by the rent-a-captive or by the rent-a-captive’s non-insurance creditors. In addition, the liquidator typically has no power to void or cancel the terms of any policy, deed or contract issued in respect of any programme.

b. Registration under the Segregated Accounts Companies Act 2000 (SAC Act)
The enactment of the SAC Act and its subsequent amendments has both streamlined and strengthened the ability to achieve a segregated accounts structure. A company no longer needs a Private Act of the Bermuda legislature to establish segregated accounts, but needs merely to register as a segregated accounts company under the SAC Act, a much more expeditious process. Moreover, the legislation establishes substantive law relating to the segregation and protection of assets, as contrasted with the largely procedural law provisions contained in the Private Acts, thereby significantly enhancing the prospects of enforceability of transactions in jurisdictions outside of Bermuda where the assets of a particular segregated account may be situated.

However, the SAC Act does not preclude or render obsolete the advantages of achieving legal segregation of accounts via the Private Act route, which is still possible (although there is now a
clear regulatory preference for proceeding via the SAC Act route). In fact many of the salient features of companies registered under the public law owe their origins to the Private Act model as it has evolved.

There is no requirement for Private Act companies to register under the SAC Act, but the conversion of such companies to registered SAC Act status is quite straightforward, and indeed many Private Act companies are expected to seek to register under the SAC Act in the fullness of time.

Not all rent-a-captives will be structured to take the benefits afforded by a Private Act or SAC Act registration. Some rent-a-captive owners take the view that their programme participants may not be able to deduct premiums for tax purposes if there is demonstrably less risk-sharing among programme participants.

5. **How Does the Rent-a-Captive Work?**

In the typical scenario, the programme participant (either on its own or with the assistance of a broker or the rent-a-captive or both) will negotiate with the issuing carrier, which will be an admitted insurance company (or ‘fronting company’) for the provision of policy-issuing and related services. The fronting company will then issue the policy and cede the working layer to the rent-a-captive. For this service, the fronting company charges a fee, which may range anywhere from 5%-14% of gross premium. The fronting company may also be required to deduct certain federal and/or state taxes. As a matter of law, the fronting company will be primarily liable for the risk. However, the reinsurance agreement with the rent-a-captive will invariably require the latter to provide the fronting company with a clean, irrevocable letter of credit. The letter of credit is ultimately paid for and backed by the programme participant, typically as a one-time charge of 1/2% of premium, or as an annual fee of 3/8% of the premium deducted from the dividend. The guarantee for the letter of credit is the programme participant’s own funds held by the rent-a-captive. In addition, the rent-a-captive itself will charge an underwriting fee of perhaps 2%-3 1/2% of premium.

6. **Capital Requirements**

In order to meet the Bermuda premium underwriting requirements (i.e., the ratio of premium to capital and surplus), a programme participant must itself either provide or ‘rent’ the necessary capital. If the programme participant elects to rent, the rent-a-captive will often supply such funds from its own common share capital (usually for a fee of 1%).

Where capital is provided by the programme participant, this is generally accomplished through the purchase of the rent-a-captive’s preferred non-voting shares, in an amount equal to 1/5th of the first year’s net premium.
Purchasing the shares achieves two purposes. First, it provides the rent-a-captive with adequate capital for regulatory purposes. Second, as ownership of the shares constitutes beneficial ownership of the rent-a-captive, it may provide a basis for the taxable transfer of income back to the programme participant through deemed dividends.

7. Rent-a-Captive Account Expenses

Rent-a-captive account expenses are typically 25%-35% of original gross premium (OGP), although they can be higher. These include boards, bureaus, taxes and assessments (3%-4%), claims handling (3%-4%), onshore broker commission (4%-5%), federal excise tax (1%), cost of specific excess (3%-6%), cost of aggregate excess (2 1/2%-4%), fronting company fees (5%-9%), rent-a-captive's underwriting fee (2%-3 1/2%) and use of rent-a-captive's capital and surplus, where applicable (1%).

What is left after fees and commissions (generally 60%-70% of OGP) and loss reserves may be temporarily available to the programme participant. Meanwhile, the rent-a-captive will invest these funds (typically through a professional investment adviser in order to maximise investment portfolio performance) and return investment income to the programme participant through dividends on the preferred shares, less a service income fee to the rent-a-captive (generally 1% of the value of the portfolio).

Provided that the rent-a-captive complies with the applicable minimum solvency and liquidity ratio requirements (or where there are segregated accounts pursuant to a Private Act, or by registration under the SAC Act), Bermuda law permits complete freedom of investment management with regard to selection of asset classes.

8. Profile of a Prospective Programme Participant

A prospective programme participant will generally:

• be too small for, or not interested in, establishing and operating a wholly-owned captive for itself; and
• generate at least $1,000,000 of annual premium onshore, whether it be a single-owner or association programme of insurance (workers’ compensation programmes in California, which may be underwritten with less premium, are an exception to this).

In the case of association programmes (which are thought to account for about one third of total rent-a-captive premium income in the Bermuda market), association members are typically characterised by:
• similar exposures;
• willingness to share risk within the mutual account;
• combined loss ratio of 50% or less;
• single or related exposure such as workers’ compensation, general liability or automobile liability; and
• consensus on the allocation of underwriting profit and investment income.11

9. Does the Rent-a-Captive Itself Assume Risk?

Many of the rent-a-captives formed in Bermuda do not assume substantial risk in respect of the insurance programmes of their programme participants. Rather, these rent-a-captives view themselves as service companies and, in fact, require aggregate excess protection in some form as a condition of accepting a particular programme. All financial agreements are typically backed up with letters of credit, ultimately guaranteed and paid for by the programme participant.

In recent years, the Bermuda Monetary Authority has made it clear that it is prepared to consider applications to establish rent-a-captives which will accept risk for their own account, subject always to meeting relevant solvency and liquidity requirements.12

Endnotes:

2. 1986 Captive Insurance Company Reports, page 5.
5. Ibid.
6. Ibid.
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid.

12. The use of rent-a-captives can provide a number of business advantages. However, achieving the desired tax results requires careful planning. The above discussion is not intended to, and does not, constitute tax advice. Accordingly, readers should consult their own tax advisers for advice in relation to specific cases.
CHAPTER 4
SPECIALISED INSURANCE VEHICLES

A. INTRODUCTION

Over the years, various prospective clients have required customised vehicles and structures to accommodate their specialised insurance programmes. The Bermuda legislators and professional advisers such as Appleby, have worked together to provide suitable bespoke entities in response to this need.

Not all insurance purposes are best served by the traditional stand alone share company structure. Specialised arrangements are sometimes required. Mutual associations, organised solely for the purpose of insuring their members, are a good example of this. Likewise, special purpose vehicles (known as ‘SPVs’) are an essential feature of structured finance transactions and of transactions involving derivatives, especially insurance derivatives. Insurance companies owned by purpose trusts can at times prove useful as well. In this chapter, we focus on a sampling of such specialised vehicles and how they operate in the Bermudian context.

B. MUTUAL COMPANIES

1. Definition of Mutual Company

A mutual company is defined at section 152 of the Companies Act 1981 (the Companies Act) to mean ‘any company, other than a company limited by shares or other company having a share capital, which is authorised to engage in or carry on as a principal object insurance or reinsurance business of all kinds on the mutual principle’. Furthermore, a company will be deemed to engage in such business on the ‘mutual principle’ if ‘the members thereof who are exposed to some contingency associate themselves together by contributing by way of premiums on the
basis that if the contemplated contingency befalls any member he shall receive a compensatory payment’.

The mutual principle rests upon a fundamental concept of insurance, ie, the sharing and spreading of risk. An ancient example of the mutual principle is that of Chinese river merchants averaging their losses by means of distributing half of their cargoes over a number of vessels and loading half their cargoes on each other’s vessels as a means of spreading the risk of loss.

2. Development of Mutual Insurance

The modern mutual insurance concept originated in England in 1696 with the creation of the first mutual fire insurer. The concept then migrated to the New World with the founding in 1752 of the Philadelphia Contributionship for the Insurance of Houses from Loss by Fire by none other than Benjamin Franklin. Subsequently, mutual insurance associations arose to provide membership to a group of persons bearing common risks. Unlike traditional insurance companies limited by shares, which are owned by investors who may have no other connection with the given company, mutual insurance companies are owned by their policyholders. Mutual companies exist for the purpose of serving the insurance needs of their members, not to provide investment profits to uninsured investors.

In spite of the simplicity at the heart of the mutual principle, the modern mutual company is far from simplistic in organisation. Typically, members are grouped according to risk, and there will be different rules for the different classes of members. Mutual companies are also used for similar reasons by industry associations to provide coverage of risk. Leading United States law firms have identified a number of tax and securities law advantages that may be gained by organising an association captive as a mutual rather than as a joint stock company.

3. Reserve Fund and Member Liability

Under the Companies Act, a mutual company must create and maintain a reserve fund of not less than the foreign currency equivalent of BD$250,000. Section 153 of the Companies Act provides that a mutual company must maintain a reserve fund in an amount approved by the Minister. The liability of the members is limited to premiums, or the undischarged portion thereof, due to the company by any member. The terms of insurance are typically contained in the contract of membership. Members pay annual premiums, or ‘calls’, to the association, which are used to indemnify members who suffer a loss. If the losses for any given period are greater than expected, members could be levied ‘supplemental calls’ to provide the necessary monies to cover the payments for those losses. The term ‘premiums’ is defined in the Companies Act to mean ‘the premiums, including retrospective premium adjustments or calls payable for insurance issued or effected by a mutual company to, for or on behalf of each member of the company and any capital contribution or other such assessment that is due under the bye-laws or any other contractual obligation with
a member of the company’. When a mutual company is wound up, after its liabilities have been satisfied, the person carrying out the winding up must either apportion the remaining assets in accordance with the bye-laws of the company or, if there is no provision in the bye-laws for such apportionment, then ‘in such a fair and equitable manner amongst the members of the company as such person may decide’.

4. Criteria for Membership

A mutual company is also required, in its bye-laws, to make provisions to establish the criteria by which membership in the company, and eligibility for such membership, is to be determined. Unless the bye-laws of the company provide otherwise, the following persons are deemed to be members of a mutual insurance company:

- Any person who is for the time being a provisional director of the company.
- Any person whose risks are insured, whether directly or indirectly, by the company and who has been accepted by the company as a member.
- Any person who provides some part of the funds necessary to establish or maintain a reserve fund of the company.

In making this determination, the reference to a risk of a person being indirectly insured by the company is to be taken as a reference to that risk being covered by the company by reinsurance through one or more intermediaries.

5. Marine Insurance

Mutual associations are commonly engaged in the provision of marine insurance. Shipowners join ‘protection and indemnity’ clubs (P&I clubs) to obtain cover for risks such as hull damage, strike loss, war risks and freight, demurrage and defence. A number of P&I clubs, including the world’s largest, have been formed in, or have re-located to, Bermuda. In addition to the tax and regulatory efficiencies which attract companies of all types to Bermuda’s shores, P&I clubs find Bermuda attractive because, as an exempted company, a Bermuda mutual insurer may deal in any currency (other than Bermuda dollars). This is a great advantage for the P&I clubs, whose international members may pay premiums and receive compensation in their national currencies, thereby negating the risk of foreign exchange losses to the club.

6. Petroleum Industry

Another large industry sector utilising the mutual insurance model is the petroleum industry. A group of 16 petroleum companies joined together in Bermuda in 1971 to form a mutual insurance
company, Oil Insurance Limited (OIL), to service their particular needs, mostly of a catastrophic coverage nature. The principal risks covered include losses relating from physical damage to onshore and offshore facilities and third-party pollution liability. Since that time, OIL has expanded greatly, to now include groups with similar energy-related concerns, for instance, electric utility, mining and chemical companies. Unlike the reduction or even elimination of certain types of coverage for energy companies out of the traditional commercial insurance market following the tragic events of September 11th 2001, the insurance limits and availability of coverage from the Bermuda mutual have remained stable. Other examples of massive energy mutuals in Bermuda are Nuclear Electric Insurance Limited, which insures domestic and international nuclear utilities for costs associated with interruptions, damages, decontaminations and related nuclear risks, and AEGIS Corporation.

7. **Recent Developments**

One highly significant recent development is that it is now possible, pursuant to a Private Act of the Legislature, to convert a joint stock company into a mutual company. This may be desirable for reasons having to do with securities, tax or other laws in effect in the jurisdiction(s) of the members of a mutual company.

There are many advantages to forming a mutual company, and these should be carefully considered with reference to professional advisers as necessary.

**C. Long-term Insurers**

1. **Introduction**

Life, accident/health and annuity providers have been a part of Bermuda’s insurance industry since its beginning. In recent years, however, an increasing number of international life companies have established operations in Bermuda to provide quality life and annuity products to high net worth individuals. Further, a number of general business insurers on the island have sought to be licensed to do long-term business as well, in order to enter this lucrative market or to provide reinsurance to life/annuity providers. As of 31 December 2005, there were 84 long-term insurers and 100 ‘composites’ (insurers writing a combination of long-term and general business, licensed both as a long-term and as a general business insurer) registered in Bermuda. Hundreds of millions of dollars in gross premiums are written annually by Bermudian long-term insurers.

A Bermuda life/annuity policy can have a number of tax or estate planning advantages for individuals, depending on their domicile of residence or citizenship. A Bermuda company’s ability, under Bermuda law, to issue policies denominated in foreign currencies is also an advantage. For international companies marketing these products to nationals of many different countries, a
neutral offshore domicile like Bermuda, with a favourable reputation both as an offshore financial
centre in general and as an insurance centre in particular, has proven attractive.

2. **Definition of ‘Long-Term Business’**

For the purposes of the Insurance Act 1978 (Insurance Act), long-term business means:

i. Effecting and carrying out contracts of insurance on human life or contracts to pay annuities
on human life.

ii. Effecting and carrying out contracts of insurance against risks of the person insured sustaining
injury as a result of an accident or of an accident of a specified class or dying as the result of
an accident or of an accident of a specified class or becoming incapacitated or dying in
consequence of disease or disease of a specified class, being contracts that are expressed to
be in effect for a period of not less than five years or without limit of time and either not
expressed to be terminable by the insurer before the expiration of five years from the
taking effect thereof or are expressed to be so terminable before the expiration of that
period only in special circumstances therein mentioned.

iii. Effecting and carrying out contracts of insurance, whether effected by the issue of policies,
bonds or endowment certificates or otherwise, whereby in return for one or more premiums
paid to the insurer a sum or a series of sums is to become payable to the person insured in
the future, not being contracts such as fall within either paragraph i. or ii.

However, the Insurance Act expressly provides that the above does not include certain credit life
business and employee group health and life business.

3. **Capital, Solvency and Separate Accounting Requirements**

A long-term insurer must have minimum paid-up share capital of the equivalent of $250,000.
This amount will be in addition to any minimum required for any class of general business in
which the insurer may also be registered.

The minimum solvency margin for a long-term business insurer is also $250,000. This margin
relates only to the long-term business of the insurer and is independent of, and in addition to, the
margin required for the insurer’s general business, if any. Given the long-term nature of the risks
covered, there is no minimum liquidity ratio required for a long-term company.

A long-term business insurer must maintain its accounts in respect of that long-term business
separate from any accounts it has in respect of any other business. All receipts of an insurer’s long-
term business are required to be carried to, and form part of, a special fund with an appropriate name, referred to in the Insurance Act as the ‘long-term business fund’.

A long-term insurer is required to maintain books of account and other records such that the assets of its long-term business fund and the liabilities of its long-term business can be readily identified at any time.

No payment from an insurer’s long-term business fund may be made directly or indirectly, other than for a purpose of the insurer's long-term business; notwithstanding any arrangement for its subsequent repayment out of receipts of business, other than the long-term business, except insofar as such payment can be made out of any surplus certified by the long-term insurer's approved actuary to be available for distribution otherwise than to policyholders.

4. Other Regulatory Requirements

Under the Insurance Act, a long-term insurer must file each year a statutory financial return and statutory financial statements within four months from its financial year end. This may be extended on application to seven months. There are penalties which may be imposed if filings are made otherwise than in accordance with the Insurance Act. The statutory financial return must include the auditor’s report on the statements and a certificate of the approved actuary on the liabilities recorded in the statements.

A long-term-insurer may not reduce its total statutory capital by 15% or more without the consent of the Bermuda Monetary Authority (Authority).

Detail on the full Bermuda legal and regulatory compliance details for long-term insurers can be found in Chapter 13.

5. Segregation of Accounts

Because the Insurance Act does not expressly provide for the legal segregation of the respective accounts of a long-term insurer, a growing number of Bermuda’s long-term insurers have successfully petitioned the Bermuda Legislature to enact private legislation for this purpose. Many such long-term insurers have expressed the view that the ability to offer segregated accounts to their own prospective clients has enhanced the marketing prospects of their companies. This is in part because, in the event of the insolvency of such a company, a liquidator would not, pursuant to the provisions of the Private Act or the Segregated Accounts Companies Act 2000 (SAC Act), be permitted to cancel policies or apply the assets of each respective account to the liabilities arising in any other account(s). Although registration under the SAC Act is now regarded as the most efficient and effective means of achieving segregated account status, the use of a Private Act can
greatly enhance the operations of a long-term insurer. Among the provisions which can be included in such an Act are stipulations that premiums may be paid in kind as well as cash, expansion of the meaning of ‘insurable interest’ and express derogation from the application of the Investment Business Act to ensure that, eg, life annuities will not be viewed as securities. Please see Exhibit 4-1 to this Chapter which contains a sample Private Act.


In addition to the Insurance Act, the Life Insurance Act 1978 (Life Act) is often applicable to long-term companies established in Bermuda. The Life Act applies to contracts of life insurance (which includes, among other things, annuities) made in Bermuda. A Bermuda insurer could also expressly provide in its policies that the contract will be governed by the Life Act. Attractive features of the Life Act for international insurers include the broad definitions of ‘life insurance’ and ‘insurable interest’ contained therein, which afford flexibility regarding the types of products which can be created and offered to insureds.

7. Fixed and Variable Annuities

Common products offered by Bermuda long-term insurers are fixed and variable annuities. A fixed annuity offers a guaranteed interest rate for a specified time period. A variable annuity provides income payments to the annuitant which vary in relation to the performance of the underlying investment portfolio. The portfolio is managed by the insurer, but in many cases is chosen by the insured. Variable annuities also include a death benefit which guarantees that the annuitant’s beneficiary will receive at least all premiums paid, less withdrawals, regardless of the value of the investment portfolio at the time of the annuitant’s death.

In many countries, annuities are attractive estate planning tools because they offer certain tax benefits to participants. For example, American taxpayers can defer taxation on the investment earnings of annuities until they are withdrawn.

For American taxpayers, other reasons for purchasing an offshore annuity include the lower costs associated with the running of the Bermuda insurance company, which benefit is passed on to its policyholders. The structure of the annuity is usually flexible enough to allow the policyholder to redeem the policy or to borrow from the annuity account.

An added attraction is that Bermuda’s regulatory environment allows greater flexibility in the investment of insurance company assets so that the policyholder can make some initial limited choices with respect to investments, subject to American tax law restraints on his ‘controlling’ the fund.
For American investors, purchasing offshore life insurance which qualifies under American rules can achieve savings from American income tax and estate duties when coupled with an appropriately drafted trust.

For other investors, the purchase of an offshore annuity is often the only way of expatriating funds from their home jurisdiction, and it is also an estate planning tool. For expatriate nationals working abroad, an annuity account may also protect their assets from tax on their return home.

8. Use of Trusts

For estate planning reasons, the policies issued by the annuity company are often placed in a trust for the benefit of the heirs of the annuitant, and in this way death duties may be minimised.

In addition, many providers of these products, or other long-term products, will establish a ‘Master Trust’, which collects, under one umbrella, a number of policyholders who may not otherwise have had the wherewithal to constitute an individual trust to own a policy.

The ownership of a policy by a trust is of benefit both to the life assured and the Bermuda insurance company. The life assured may gain a host of tax or estate planning benefits from the structure, depending on the policyholder’s domicile of residence. Likewise, the Bermuda insurance company can sell these products without subjecting itself to the local jurisdictional requirements and insurance company regulations of the domicile of residence of the life insured.

D. SPECIAL PURPOSE VEHICLES FOR INSURANCE DERIVATIVE TRANSACTIONS

Bermuda’s insurance environment and regulations make it a choice domicile for the incorporation of a special purpose vehicle (SPV) for insurance derivative transactions, also referred to as alternative risk transfers (ARTs). ARTs work to transfer risks to the capital markets in the form of cat bonds and other securitisations, derivatives, swaps and in some ways, finite insurance. An SPV is colloquially called a ‘transformer’ company because it ‘transforms’ insurance risk into capital market instruments which can be traded by investors.

E. INSURANCE COMPANIES AND PURPOSE TRUSTS

A ‘purpose trust’ may be created under Bermuda law in accordance with the provisions of The Trusts (Special Provisions) Act 1989 (Act), which came into force in Bermuda on 31 January 1990. The Act was significantly amended in The Trusts (Special Provisions) Amendment Act 1998 (1998 Act), which came into force on 1 September 1998. A purpose trust is unique in that, among other things, it has no beneficiaries. It exists only to pursue its stated purpose, which may be a commercial
one. It is necessary that the purpose is specific, reasonable and capable of achievement, and is not immoral, contrary to public policy in Bermuda or unlawful in accordance with Bermuda law.

With careful tax planning, a purpose trust may accomplish the following:

- An ownership structure which may enable a Bermuda insurance company to be incorporated and operated achieving ‘non-controlled foreign corporation’ status for United States tax purposes in respect of its relationship with its ‘promoter(s)’, ie, the party/ies providing the start-up capital.

- Deferral or avoidance of taxable distributions to the parties which will ultimately be entitled to the ‘profit’ derived from the operation of the insurance company, for the period during which this ownership structure is in place.

The structure involves the establishment of a purpose trust whose purposes may be, for example, ‘to incorporate, or procure the incorporation of, an insurance company in Bermuda and to acquire, hold and otherwise deal with the shares and other securities of that company’.

F. CONCLUSION

Depending on the special needs of the investor, insurer or insured, Bermuda has a specialised vehicle to best serve those needs. Bermuda’s legislators and regulators in conjunction with the legal community and other professional advisers are continually revisiting and fine-tuning the laws and regulations governing the insurance industry in Bermuda to ensure that Bermuda remains on the cutting edge of the offshore insurance marketplace.
WHEREAS a petition has been presented to the Legislature by Sample Annuity & Assurance Company Ltd., praying that legislation may be enacted to provide for the establishment by the said company of segregated reserves for the purpose of assuring the said company’s ability to meet its obligations under certain policies issued and pension plans administered by the said company.

AND WHEREAS it is deemed expedient to pass an Act to give effect to the prayer of said petition. Be it therefore enacted by The Queen’s Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

1. This Act may be cited as the Sample Annuity & Assurance Company Ltd. Act 2006.

2. (1) In this Act, unless the context otherwise requires—

(a) “approved actuary” means the approved actuary of the Company within the meaning of section 26 of the Insurance Act;

(b) “Companies Act” means the Companies Act 1981 [title 17 item 5], as amended, and every Bermuda statute from time to time in force concerning companies insofar as the same applies to the Company;

(c) “Company” means Sample Annuity & Assurance Company Ltd., a Bermuda exempted insurance company in the course of incorporation, and any subsidiary thereof incorporated in Bermuda under the Companies Act and registered as an insurer under the Insurance Act, in respect of which notice has been given to the Registrar pursuant to Section 7 hereof;

(d) “Insurance Act” means the Insurance Act 1978 [title 17 item 49], as amended, and the regulations promulgated thereunder from time to time;
(e) “Long-term business” means long-term business within the meaning of section 1 of the Insurance Act;

(f) “Policyholder” means any person who purchases a Policy (except where the term “purchaser” is expressly given another meaning in this Act), any person under or pursuant to a Policy who is an owner of a Policy or with whom the Company is contractually bound or any person who is a beneficiary receiving benefits or payments under a Policy, and shall include such person’s successors in title or assigns;

(g) “Policy” means any contract under which the Company is committed or to which the Company may commit itself from time to time in such form as it may deem expedient whereby (i) persons are protected against loss or liability to loss in respect of risks to which such persons may be exposed, or (ii) a sum of money is to be paid or money’s worth is to be rendered upon the happening of an event or a specified date, or (iii) the Company administers a pension or other benefits plan;

(h) “Registrar” means the Registrar of Companies appointed under Section 3 of the Companies Act or such other person as may be performing his duties under the Companies Act;

(i) “Separate Account” means each account established or recorded pursuant to Section 4 of this Act, which shall be evidenced in the records of the Company and may be composed of sub-accounts and where there are sub-accounts, the expression “Separate Account” shall mean also each sub-account;

(j) “Subsidiary” means subsidiary company as that term is defined in Section 86 of the Companies Act;

(k) Expressions importing the singular shall include the plural and expressions importing the plural shall include the singular;

(l) Expressions importing the masculine shall include the feminine;

(m) Wherever in this Act an obligation or duty is placed on the Company or the Company is authorised to do any act, then, unless it is otherwise provided herein, such obligation, duty or act may be carried out by the directors of the Company or those persons delegated by the directors of the Company.

3. (1) For the avoidance of doubt, this Act applies to all and any Policies including, without limitation, Policies issued prior to the commencement of this Act.

(2) Subject to Sections 3(3) and 3(4), the Insurance Act shall apply to the Company in accordance with its terms.
(3) Notwithstanding Section 23 of the Insurance Act, Section 24 of the Insurance Act shall not apply to long-term business carried on by the Company or to the receipts from, assets (and income arising therefrom) of and liabilities and expenses attributable to or allocated to a Separate Account or which form part of a Separate Account.

(4) Section 36(1) of the Insurance Act shall not apply to the Company. Section 36(2) to (5) (inclusive) and Section 37 of the Insurance Act shall not apply to long-term business carried on by the Company or the receipts from, assets (and income arising therefrom) of and liabilities and expenses attributable to or allocated to a Separate Account or which form part of a Separate Account.

4. (1) Where required under the terms of a Policy and in accordance with the terms thereof, the Company shall, pursuant to the provisions of this section, establish and maintain a Separate Account for such Policy or a Separate Account for any particular class of Policies (the Company determining the nature of the class and which Policies shall form a part of that class) with a sub-account for each Policy forming a part of the said class. For the purposes of this Act, each said sub-account shall be deemed to be a Separate Account for the Policy to which it relates.

(2) Subject to the provisions of this Act, rights and interests in the assets and property standing to the credit of a Separate Account shall be determined by the terms of the relevant Policy and no other rights or interests which might exist in such assets and property shall be recognised, notwithstanding any statutory provision or any rule of law to the contrary. Each Policy shall be deemed to have a provision incorporated therein to the effect that no claim under the Policy may be paid from the assets or funds of any Separate Account not relating to such Policy. To the benefit of the relevant Policyholder the remedies of tracing in law and in equity shall apply to the property and the proceeds of the property of any Separate Account where such property or proceeds may have been commingled.

(3) The Company shall be authorised to disclose information regarding its Policies or Policyholders to departments and agencies of the Government of Bermuda as required under Bermuda law.

(4) The Company shall not disclose any information about its Policies or Policyholders to any person, corporate entity or governmental agency outside the jurisdiction of Bermuda unless the Policyholder concerned authorises the Company to do so in writing.

5. (1) Subject to the terms of the Policy to which a Separate Account relates, for each Separate Account:

(a) the Company may transfer or allocate (as the case may be) reserves and funds to the Separate Account as it deems appropriate but subject to obtaining the confirmation from the approved actuary as required by Section 5(2);
(b) without prejudice to the protections afforded by this Act to property subject to Separate Accounts, the Company may invest and deal with the assets, investment income and other property belonging to or concerning a Separate Account in such manner as the Company thinks fit including without limitation commingling the property thereof with property belonging to or in the control of the Company or for which the Company is responsible (whether relating to other Separate Accounts or not) provided always proper records are maintained which would allow the approved actuary to identify the property or the interest in the mixed fund or combined or converted property which represents the property or its proceeds or property or allocations of portions of property among the Separate Accounts;

c) the Company shall allocate to a Separate Account all expenses, income, interests, gains (or losses) incurred or earned from investing or dealing with the assets, investment income and other property belonging to or concerning that Separate Account; and

(d) the Company may close a Separate Account and distribute the property attributable thereto.

(2) Notwithstanding the terms and conditions of any Policy, transfers and allocations to the Separate Accounts administered by the Company shall be audited annually by the approved actuary. The approved actuary shall approve the form of each Policy used by the Company. In the event that it comes to the attention of the approved actuary that the Company has made or intends to make any transfers or allocations requiring the approval of the approved actuary but such approval has not or will not be given (in this Act referred to as the “unauthorised transfer or allocation”), then the approved actuary shall inform the Registrar within thirty days of the unauthorised transfer or allocation coming to his attention. The approved actuary shall be obliged to give the Registrar upon the written request of the Registrar any information in the possession of the approved actuary concerning the unauthorised transfer or allocation and the reasons why the approved actuary has not or will not give his approval. After review of the information and other matters the Registrar shall report to the Minister of Finance who may exercise any powers granted under Sections 30 to 32, inclusive, of the Insurance Act as amended, as the Minister of Finance considers appropriate in the circumstances. Section 52 of the Insurance Act shall extend to any information received by the Registrar pursuant to the foregoing.

6. The Company shall maintain separate books and records for each Separate Account in accordance with such generally accepted accounting principles consistently applied with any amendments thereto and any additional principles, as determined from time to time by the Company.

7. (1) A subsidiary may for the purposes of availing itself of the provisions of this Act, with the prior written consent of the Minister of Finance, by notice, apply to the Registrar to be registered under this section.

(2) A notice referred to in Section 7(1) shall be in the form set out in Schedule I.
(3) The Registrar shall, upon receipt of the notice and the consent of the Minister of Finance, register the subsidiary as being entitled to avail itself of the provisions of this Act and such entitlement shall be effective on the date of such registration.

(4) Where a subsidiary, being registered under this section, ceases to be a subsidiary of the Company, it shall, within 30 days of ceasing to be registered, or such later date as the Registrar may in his discretion permit, give written notice to the Registrar thereof in the form set out in Schedule II and the Registrar shall register that company as ceasing to be entitled to avail itself of the provisions of this Act and such cessation shall be effective on the date of such registration.

(5) The Registrar shall maintain a public record of all registrations under this section, in such form and manner as the Registrar may in his discretion consider appropriate.

8. No creditor of the Company, or of a purchaser of a Policy or of any Policyholder may attach any rights or interests in the property subject to a Separate Account or the proceeds of a Policy of the Company that is subject to a Separate Account, unless:

(a) a winding up petition against the Company was filed prior to or within six months of the purchase of the Policy and an order of attachment was issued by a competent court as part of those proceedings; or

(b) voluntary or involuntary bankruptcy proceedings against the purchaser of a Policy or the Policyholder were initiated prior to or within six months of the purchase of the Policy and an order of attachment was issued by a competent court as part of those proceedings; or

(c) the Policyholder has been convicted of fraud in conjunction with either acquiring, conveying, transferring or settling the assets used to purchase the Policy; or

(d) a creditor of a Policyholder has initiated a claim in a competent court of law prior to the purchase of the Policy or obtains a judgment within two years of the purchase of the Policy to the effect that the purpose of the disposition made by the Policyholder was to defeat legitimate creditors.

9. Notwithstanding any statutory provision or any rule of law to the contrary, on the commencement of proceedings to wind up the Company and in the winding up of the Company:

(a) the liquidator shall be bound to recognise the separate nature of each Separate Account pursuant to the provisions of this Act and shall not apply property identified as the property of any one Separate Account (including any interest in a mixed fund or converted or combined property where property may have been commingled) to pay the claims of creditors of the Company or Policyholders other than the Policyholder to whom the Separate Account relates;
(b) if required under the terms of the Policy, the liquidator shall preserve the property in the Separate Account and ensure, where applicable, that the property therein matures in the ordinary course for the benefit of the Policyholder;

(c) the liquidator shall be bound to observe, and shall have no power to void or cancel, the terms of any Policy for which a Separate Account has been established and any deed, contract or agreement between the Company and any other person with respect to such Policy or Separate Account;

(d) transfers of property from a Separate Account to the Policyholder to whom the Separate account relates, whether pursuant to a Policy, the bye-laws of the Company or otherwise, shall not constitute nor be deemed to be a fraudulent preference or a fraudulent conveyance, nor constitute business of the Company being carried on with intent to defraud creditors of the Company or creditors of any person or for any fraudulent purpose, for the purposes of any statute or law relating to bankruptcy or insolvency; and

(e) to the benefit of the relevant Policyholder the remedies of tracing in law and in equity shall apply to the property and the proceeds of the property of any Separate Account where such property or proceeds may have been commingled.

10. Nothing contained in this Act shall be construed to affect the rights of Her Majesty, Her heirs and successors or of any body politic or corporate or of any other person or persons except such as are mentioned in this Act, and those claiming by, from or under them.
SCHEDULE I

The Sample Annuity & Assurance Company Ltd. Act 2006
(the Act)

NOTICE PURSUANT TO SECTION 7

I, [ ], a duly authorised representative of [ ], hereby give you notice pursuant to section 7 of the Act that [ ] is a subsidiary of Sample Annuity & Assurance Company Ltd., and request that you register [ ] pursuant to the said section as being entitled to avail itself of the provisions of the Act. Attached hereto is evidence of receipt of the consent of the Minister of Finance required under the said section.

Yours faithfully,

[signature of the person giving notice]
Date of Notice: [day, month and year]

SCHEDULE II

The Sample Annuity & Assurance Company Ltd. Act 2006
(the Act)

NOTICE PURSUANT TO SECTION 7

I, [ ], a duly authorised representative of [ ], hereby give you notice pursuant to section 7 of the Act that [ ] ceased to be a subsidiary of Sample Annuity & Assurance Company Ltd. on [ ] and that in consequence it is no longer entitled to avail itself of the provisions of the Act.

Yours faithfully,

[signature of the person giving notice]
Date of Notice: [day, month and year]
CHAPTER 5
LIFE AND WEALTH ACCUMULATION PRODUCTS IN BERMUDA

A. INTRODUCTION

Bermuda has long been known as a centre of excellence and innovation in the world of insurance. Nowhere is this more evident than in the rapidly growing field of offshore life insurance and annuity products. The past decade has been marked by a dramatic upswing in interest in such offshore products issued by Bermuda insurers. This has translated into a high level of activity by large institutional players (mainly US insurers and investment houses) seeking to establish new long-term insurance facilities in Bermuda. Despite the avalanche of investment in the new property and casualty, and catastrophic companies created in the wake of the September 11th tragedy, and more recently, the 2005 hurricanes, resulting from capacity crunch and soaring profit margins in that sector, life and annuity companies have continued their steady emergence in the Bermuda marketplace.

B. NEW DEVELOPMENTS

The life reinsurance market has continued to show significant growth, despite the dramatic effects of September 11th, with its attendant estimated $40.2 billion worldwide liability and life insurance losses. The continuing trend of large US and Canadian life companies toward consolidation, demutualisation and going public has caused these insurers to look for means of freeing up capital, which offshore reinsurance is able to provide. Such reinsurance also helps to stabilise the primary insurers’ financial position and earnings, reduces exposure to risk and minimises analysts’ and regulatory scrutiny over earnings and capital management.

Bermuda reinsurers have developed a strategic focus on niche products in the life and annuity marketplace. The types of products that are typically being reinsured include universal life and other investment-linked products, variable annuities (with or without guaranteed minimum death
The concept of buying life insurance and annuity products to protect one’s life and assets is by no means new. What has developed over the past several years, however, is the use of insurance tools as an alternative means of achieving the multiple goals of investment appreciation, asset protection, and tax planning. As such, insurance techniques and structures can be a key tool in achieving planning goals for international clients, whether they are individuals seeking to provide for their family’s future or companies looking to provide pensions or employee benefits.

For example, while mutual funds, investment partnerships and foreign corporations, to the extent that US residents are shareholders, generate taxable income at the shareholder level, cash value life insurance products allow for build-up of cash surrender values (including dividends, interest, realised capital gains and unrealised appreciation) on a tax-free basis. Moreover, they make available the ability to borrow against cash value at competitive interest rates and income tax-free death benefits combined with a tax-free step-up in cost base to the beneficiary. Finally, Bermuda life insurance legislation provides for extensive protection from creditors where designated beneficiaries are in place.

Products offered are frequently tailor-made to meet the needs of sophisticated high net worth individual purchasers seeking an efficient means of minimising taxes, while at the same time safeguarding and growing assets for future generations. They also often offer innovative product enhancements that are not available onshore. One such enhancement, utilised, for example, by Scottish Annuity & Life, another recently-created Bermuda life insurance company, allows the use of private independent money managers to manage the sub-accounts of a given product, significantly improving the performance of the underlying assets portfolio formerly managed by in-house insurance company personnel.

Some players in the wealth management field have experienced difficulties in the current low interest environment. Annuity & Life Re, for instance, has experienced difficult times and suffered significant losses since 2001, partly as a result of excessive surrender rates and poor investment performance not matching minimum guaranteed interest rates on its annuity products, and partly as a result of the adverse mortality experience surrounding the events of September 11th. Others weathered the storm and added to the growth of the Bermuda life sector, including such names as ACE Tempest Life, Centre Life, Chubb Life Solutions and Everest Re.

Over the past 50 years, Bermuda has earned a reputation for high-end transactional work. Complex and innovative products and corporate structures are now routinely developed for issue from Bermuda. There are many reasons to incorporate in Bermuda. These include the frequently cited ones, such as Bermuda’s superlative infrastructure and professional expertise, cutting-edge telecommunications and speed of response time. There are, however, certain very special reasons for selecting Bermuda for offshore life insurance and annuity products.
C. SOPHISTICATED FINANCIAL CENTRE

Bermuda is recognised the world over as a sophisticated and strong offshore financial centre. This has been cited as the number one reason why many of the world’s largest institutional players have selected Bermuda as the domicile for their new life insurance and annuity company. For example, Bermuda companies are well known to, and readily accepted by, the world’s major stock exchanges. Professionals can, therefore, be confident of securities commission reviews that reflect high confidence in the selection of Bermuda. Likewise, investors have confidence in the probity of Bermuda’s English common law-based legal system and its ability to protect their interests. This is reflected in the fact that large numbers of Bermuda’s companies are registered on major stock exchanges around the world.

Bermuda is now the second largest reinsurance market in the world, after New York and ahead of London. Enormous professional resources are readily available, and many of the world’s largest insurers and reinsurers have fully functional offices in Bermuda. Accordingly, it is possible to effect all layers of a transaction in Bermuda on a one-stop-shopping basis. Adequate levels of reinsurance may be of particular importance to the newly-formed life insurance and annuity vehicle, and the ready proximity of Bermuda’s reinsurance players may, in turn, reduce structural costs as well as the professional time necessary to effect such arrangements.

D. ENLIGHTENED REGULATION

Bermuda’s reputation rests on sound but flexible regulation. There is sufficient oversight to ensure probity and solvency; however, the government does not mandate the business methods of Bermuda companies. Thus, policy forms and rates for insurers are left entirely to the discretion of management. Additional flexibility may be achieved even in relation to statutory matters for insurers by way of a Section 56 Direction under the Insurance Act 1978 (Insurance Act) from the Bermuda Monetary Authority. These directions allow the regulators to permit variations from the solvency and accounting rules in appropriate cases.

The issuing of life and annuity contracts falls within the meaning of ‘long-term business’ under the Insurance Act. Hence, a life insurance and annuity company will need to be licenced as a long-term insurer under the Insurance Act. The minimum capital and surplus requirement for a long-term insurer is $250,000. However, in practice, this amount will almost invariably be much higher. The exact capitalisation will depend on various considerations, including marketing and reinsurance arrangements. A long-term insurer must maintain a minimum solvency margin of $250,000. Unlike the position in respect of general business insurers, there is no applicable liquidity ratio requirement for long-term insurers in Bermuda, given the long-term nature of the risks covered. A long-term insurer must appoint an approved actuary who must provide an actuarial report annually.
A long-term insurer is required to maintain its accounts in respect of long-term business, separate from any accounts it has in respect of any other business. It may not reduce its total statutory capital by 15% or more below that included in the previous year’s financial statements without the consent of the Minister of Finance, and the only Insurance Act restriction on dividends or distributions is that the long-term insurer must be in compliance with the minimum solvency requirement at the time of payment of a proposed dividend.

Owners of Bermuda-based life insurance policies are protected from the claims of third-party creditors under the Life Insurance Act 1978 (Life Act). As well, the ability to designate beneficiaries and pay out proceeds on death in the form of an annuity is a valuable estate planning tool.

Another mechanism for the safeguarding of life insurance policyholders is found in Section 25 of the Insurance Act. This provision prohibits the transfer of any long-term business without the sanction of the Supreme Court of Bermuda, which will only be granted upon the filing of sufficient evidence that the interests of the various affected policyholders are being protected.

E. INVESTMENT FLEXIBILITY

Bermuda’s long-term insurers have wide latitude with respect to the investment of surplus funds. Unlike the case with many of their onshore counterparts, there are no substantial restrictions on the nature or type of investments that can be made by long-term insurers. They also have far greater freedom as to the nature and compensation arrangements of their investment managers.

F. BESPOKE COMPANIES AND PRODUCTS

Bermuda is unique in being able to offer clients the ability to petition the Bermuda Parliament for the enactment of special legislation in favour of a client company. Such private legislation is frequently instrumental in effecting innovative structures a client may propose, but which would otherwise not be permitted under either the Companies Act 1981 or at common law. Thus, recent life insurance and annuity products have been structured by ‘designer’ companies created for the purpose, with a Private Act obtained to give unique characteristics to the policies as well as the corporate powers of the new company. For example, special provisions are now almost routinely enacted in appropriate cases to permit the payment of both premium and death benefit ‘in kind’ as well as in cash, to expand the meaning of insurable interest and to extend the usual 30-day death benefit payment rule.

G. PRIVATE AND PUBLIC SEGREGATED ACCOUNTS LEGISLATION

Since 1990, Bermuda has been enacting Private Acts of Parliament to enable life insurance and annuity companies to operate segregated accounts, giving Bermuda more experience of such
companies than any other jurisdiction. In 2000, Bermuda enacted the Segregated Accounts Companies Act 2000 (SAC Act), a definitive public statute which effectively permits any company registered under the SAC Act to operate segregated accounts enjoying statutory division between accounts.

The obvious benefit of segregated accounts as they relate to life insurance and annuity companies is that they provide each policyholder with statutory ‘fire-wall’ protection against risks arising in other client accounts or the general account of the insurer itself, beyond the general separate account protection found in Section 24 of the Insurance Act. In this regard, many of our clients have expressed high confidence in the integrity and effectiveness of Bermuda segregated account structures that have been established. This is particularly important in circumstances where the funds in a segregated account will often represent the life savings of an individual insured and will typically be held in an account or financial instrument outside of Bermuda.

The use of a Private Act can greatly enhance the operations of a long-term insurer. Among the provisions which can be included in such an Act are stipulations that premiums may be paid in kind as well as in cash, expansion of the meaning of ‘insurable interest’ and express derogation from the application of the Investment Business Act 1998 to ensure that, eg, life annuities will not be viewed as securities.

H. THE LIFE INSURANCE ACT 1978 (LIFE ACT)

Almost invariably, the policies issued by a Bermuda life insurance and annuity vehicle will be governed by the general provisions of Bermuda law and, in particular, the Life Act. This is a crucial threshold issue for a new insurer and will take the form of an express provision providing for the Life Act as the choice of law to govern the policy. In making this selection, many of our clients have been persuaded by the comprehensive legislative framework established by the Life Act as well as its overwhelmingly beneficial rather than restrictive nature. The Life Act applies only to contracts of life insurance made after the commencement of the Life Act and to all such contracts made in Bermuda, unless the parties agree that some other law shall apply. The Life Act, among other matters, prescribes the contents of policies and defines insurable interest, with specific provisions dealing with the payment of premiums, default in paying premiums, the duty to disclose, incontestability, designation of beneficiaries, the right to sue, the assignment of policies and the general powers of court in relation to disputes between an insurer and one of its insureds.

I. MODERN TRUST LAW

The law of trusts in Bermuda, which is grounded in the common law of England, has been continually refined and amended over the years in response to the needs of Bermuda’s international clients. For estate planning reasons, policies issued by offshore life and annuity companies are often purchased via a trust or placed in a trust for the benefit of the heirs of the insured. Such a
structure will keep the property out of the taxable estate of the insured. As well, if the insured lives in a country where there is economic or political instability, then the ability to purchase, hold and possibly borrow against a life or annuity policy in a stable currency such as the US dollar may be very attractive in terms of both asset protection and investment appreciation.

Such policies may be owned by any legal entity (for example, the individual client, a company, a partnership or the trustee of a trust). Where the insured does not wish to own the policy in his own name, the option of an alternative ownership should be explored. How the ownership is structured will depend on the planning advice given in the insured’s home jurisdiction and will also be a function of the reasoning behind the purchase of the policy. If the insurer is not licenced to sell in the home jurisdiction of the insured, sale to a Bermuda trust may overcome this obstacle. Also, the cost of acquisition may be lowered by the absence of premium taxes.

A trust has the benefit of being flexible, imposing a number of checks, balances and other controls which can be drafted into the trust deed, as well as passing the benefit of assets to one or more persons without the necessity of going through the probate process.

Often, what is known as a ‘master trust’ (which is generally non-discretionary) will be created in order for the trustee to hold a group policy. The most important reason for using a master trust to purchase policies is to ensure that the insured does not directly purchase the policy.

J. RESPONSIBLE ASSET PROTECTION LAWS

Bermuda has never sought to be a leading contender among offshore jurisdictions in the area of ‘asset protection’. Asset protection can mean many things (protection from exchange controls, taxation or expropriation, for example), but the term is more commonly used in legal circles to mean protection from one’s creditors. It may be possible to achieve such protection by transferring assets to a trust (or to a company owned by a trust) established in Bermuda. However, by contrast to the legislation of certain other common law jurisdictions including the Cayman Islands and the Bahamas, which have restricted the rights of creditors, Bermuda has taken a more moderate approach, attempting to establish a reasonable balance between the interests of the well-intentioned individual and those of that individual’s legitimate creditors. We believe that our legislation in this regard is widely viewed as fair and sensible in international circles, and mandates the selection of Bermuda as a jurisdiction for legitimate arrangements.

K. STRONG ANTI-MONEY LAUNDERING LAWS

In keeping with its long standing commitment to ‘keep out the unscrupulous’, Bermuda enacted sweeping anti-money laundering legislation in 1997. The Proceeds of Crime Act 1997 (Proceeds Act) complies with the recommendations of the Financial Action Task Force established by the
G7 countries in 1989. Bermuda has embraced the passage of the Proceeds Act and its subsequent amendments, and compliance has not proved difficult for most client companies, as Bermuda (unlike several of its offshore competitors) has always had a deep-seated ‘know your client’ culture. Nevertheless, as the Proceeds Act and the Proceeds of Crime (Money Laundering) Regulations 1998 apply to companies with segregated accounts and long-term insurers (excluding, for the time-being, reinsurance, life insurance and disability insurance), it has become increasingly important in the post-September 11th, post-Enron environment for such ‘regulated institutions’ to establish and observe higher standards for client identification and verification, record-keeping, internal reporting and employee training.

The Proceeds of Crime Amendment Act 2000 extended the regulated conduct for money laundering purposes to all indictable offences (the earlier legislation dealt only with the proceeds of drug related crimes). The Criminal Code has been amended to provide criminal penalties for the offences of Insider Trading and Market Manipulation (which became operative 1 November 2004). Finally, the Anti-Terrorism (Financial and Other Measures) Act 2004 (Anti-Terrorism Act) was enacted to make terrorism and terrorist financing indictable offences. This legislation will make it possible to apply the provisions of the Anti-Terrorism Act to funds that are suspected to be intended for use in terrorist activities.

As a result, Bermuda can be seen to be reacting to the changing world of the 21st Century. Many of our large blue chip institutional clients have welcomed the opportunity to be (and to be seen to be) subject to such standards of business conduct as clearly accord with their own high operating standards in the international life insurance and annuity marketplace.

L. USA-BERMUDA TAX CONVENTION

Bermuda has a tax convention with the USA which offers insurance companies relief from certain US tax, if they qualify under US rules. Some US carriers have found they can benefit. (See Article 4.1 of the USA-Bermuda Tax Convention Act 1986.)

M. TAX ASSURANCE

Bermuda does not levy income or capital taxes, getting its revenues from other sources, such as customs duty, payroll taxes on local employers, inheritance tax and stamp duty on real estate transactions. By way of assurance to foreign-owned companies incorporated on the Island, a certificate is routinely issued by the Minister of Finance confirming that no such taxes will apply to the company until at least 2016. Regular extensions of the time limit are made.
N. CONCLUSION

Bermuda has indeed continued to be a most attractive jurisdiction for offshore life and annuities business. New products are continuously being developed utilising the regulatory and commercial environment and other advantages enumerated above which will only enhance the business prospects of the companies already on the Island and encourage others to join them. Many industry observers believe that the global marketplace has now recognised Bermuda as the natural domicile for the conduct of international life and annuity business. For its part, Bermuda remains committed to developing and maintaining conditions that are conducive to attracting this high quality business.
A. INTRODUCTION

For many years, Appleby has made effective use of the principles governing the enactment of a Private Act of the Bermuda Legislature (Private Act) to help service the needs of our clients. The Private Act is an effective tool for assisting companies that require legislation to be in place that will confer particular powers or benefits on a company which are not permitted or available under public legislation or common law. As such, Private Acts are distinguished from public legislation, which is applicable to the general community. This chapter will examine the history of the Private Act starting with its origins in the United Kingdom together with details as to how the Private Act continues to be a useful tool following the recently enacted segregated accounts legislation. Details as to the procedure for enacting a Private Act are also contained in this chapter.

The procedure for petitioning a Private Act is set out at the end of this chapter. In much the same way that public legislation starts, the Private Act begins in bill form (Private Bill). The Private Bill must first be formulated and drafted by local attorneys, and it is at this stage that the Private Bill should be tailored to suit a client’s specific needs. The Private Bill must then be advertised locally and submitted to the Clerk to the Legislature, the Proposer (a Member of Parliament) in the House of Assembly (the lower chamber of Bermuda’s bicameral legislature), and the Proposer (a Senator) in the Senate (the upper chamber). The Joint Select Committee on Private Bills, on the advice of various regulatory bodies such as the Registrar and the Attorney-General’s Chambers,
will then review and approve the Private Bill with or without amendments. Thereafter, the Private Bill must go through three readings in the House of Assembly and three readings in the Senate. Once the Private Bill has been signed by the Speaker of the House of Assembly and the President of the Senate, it is passed to the Governor for the purpose of receiving Royal Assent. Once signed by the Governor, the Private Act is formally enacted into law.

B. HISTORY

While Bermuda as a jurisdiction takes advantage of the size and accessibility of both the House of Assembly and the Senate to take advantage of the benefits that are afforded by Private Acts, the legal principles are available in most common law jurisdictions. In the United Kingdom, Private Acts have been used effectively since the 15th century when there was no ordinary procedure for divorce or naturalisation under common law. Today, Private Acts can still be presented by organisations outside the House. The significant difference between Bermuda and the United Kingdom is that there are only a few Private Bills heard in the United Kingdom in each session of Parliament. From their origins in the 15th Century until the 19th Century most Private Acts in the United Kingdom were concerned with individuals. According to the House of Commons’ website, Private Act records are far more numerous than those of public acts. From the nineteenth century onwards, Private Acts were used in the United Kingdom for the construction of railways, docks, harbours and gas and water systems. In modern times, the greater and more important part of the Private Acts which come to Parliament are those promoted by local authorities and statutory undertakers for the better fulfillment of their functions by the conferring of powers which ordinary law does not give them.

The range of activities requiring Private Acts in the United Kingdom gradually narrowed during the course of the 1990s as an increasing number of functions came to be governed by public and general acts. The 1980s saw a resurgence of private legislation to authorise railway underground and tramway schemes as well as harbour installations and river barrages. Many of the original uses in which Private Acts were utilised and were a necessity have since been legislated for either under orders or in public legislation.

In Bermuda, prior to the enactment of the Companies (Incorporation by Registration) Act 1970 all companies in Bermuda were incorporated by a Private Act. While the Companies (Incorporation by Registration) Act 1970 removed the need to use a Private Act to incorporate, the Private Act has continued to be an effective tool to assist clients in both the incorporation of companies and also tailoring companies to suit the specific needs of clients.

The most important factor when considering the issues of Private Acts is that a Private Act is an Act of Parliament and therefore constitutes statutory law in the same way as public legislation. Private Acts in Bermuda have, in much the same way as the laws on divorce and naturalisation in the United Kingdom, consequently proved to be an invaluable tool for assisting in the drafting
and creation of public legislation. In Bermuda, the best example of the creation of public legislation based on the evolution of Private Acts is the Segregated Accounts Companies Act 2000.

C. SEGREGATED ACCOUNTS COMPANIES ACT 2000 (SAC ACT)

Since 1990 and prior to the enactment of the Segregated Accounts Companies Act 2000 (SAC Act), the only way for a company to which the Companies Act 1981 (Companies Act) applied, to operate segregated accounts enjoying statutory divisions between accounts and protecting the assets of one account from the liabilities of other accounts, was by Private Act.

Bermuda and Appleby have been at the forefront of the development of the concept of segregated accounts through the medium of Private Acts. Having chosen to ‘watch and wait’, in the late 1990s Bermuda decided that the concept of legally segregated accounts was sufficiently well developed and recognised internationally that the time was right to enact a voluntary public law system of registration. The question therefore is what practical uses are there for Private Act companies post the enactment of the SAC Act and what advantages continue to remain.

D. COMMON PRIVATE ACT USES

Bermuda strives to be an innovative jurisdiction with the ability to accommodate any structure that may be proposed while at all times ensuring that companies operate within a strong and efficient public legislative umbrella. What follows are some of the standard provisions contained in many Private Acts, but this is not an exhaustive list as a Private Act can be structured to accommodate an array of further unique provisions that a client may propose.

1. Third-party Rights under Contract

Under Bermuda Law there are no rights afforded to third parties under a contract equivalent to those contained in the Contracts (Rights of Third Parties) Act 1999 in the United Kingdom. This could cause problems under Bermuda Law for potential policy holders. If a policy holder has insurance which is reinsured through a reinsurance company there is no privity of contract between the policy holder and the reinsurance company. Therefore, in the event of an insolvency of the insurance company, the policy holder under Bermuda Law would have no right of action against the reinsurance company under the reinsurance treaty.

Private Acts have been used to resolve the situation by specifically authorising the policy holder to be afforded third-party rights as against the reinsurance company. The underlying agreements would allow the cut through to the reinsurance company and would specifically state that they are to be governed by Bermuda Law referencing the Private Act.
2. **Life Insurance**

The Life Insurance Act 1978 (Life Act) can be restrictive and with the use of a Private Act a client can carve out certain aspects of the Life Act while still maintaining its overall effectiveness. Examples of ways in which the Life Act is typically adopted by a Private Act are as follows:

(i) the meaning of ‘insurable interest’ in the Life Act is extended to cover additional categories of people as requested by the client, the additional people then being listed in the Private Act.

(ii) if at the time a life policy is to take effect, the Policyholder has an insurable interest in the person whose life is insured under that Life Policy, the Private Act will ensure there shall be no limitation on the amount insured under the Life Policy.

(iii) removal of the application of the provisions of subsections 11(3) and 19(2) of the Life Act relating to the maximum rate of interest charged on policies governed thereby.

3. **Transformer Companies**

A transformer company can either be an insurance or non-insurance entity. The most common role for a non-insurance transformer is to act as a swap counterparty under, typically, an ISDA Master Agreement. In most instances, the non-insurance transformer would obtain a form of insurance policy from a financial guaranty provider in order to protect its position. The proceeds of the insurance policy are, for many transformers, either assigned or secured in favour of the protection buyer under the swap. In order for a non-insurance transformer to operate as a protection seller under an ISDA Master Agreement it must be able to characterise the ISDA Agreement as a financial instrument, as opposed to insurance business or an insurance policy.

The problem facing a non-insurance transformer involved in a transaction is that one or more of the transaction documents may fall within this broad definition of insurance business as defined by the Insurance Act 1978 (Insurance Act). In a technical sense, this may be seen as requiring the non-insurance transformer to obtain an insurance licence in order to enter into the transaction. To avoid this potential problem, the non-insurance transformer can obtain a direction pursuant to Section 57A of the Insurance Act (Section 57A Direction) or avail itself of a Private Act enacted in favour of the non-insurance transformer which allows the transformer to designate its own transaction document. As such, no insurance licence is required in order to enter into the transaction documents.

The Private Act can be a more effective tool to accomplish the non-insurance designation for two reasons. Firstly, a Section 57A Direction is only available on a transaction-by-transaction basis with respect to specifically identified documents. The same 57A Direction cannot be utilised for any other transaction, even where the transaction documents are similar, and a new 57A Direction
must be obtained for each transaction. Under a Private Act, each of a series of several transactions contemplated could be characterised as non-insurance and the need to go back to the regulators for each transaction would not be necessary. Secondly, while an insurance transformer is capable of engaging in insurance and non-insurance business, Section 57A only allows the Bermuda Monetary Authority (the Authority) to characterise a contract as non-insurance; it does not however allow the Authority to do the opposite and characterise a contract as insurance business. This may impact on certain transactions involving insurance transformers. The ability to categorise a contract as insurance business can, however, be achieved through a Private Act.

4. **Betting Act 1975**

Certain contracts may fall within the definition of prohibited activities under the Betting Act 1975 and be void, voidable or unenforceable by reason only that it is a contract where a party will pay or not pay a sum of money or render or not render money’s worth upon the determination or ascertainment of an uncertain event without reference to a loss incurred by any of the parties to such contract resulting from such event. A Private Act can ensure that a company’s activities do not fall within this definition.

The above represents a brief synopsis of some of the more common provisions contained in Private Acts. This is by no means meant to be an exhaustive list of what a Private Act can achieve. For further details on how a Private Act can be used to assist you to achieve your objectives, please contact Appleby.

**E. PROCEDURE FOR THE PASSING OF A PRIVATE BILL**

It is important from the outset to ensure that the Private Act that is to be enacted has the appropriate support from the relevant Ministry. It is therefore crucial at the drafting stage of the Private Act to involve the relevant Ministry and to get sign off in advance of petitioning the House of Parliament, as, without the support of the Ministry, the Private Act will not be successful. With respect to an insurance company the appropriate Ministry will be the Ministry of Finance (in conjunction with the Registrar of Companies and Bermuda Monetary Authority, Insurance Division).

1. **Drafting the Private Bill**

Appleby, in conjunction with the client, will prepare a draft of the Private Bill, which will contain all of the necessary information. The Private Bill will have been drafted in cooperation with the Ministry of Finance and any other relevant authorities to ensure a successful outcome.
2. **Advertising**

The preamble and text of the Private Bill is required to be advertised in a local newspaper. Appleby will prepare the advertisement and arrange for publication:

- where the Private Bill will first be read in the House of Assembly, not less than 10 days before the first reading;
- where the Private Bill will be first read in the Senate, not less than 15 days before the first reading. Though the Senate Rules require the Private Bill be advertised three times, the practice is that it be advertised once.

3. **Drafting the Explanatory Memorandum**

In conjunction with the drafting of the Private Bill an Explanatory Memorandum is prepared. The purpose of the Memorandum is to fully detail all of the sections of the Private Act and explain the purpose and objective of each of the proposed sections.

4. **Drafting the Questionnaire**

In conjunction with the drafting of the Private Bill, a questionnaire needs to be drafted and filed. The questionnaire contains certain factual information about the company making the application and can therefore be signed off on by Appleby as attorneys to the company.

5. **Drafting the Petitions**

Petitions are drafted and addressed to the Speaker of the House of Assembly and President of the Senate. Each petition must be signed by two directors and have the company seal affixed. The directors’ names must appear in block letters below the signatures and the petition must be dated.

**F. SUBMISSION OF DOCUMENTATION**

The following documents must be submitted to the Clerk to the Legislature:

a. Letter to the Clerk to the Legislature for the Joint Select Committee on Private Bills together with:

(i) 20 photocopies of the printer’s proof of the Private Bill;
(ii) 20 copies of the explanatory memorandum;
(iii) 20 copies of the questionnaire; 
(iv) original petition to the House of Assembly; 
(v) original petition to the Senate; and 
(vi) one original clipping of the advertisement.

b. Letters and required documentation to the proposer in the House of Assembly and the proposer in the Senate.

The Clerk will then vet and approve all submitted documentation.

G. PASSAGE THROUGH JOINT SELECT COMMITTEE ON PRIVATE BILLS

All Private Bills are reviewed in advance by the Joint Select Committee (Committee), which meets when there is sufficient business to warrant a meeting. Due to the ‘sufficient business’ requirement, it can take upwards of three weeks before a meeting will be held. Appleby will be required to attend and may need to speak to the Private Bill before the Committee. At all times the client should remember that as the sitting session of Parliament draws to an end, there are deadlines which must be met to ensure the Private Bill is passed before the House breaks for summer, winter and Easter recesses.

H. PROCEDURE IN THE LEGISLATURE

Once reviewed and approved by the committee, the petitions are thereafter, as soon as is practicable, tabled in the Houses of Parliament by the respective proposers. The Private Bill (with or without amendments) must be sent to the printers with a request to produce:

a. 65 printed copies of the Private Bill; and
b. four overprints. (The overprints are copies of the Private Bills with notations on the front page as to the dates to be inserted when the Private Bill was passed by: (i) the House of Assembly; (ii) the Speaker; (iii) the President of the Senate; and (iv) the date assented to by the Governor.)

The copies of the Private Bill are then sent to the Clerk to the Legislature (65 printed copies plus four overprints) for distribution to the Members of both Houses prior to the first reading.

I. PROCEDURE FOR THE PASSAGE OF THE PRIVATE BILL THROUGH THE LEGISLATURE

The copies of the Private Bill are distributed to the Members of both Houses. The House of Assembly will proceed through the first, second and third readings of the Private Bill at the next
sitting of the House of Assembly. Once approved, the Private Bill is then signed by the Speaker of the House of Assembly and sent to the Senate. The Senate will normally approve the Private Bill after two sittings. If the Senate approves the Private Bill, it shall be signed by the President of the Senate and then forwarded to the Premier. The Private Bill is then signed by the Premier and forwarded to the Chambers of the Attorney-General for final vetting. The Private Bill finally comes before the Governor and, having received his signature of assent, the Private Bill is reported in the newspaper as having been passed. At this time the Private Bill is enacted and becomes a Private Act of the Bermuda Legislature. The Clerk will send the Private Act to the printing company for printing.

J. TIMING

The timeframe from start to finish for the Private Bill process is approximately six to eight weeks depending on the nature and complexity of the matter, and the timing of the sitting of the House of Assembly.
CHAPTER 7

HOW TO FORM A BERMUDA INSURANCE COMPANY

A. INTRODUCTION

The first insurance company to plant its roots in Bermuda was the American International Reinsurance Company in 1948. The first Bermudian insurance product was the ‘captive’ insurance company developed by Fred Reiss of Youngstown, Ohio in the early 1960s. The insurance market has grown considerably since then, making Bermuda among the three largest insurance markets in the world, behind New York and ahead of London. A total of 70 new insurers were added to the Bermuda insurance register for the period ending 30 November 2006, bringing the total number of international insurers incorporated in Bermuda to more than 1,400.

A Bermuda insurance company is established and enabled to commence business by a relatively straight-forward process which includes: (a) making an application to incorporate the company (which includes a pre-vetting of the proposed insurance programme of the company); (b) incorporating the company; (c) organising the company; and (d) registering the company as an insurer under the Insurance Act 1978, as amended (Insurance Act). This chapter outlines what is required in respect of each of the above steps.

Further, should the insurance company wish to obtain legal segregation of assets and liabilities (useful, for example, for rent-a-captive programmes), it will need to register under the Segregated Accounts Companies Act 2000, as amended (SAC Act). This concept arose primarily out of the concern that rent-a-captives do not legally protect each participant’s assets from third-party creditors. In November 2002, the SAC Act was amended with a view to enhancing Bermuda’s competitive position further by allowing registration under the SAC Act for non-insurance uses including mutual funds. Prior to 2000, the legal segregation of accounts was only available by means of a Private Act of the Bermuda legislature.
The effect of such statutory division under the SAC Act is to protect the assets of one account from the liabilities of other accounts within the same company, with the result that only the assets of a particular account may be applied to the liabilities of that account. Further information on registering under the SAC Act will be provided upon request.

Included as exhibits to this chapter are copies of the various forms required to be completed in order to form a Bermuda insurer or an insurance intermediary, as well as an outlined business plan identifying the required documents according to the class of insurer and type of insurance business.

B. APPROVAL OF PROPOSED INSURANCE PROGRAMME

An Incorporation Questionnaire (please refer to Exhibit 1 for a sample Questionnaire and to Exhibit 2 for Explanatory Notes thereto) must be completed at the beginning of the incorporation process which will include details on the ownership and administration of the insurance company. A pre-incorporation information form (the Pre-Incorporation Form) will also need to be completed, typically by the insurance managers, detailing the proposed insurance programme.

The availability and suitability of the proposed name of the insurance company should then be reserved with the Registrar of Companies (the Registrar) by submitting a Name Reservation Application. Once the name is reserved, the Registrar will stamp the Name Reservation Application; this reservation is valid for three months but can be renewed, at any time before the expiration of the three months, for a further three months.

Prior to commencement of the formal application process, the principals of the proposed new insurance company will have spent days or weeks in consultation with both onshore and offshore advisers, conducting feasibility studies where appropriate, developing a detailed business plan, and completing the various forms exhibited to this chapter.

Once this preliminary work has been completed, the formal application process is ready to commence. There are three distinct government or quasi-government bodies involved in the application process; the Bermuda Monetary Authority (Authority), the Registrar and the Insurers’ Admissions Committee (IAC). The IAC will review and approve the proposed insurance programme of the applicant as submitted in the application package, then the Authority will review and approve all necessary compliance documentation which form part of the application to incorporate the company (please see requirements below). The Registrar will ultimately issue a Certificate of Incorporation for the insurance company once approved. The applicant (usually, but not necessarily represented by a firm of attorneys), applies to the Authority, to incorporate the company, and for permission to issue the shares to the intended immediate owner(s) of the company. The application is circulated to the members of the IAC on any given Monday in the form of a complete and bound insurance application package comprised of:
a. Form 1 (application for Registration/Continuation);
b. Form 2 (the Memorandum of Association of Company Limited by Shares);
c. The Pre-Incorporation Information Form (please refer to Exhibit 3 for a sample); and
d. A business plan (please refer to Exhibits 4 and 5 for samples) which must contain the following information:

(i) Type of business being written, limits, attachment points and retention.
(ii) Class of registration.
(iii) Ownership structure, including intermediate and ultimate beneficial owners of the proposed company. For individual shareholders/beneficial owners, a net worth statement and personal declaration form (please refer to Exhibit 1 for a copy of the personal declaration form) is required for any owners who are proposing to own 5% or more of the company. For shareholders which are bodies corporate, the most recent audited financial statements (private companies) or the most recent annual report (public companies) must be submitted, or for publicly-listed companies a ticker symbol will suffice.
(iv) Financial projections (including a pro forma balance sheet and income statement) for five years of operations with substantiation of loss assumptions. An actuarial analysis of the relevant loss data should also be included if available.
(v) Proposed level of capitalisation and any contributed surplus.
(vi) Reinsurance plan (if any).

The information provided in the pre-incorporation information form summarises the information contained in the business plan.

Fifteen copies of the application materials are sent by the applicant to the Authority, who keep one copy for internal review and forward the remaining 14 copies to the members of the IAC. The IAC is a sub-committee of the Insurance Advisory Committee with responsibility for vetting all proposed insurance incorporation applications. The IAC is comprised of insurance industry professionals including accountants, actuaries and underwriters as their meetings include regulatory personnel of the Insurance Division of the Authority. The IAC meets weekly on Friday mornings to conduct a pre-incorporation enquiry into the soundness of the proposed insurance programmes outlined in pending applications. An application must be filed by no later than 5pm on Monday in order to be considered at the meeting of the IAC on the following Friday. Ordinarily, it will not be necessary for the applicant or their attorneys to appear before the IAC. If the application is not approved outright, requests for further information, or clarification, commonly known as ‘deferrals’ will usually be communicated to the attorneys for the applicant by one of the technical officers of the Insurance Division of the Authority, following the meeting. Typically, these ‘deferrals’ are usually requests for:

- clarification of the proposed reinsurance programme;
- clarification of the proposed company’s ultimate risk exposures;
• justification for the loss ratios used; and
• confirmation that the company will accept a restriction on their licence to reinsurance only.

Requests for further information may differ depending on the nature of the incorporation application. In rare circumstances an application to incorporate an insurance company can be declined outright. In the case of a declination under Section 4A of the Companies Act 1981 (Companies Act), the Authority is not bound to provide any reasons for its refusal and the decision is not subject to appeal or review in any court.

The result of the IAC’s review will normally be communicated by a technical officer of the Authority’s Insurance Division and the attorneys either on the day of the IAC’s meeting or on the following Monday. In practice, the attorneys frequently contact the Insurance Division directly for the outcome of the IAC meeting.

The Authority invariably waits to hear the IAC’s views at the conclusion of its Friday morning meeting before proceeding with the incorporation of the company. On the assumption that the Authorisation and Compliance Division of the Authority is satisfied with the financial and compliance integrity of the proposed beneficial owners the Company will be incorporated. The confidentiality of all information received by members of the IAC is protected under Section 52 of the Insurance Act.

Once approved, and upon receipt of the applicable annual government fee, the company will be registered as an exempted company under the Companies Act and a Certificate of Incorporation will be issued by the Registrar. Upon payment of the necessary government fee and insurance application and registration fee, and submission of the requisite documentation (discussed further in this chapter), the company will then be registered as the requested class of insurer under the Insurance Act.

Establishing an insurance company in Bermuda is a relatively straight-forward process which can usually be completed within a two-week period provided all the relevant information is provided to the attorneys and the IAC does not have any substantive questions on the insurance or structure of the proposed insurance company’s programme.

C. INCORPORATION BY REGISTRATION OF THE COMPANY UNDER THE COMPANIES ACT

An insurance company is usually incorporated in the same manner as other Bermuda companies, ie, pursuant to the registration procedure set out in the Companies Act.
The Registrar will have received the incorporation papers from the applicant’s attorneys at the time of the submission of the application to the Authority, but will not incorporate the company until all the necessary consents of the IAC and the Authority are obtained.

Once approved and upon receipt of the government fee, which is based on the company’s assessable capital, the company will be registered as an exempted company under the Companies Act and a Certificate of Incorporation will be issued by the Registrar.

D. ORGANISATION OF THE COMPANY

The company can be organised (the term ‘organised’ refers to the formal establishment of its internal corporate structure) at any time following its incorporation. Typically, organisational meetings are held within a week of incorporation. A company’s organisation involves convening and holding the following meetings:

a. Meeting of the provisional directors (ie, the subscribers to the Memorandum of Association) at which, among other things:

   i. the bye-laws are presented; and
   ii. the minimum share capital is allotted unless the company is a mutual company, in which case the minimum reserve fund is established.

b. Statutory meeting of the shareholders at which, among other things:

   i. the bye-laws are confirmed;
   ii. the directors are elected; and
   iii. the auditors are appointed.

c. Meeting of the first board of directors at which, among other things:

   i. the officers are appointed;
   ii. the financial year end is determined;
   iii. the registered office is determined;
   iv. the accountants are appointed;
   v. the bankers are appointed and signing authority is established;
   vi. the insurance managers and principal representative are appointed;
   vii. the principal office is determined;
   viii. the secretary is instructed to apply for a tax assurance certificate (see below); and
ix. the authority is granted for initiating the application for registration as an insurer in one of the classifications under the Insurance Act; this is a formality which follows the substantive approval process with the IAC outlined in Section B. above.

A notice must then be filed with the Registrar stating the address of the registered office (Form No. 13). A letter of application is then sent to the Accountant General (care of the Registrar) for a tax assurance certificate, which is a confirmation that the company will not be taxed in Bermuda on capital gains or profits, or be subject to other taxes of a similar nature. The Minister will then grant an assurance (currently effective until March 2016) under the Exempted Undertakings Tax Protection Act 1966.

Once the organisation is complete, and the capital paid up (as referred to in the business plan), the company is in a position to make an application to the Authority for registration under the Insurance Act so that it may commence underwriting.

**E. REGISTRATION OF THE COMPANY UNDER THE INSURANCE ACT**

Upon proof of receipt of the company’s capital as confirmed by the attorneys, an application is made to the Authority for registration under the Insurance Act, enclosing:

a. Form 1B (ie, the executed pre-incorporation information form) (please refer to Exhibit 6 for a sample);
b. the requisite application and registration fees;
c. a letter of acceptance of appointment from each of the principal representatives, the insurance manager and the auditors and other documentation required pursuant to the Guidance Notes issued by the Authority; and
d. a letter of acceptance of appointment from the approved actuary and/or the loss reserve specialist, where required, together with their curricula vitae and such other information as is required pursuant to the Guidance Notes issued by the Authority.

Although, as a matter of law, the Authority has the discretion to refuse to register the company under the Insurance Act, in practice such discretion is rarely exercised where registration is based upon the insurance programme presented and approved by the IAC prior to incorporation. Assuming the Authority registers the insurer under the Insurance Act, the Authority then issues a Certificate of Registration.
TIMELINE

select professional service providers (insurance managers, attorneys, and auditors)

reserve preferred name of company with two alternative names (valid for 3 months)

apply to Bermuda Monetary Authority (the “Authority”)

complete pre-incorporation documents including Business Plan

apply to Insurers’ Admissions Committee

application approved

incorporate and capitalise company and convene organisational meetings

submit application for insurance licence to the Authority (Form 1B)

Authority issues registration certificate

insurer can commence writing business
Bermuda Exempted Company
INCORPORATION QUESTIONNAIRE

Introduction
Before completing this Questionnaire please read the General Notes sent with this Questionnaire. The information you provide to us in this Questionnaire which is divided into 9 sections, together with the required compliance information and Personal Declarations referred to in this Questionnaire, will enable us to make an application for a Bermuda Exempted Company (“BEC”) to the Bermuda Authorities, unless following review of all the information and documentation you provide to us, we require further information from you.

Please contact Ruby L. Rawlins, Manager – Incorporation, direct telephone # 441 298 3552 or Bernett Cox, Deputy Manager – Incorporation, direct telephone # 441 298 3200 if you have any questions.

Following receipt of all required information and the agreed retainer we will then submit the application as soon as possible.

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Section [1] - Contact Details

Please provide contact details for the person who will be responsible for continuing instructions in relation to the company:

- **Name**: ___________________________________________________
- **Position**: ___________________________________________________
- **Company**: ___________________________________________________
- **Street**: _____________________________________________________
- **City**: _______________________________________________________
- **State or Province**: ___________________________________________
- **Country**: ___________________________________________________
- **Zip Code or Postal Code**: _____________________________________
- **E-mail Address**: _____________________________________________
- **Telephone Number**: _________________________________________
- **Fax Number**: _______________________________________________

Section [2] - Name Reservation Information

Please select a name and two alternative names for the company:

<p>| | |</p>
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<td>Name of company:</td>
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<td>Alternative name:</td>
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<td>Second alternative name:</td>
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</table>

**Note:** The name must end with “Limited” or “LIMITED”, “Ltd.” or “LTD.”. In specific circumstances (please refer to the General Notes) the Minister of Finance may authorize dispensation of the use of these words. Please contact Ruby L. Rawlins or Bernett Cox if you require assistance. If the name is already in use, or reserved, one of the alternative names will be used.

**Additional Notes:**

- If initials are used and stand for something, please explain.
- If the company will be an affiliate or subsidiary of a Bermuda company and have a similar name, please explain.
- If you have another/other company(ies) registered in Bermuda with a similar name, please list the name(s):
Section [3] - Business Information

From the list below, please circle the principal intended business of the company.

If you are forming an insurance/reinsurance company, a mutual fund or a company which will be conducting investment business, please provide a business plan or a detailed descriptive text of the proposed business of the company. In each of these cases and also if you are forming a trust company one of our Appleby lawyers will contact you.

1. Please circle the principal intended business of the company.

   Acquisition  Intellectual Property
   Advertising  Investment Holding
   Agent  Investment Management Business
   Aircraft  Mining
   Computer Hardware  Mutual Fund (Collective Investment Scheme)
   Computer Software  Oil & Gas Exploration
   Computer Consulting  Partnership
   Consultancy  Pharmaceutical
   Distribution  Property Development
   E-commerce  Publishing
   Foreign Sales  Shipping/Ship owning
   Franchising  Telecommunications
   Guarantee  Trading
   Information Technology  Trust
   Insurance/Reinsurance  Other, please specify:

2. Please provide a description of the principal intended business of the company.

_______________________________________________________________________________

_______________________________________________________________________________

Bermuda Law requires the Minister of Finance to give permission for a company to conduct the following restricted business activities. If the BEC will be engaging in any of these activities, please circle the appropriate activity(ies):

i. Providing money transmission services;
ii. Cashing cheques which are made payable to customers;
iii. Operating a bureau de change, whereby cash in one currency is exchanged for cash in another currency;
iv. Issuing, selling or redeeming money orders or traveller’s cheques for cash;
v. Issuing and administering means of payment by credit or debit cards;
vi. Administering means of payment over the internet;
vii. Offering of professional services as a barrister, solicitor, medical practitioner, architect, dental practitioner, public accountant, optometrist, optician, professional surveyor, nurse, health services provider or any profession or occupation specified under the First Schedule to the Professions Supplementary to Medicine Act 1973, that is a chiropodist, dietitian, medical laboratory technician, occupational therapist, physiotherapist, radiographer or speech therapist;
A company limited by guarantee can only be formed if its purpose is to promote art, science, religion, charity, sport, education or any other social or useful purpose and its profits, if any, and other income is to be used in promoting its purposes, and no dividends are to be paid to its members, or it is a mutual company.

4. Please circle the type of company this will be:

<table>
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<tr>
<th>Limited Liability</th>
<th>Unlimited Liability</th>
<th>Guarantee</th>
</tr>
</thead>
<tbody>
<tr>
<td>viii Bank;</td>
<td>ix Collective Investment Scheme (Mutual Fund);</td>
<td></td>
</tr>
<tr>
<td>x Credit Union;</td>
<td>xi Deposit Company;</td>
<td></td>
</tr>
<tr>
<td>xiii Licensed Trust Company.</td>
<td></td>
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</tr>
</tbody>
</table>

If the BEC will be engaging in investment business a licence may be required under the Investment Business Act 1998. If so, please circle Investments.

If the BEC will be engaging in trust business a licence may be required under the Trusts (Regulation of Trust Business) Act 2001. If so, please circle Trust.

The following are prohibited business activities in Bermuda and companies cannot be incorporated for these purposes:

- Trafficking in armaments;
- Except as authorized by law, operating lotteries, gambling facilities, including the operation thereof through the Internet; and
- Except as authorized by law importation, exportation, trading in, manufacture, production or supply of controlled drugs.
Section [4] - Share Capital

What is the intended authorised and issued share capital of the company?

The minimum authorised and issued share capital of a BEC is the equivalent in a foreign currency of Bermuda $12,000 except for a mutual fund company in which case the minimum is the equivalent of Bermuda $1.00 and for an insurance/reinsurance company it is dependent on the insurance/reinsurance class. The capital requirements for insurance/reinsurance companies, the capital of which must be paid in full on incorporation, will be discussed with you by an Appleby attorney. Please be aware that increasing the authorised share capital of the company above Bermuda $12,000 will subject the company to a higher annual Government fee.

1. State the share currency: ________________________________________________

2. State the monetary equivalent in foreign currency of BD$12,000________________________

3. State the par value of the shares: ____________________________________________

4. State the number of shares to be issued on incorporation: _________________________

5. Are the shares to be issued at a higher price than par? Please circle: Yes No

If yes, what is the premium per share to be added to the par value: ___________________

6. On incorporation, will the shares of the company be paid for in full, in part, or not at all? Please circle: Full In Part Nil

If in-part, state the amount to be paid per share:___________________________________

7. Where the shares will be paid in full or part, please state the source of these funds: _________________________________________

We recommend you reduce the par value (i.e. to .10 or .01, etc) if you want more shares but do not wish to attract a higher annual Government fee.

Under Bermuda law “no par value” shares are not permitted.

Please note, the shares can remain nil paid indefinitely although the shareholders will be liable for the amount unpaid.

Section [5] - Contribution to Surplus

Please advise whether or not the parent, shareholders or any other party will contribute or donate cash or other assets to the company.

To qualify as a contribution to surplus, a gift of cash or assets to the company by the party making the contribution must be unrelated to an issue of shares in the company.

1. Will there be an additional contribution to the surplus of the company? Please circle: Yes No

If yes, state the amount: ____________________________________________________________

2. Please state the source of any contribution to surplus: __________________________________

We recommend you reduce the par value (i.e. to .10 or .01, etc) if you want more shares but do not wish to attract a higher annual Government fee.

Under Bermuda law “no par value” shares are not permitted.

Please note, the shares can remain nil paid indefinitely although the shareholders will be liable for the amount unpaid.
Section [6] - Ownership Information

The Bermuda Authorities require full disclosure of direct, intermediate and ultimate beneficial owners of a BEC to fulfill Bermuda’s “know your client” requirements and to prevent any BEC being the subject of money laundering or other criminal activities. In other words, if a shareholder of the company is not a natural person, the ownership of the person (e.g. a trust, partnership or company) must be disclosed to the Bermuda Authorities. If you have a complex ownership structure and require assistance to determine what information is required, please contact Ruby L. Rawlins or Bernett Cox.

Bermuda’s Proceeds of Crime Act 1997 (as amended) and the Proceeds of Crime (Money Laundering) Regulations 1998, were both enacted to prevent and discourage money laundering on the Island. Appleby fully supports the Bermuda Government in its drive to further enhance Bermuda’s reputation as the leading off-shore jurisdiction and a respectable country in which to do business. In our commitment to our clients and to Bermuda, Appleby requires detailed customer information to provide a better service to its clients and to assist in the prevention of fraud.

At the time of receiving this completed Questionnaire we also require receipt of the completed individual Compliance Form from all individual shareholders, directors, officers, authorized signatories and all other individuals who will control, manage or direct the management of the BEC as well as from those individuals who instruct us (other than from individuals representing regulated institutions, law firms, banks or accounting firms and similar instructing parties known to us), together with certified copies of the passports, drivers licences or other photo identification. Certified residential address details will also be required for each of the foregoing individuals.

For a publicly quoted company the only information we require is the detail of the exchange on which it is listed and its ticker symbol.

We will also require evidence of the existence of the proposed direct, intermediate and ultimate owners of the company if any of these are not individuals and completion of the Compliance Form for Companies/Trusts/Partnerships. The evidence will vary depending on the nature of the entity involved but will include certified copies of the constitutional documents or equivalent (e.g. certificate of “good standing”, certificate of incorporation, memorandum and articles of association or bye-laws, certificates of incumbency with specimen signatures and certified copies of resolutions relating to the formation of the proposed new company). Again, please contact Ruby L. Rawlins or Bernett Cox if you require us to assist you in meeting these requirements.

This information will be furnished in or pursuant to our Compliance Form for Individuals or Compliance Form for Companies/Trusts/Partnerships, as applicable (see attached forms). This information is retained by us and is for our internal client verification records only, to comply with the requirements of Bermuda law. Bermuda law imposes strict criminal sanction and potential civil liability in regard to our activities and affiliated entities, where these “know your client” rules are not met. Accordingly, we appreciate your understanding in completing and returning the requisite forms and providing any additional requested information.
The Bermuda Authorities require full disclosure of direct, intermediate and ultimate beneficial owners of the company.

1. Identify the direct shareholders of the company, the number of shares they will hold and the type of entity, (e.g: an individual, public or private company, a trust or a partnership).

<table>
<thead>
<tr>
<th>Name of Entity or Individual</th>
<th>Shares</th>
<th>% of Shares</th>
<th>Type</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

For each direct shareholder, except individuals and publicly quoted companies on a recognized stock exchange, please supply the necessary particulars on the appropriate form A, B or C provided at the end of this Questionnaire.

2. If the direct shareholder(s) is not an individual(s) or a publicly quoted company on a recognized stock exchange, identify the intermediate and ultimate beneficial owners of each entity and provide their particulars on the appropriate form A, B or C. Where the ownership structure is complex please include, where possible, an ownership schematic.

<table>
<thead>
<tr>
<th>Name of Intermediate and Ultimate Beneficial Owners</th>
<th>% of ownership</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tbody>
</table>

The Bermuda Authorities require full disclosure of direct, intermediate and ultimate beneficial owners of the company.
Section [7] - Directors and Officers

Each BEC must have a minimum of two directors who are individuals (as opposed to bodies corporate) and who do not have to be resident in Bermuda. There is a requirement to have a minimum of two individuals ordinarily resident in Bermuda appointed to represent the BEC which requirement is satisfied by individuals ordinarily resident as representative and secretary or director and secretary or two directors. Where required, Appleby Corporate Services (Bermuda) Ltd., an Appleby affiliate, can provide a secretary and a resident representative to the company.

In the case of a company whose shares are listed on an appointed stock exchange or a wholly owned subsidiary of such a company the requirement is that a company appoint a resident representative (who need not be an individual).

In addition, every BEC must select two of its directors to act as a president or vice-president or chairman or deputy chairman. Other than these officers, a company can have as many officers (who are not required to be directors) as needed.

In order to facilitate the speedy completion of organizational aspects and appointment of officers by the directors we recommend that in addition to the directors of your choice, two of our employees (normally Ruby L. Rawlins and Bernett Cox) be appointed as directors at the Statutory Shareholders Meeting of the company and to hold office until the conclusion of the First Directors Meeting. These persons will then form the quorum for the first directors meeting at which the appropriate organizational and officer appointment resolutions will be passed (prior notice of this meeting’s agenda having been given to all the directors) and at the conclusion of this meeting these two persons will cease to be directors. If you do not wish us to proceed in this manner, please tick the box

1. Please list the directors of the company and ensure that we receive with this complete Questionnaire the completed Compliance Form attached from each director together with the certified copy documentation referred to in Section 6.

<table>
<thead>
<tr>
<th>First name</th>
<th>Middle name</th>
<th>Last name</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>President, or</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Chairman</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- OR -</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Vice President</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>or Deputy</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Chairman</td>
</tr>
</tbody>
</table>

2. Please list the officers of the company and ensure that we receive with this complete Questionnaire the completed Compliance Form attached from each officer together with the certified copy documentation referred to in Section 6.

<table>
<thead>
<tr>
<th>First name</th>
<th>Middle name</th>
<th>Last name</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

Section [8] - Organisation

The organisation will commence once the company has been incorporated. This section deals largely with administrative issues which are required by law or intended to provide a superior client service.

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Do you wish the Registered Office of the Company to be at Appleby's address? Please circle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If no, please provide the Registered Office address of the Company.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Street</td>
<td></td>
<td></td>
</tr>
<tr>
<td>City</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Postal Code</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Do you wish the share certificate(s) to be held in the Appleby vault?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Please circle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If no, please provide the name and address to which the certificate(s) are to be sent:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Name</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Street</td>
<td></td>
<td></td>
</tr>
<tr>
<td>City</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State or Province</td>
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<tr>
<td>Country</td>
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<tr>
<td>Zip Code or Postal Code</td>
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<td></td>
</tr>
<tr>
<td>Telephone Number</td>
<td></td>
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<tr>
<td>Fax Number</td>
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<tr>
<td>3. Will the company establish a business office in Bermuda? Please circle</td>
<td></td>
<td></td>
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<tr>
<td>If yes do you wish Reid Management Ltd., an Appleby affiliate, to provide accounting, management and consulting services? Please circle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Is a Bermuda bank required? Please circle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If yes, please circle the selected a bank:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank of Bermuda</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank of N.T. Butterfield</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bermuda Commercial Bank</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Capital G Ltd.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Account type: Please circle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank of Bermuda</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank of N.T. Butterfield</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bermuda Commercial Bank</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other state</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Currency: Please circle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>US</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Euro</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sterling</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other state</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Signing Authority - please indicate who will have signing authority:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Name(s)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Title(s)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Please specify any limitations on the signing authorities:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
5. Please provide the details of the person or entity responsible for the day to day bookkeeping of the company:

Name person/entity
Street
City
State or Province
Country
Zip Code or Postal Code
E-mail Address
Telephone Number
Fax Number

We recommend that clients obtain and consider professional advice relating to the tax liability and residence of the company and that you provide us with a copy of the tax advice obtained.

6. Have you taken advice on the establishment and operation of the BEC and on the tax liability and residence of the company for tax purposes? Please circle

If you replied “no” to the previous question, are you comfortable, based on your past experience, regarding the tax liability and residence of the company for tax purposes? Please circle

If you replied “no” to both the previous questions, have you made arrangements to ensure that the company will be in compliance with all applicable tax and other laws? Please circle

Please provide us with a copy of the tax advice obtained.

The promoters of a BEC, and the intended directors and shareholders, should obtain and carefully consider professional advice in relation to the potential liability to tax of the company, under the laws of those jurisdictions in which and with which it may carry on business. Accordingly, we recommend that professional advice is obtained from those qualified in the relevant jurisdictions.
<table>
<thead>
<tr>
<th>Paragraph</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.</td>
<td>Do you wish to waive the appointment of an auditor? Please circle Yes No. If no, please provide the following information:</td>
</tr>
<tr>
<td></td>
<td>Name the Auditor to be appointed: ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>Street ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>City ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>State or Province ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>Country ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>Zip Code or Postal Code ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>E-mail Address ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>Telephone Number ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>Fax Number ____________________________________________________</td>
</tr>
<tr>
<td>8.</td>
<td>Date of financial year end ____________________________________________________</td>
</tr>
<tr>
<td>9.</td>
<td>Date of the end of the first accounting period ____________________________________________________</td>
</tr>
<tr>
<td>10.</td>
<td>If different from Section [1], please provide details of the person to whom statements for billing, corporate administrative or resident representative services and requests for the annual Government fee(s) should be sent or copied:</td>
</tr>
<tr>
<td></td>
<td>Name ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>Street ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>City ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>State or Province ____________________________________________________</td>
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<td></td>
<td>Country ____________________________________________________</td>
</tr>
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<td></td>
<td>Zip Code or Postal Code ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>E-mail Address ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>Telephone Number ____________________________________________________</td>
</tr>
<tr>
<td></td>
<td>Fax Number ____________________________________________________</td>
</tr>
<tr>
<td>11.</td>
<td>Do you have any special instructions for the incorporation of the company? Please circle Yes No. If yes, please explain: ____________________________________________________</td>
</tr>
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<td></td>
<td>____________________________________________________</td>
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</table>
Appleby and its affiliates are able to provide you and your company with a variety of business services and solutions.

If you are incorporating the company for some other person or company you may want to have these materials sent to that person or company.

12. Please circle if you would like information on:
   - Management Services
   - Accounting and Payroll Administration
   - Estate Planning and Administration
   - Trusts - Advice and Administration
   - Real Property - Advice
   - Litigation Services
   - Trademarks

If different from Section [1], please provide the contact details of the person to whom these materials should be sent.

Name ___________________________________________________
Position _________________________________________________
Company ________________________________________________
Street ___________________________________________________
City _____________________________________________________
State or Province __________________________________________
Country __________________________________________________
Zip Code or Postal Code _____________________________________
E-mail Address ____________________________________________
Telephone Number _________________________________________
Fax Number ______________________________________________

Marks and logos associated with your business are valuable. Protection in your home country will not extend to Bermuda, and we recommend you consider registering them in Bermuda as a means of protection.

13. Active trading companies are advised to register their trade marks and service marks in Bermuda. Do you have trade or service marks, or require any further information on the protection of your Intellectual Property? Please circle

   Yes  No

Select if you have worked with Appleby previously and wish to work with a particular attorney or corporate administrator again.

14. Have you worked with Appleby before?  Yes  No

If yes, state:
Which lawyer: _____________________________________________
Which corporate administrator: _______________________________

APPLEBY
Section [9] - Payment Options

You have two payment options: wire transfer and bankers draft. We will begin the incorporation process on receipt of a completed Questionnaire and all Compliance and Personal Declarations Forms but will not submit the application to the Bermuda Authorities until payment is received and receipt of any additional information we require from you.

Please include the following particulars with your remittance:

1. Wire Transfer Information:

   Payment for Incorporation of:
   
   Company ____________________________________________________________
   
   Client Name ________________________________________________________
   
   Company ____________________________________________________________
   
   Date ________________________________________________________________
   
   The Bank of Bermuda Limited
   CHIPS UID: 005584
   S.W.I.F.T. Code: BBDA BMHM
   Beneficiary Account Number: 1010-530589
   Beneficiary Account Name: Appleby
   Total amount remitted:

2. Bankers draft must be sent to:

   Incorporations Manager
   Appleby
   P.O. Box HM 1179
   Hamilton HM EX
   Bermuda

   Payment for Incorporation of __________________________________________
   
   Client name _________________________________________________________
FORM A  Ownership Information: Private Company in the Ownership Chain (the ownership chain begins with the intended owners of the shares in the BEC and ends with all ultimate beneficial owners).

<table>
<thead>
<tr>
<th>Name of company</th>
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<tbody>
<tr>
<td>Place of incorporation</td>
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</tbody>
</table>

List all shareholders:

<table>
<thead>
<tr>
<th>Name and Addresses</th>
<th>% of Shares</th>
<th>Type</th>
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<tbody>
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On a case by case basis after prior review with the Bermuda Monetary Authority ("BMA") these requirements may be waived for persons intending to hold a small percentage of shares in the BEC or in circumstances where the BEC will have a large number of shareholders and/or have a complex ownership structure. Please contact Ruby L. Rawlins or Bernett Cox to discuss any possible waiver situations and we recommend you provide us with more information rather than less which we can evaluate with you.
**FORM B** Ownership Information for each Trust in the Ownership chain (the ownership chain begins with the intended owners of the shares in the BEC and ends with all ultimate beneficial owners).

<table>
<thead>
<tr>
<th>Type of Trust</th>
<th></th>
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<tbody>
<tr>
<td>Date of Settlement</td>
<td></td>
</tr>
<tr>
<td>Country of Settlement</td>
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</tbody>
</table>

Settlers are sometimes referred to as grantors in the US and as trustees in Scotland.

List the settlor(s), trustee(s) and beneficiary(ies)

Name and type of settlor(s) __________________________________________________________
(e.g. individual, company)

Name and type of trustee(s) ________________________________________________________

Name and type of beneficiary(ies) __________________________________________________

Please provide the name, address, nationality, occupation, date of birth for each of the Settlor(s) and beneficiary(ies).

On a case by case basis after prior review with the BMA these requirements may be waived for persons intending to hold a small percentage of shares in the BEC or in circumstances where the BEC will have a large number of shareholders and/or have a complex ownership structure. Please contact Ruby L. Rawlins or Bernett Cox to discuss any possible waiver situations and we recommend you provide us with more information rather than less which we can evaluate with you.

A Personal Declaration Form must be completed and signed by each beneficiary if the Trust beneficially owns, directly or indirectly, 5% or more of the BEC (except where the beneficiary is a minor, in which case, the Personal Declaration Form must be completed by the Settlor).

In the case of a Discretionary or Purpose Trust no information on the beneficiaries and no Personal Declaration Form is required.
## FORM C Ownership Information for each Partnership in the Ownership Chain (the ownership chain begins with the intended owners of the shares in the BEC and ends with all ultimate beneficial owners).

<table>
<thead>
<tr>
<th>Name of Partnership</th>
<th>Place of Formation</th>
</tr>
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<tbody>
<tr>
<td></td>
<td></td>
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</tbody>
</table>

### Place of Formation

<table>
<thead>
<tr>
<th>Street</th>
<th>City</th>
<th>State or Province</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
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</tbody>
</table>

### Zip Code or Postal Code

<table>
<thead>
<tr>
<th>Stock Exchange (if any)</th>
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</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

### Stock Ticker Symbol (if any)

<table>
<thead>
<tr>
<th>General Partner Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name</td>
</tr>
<tr>
<td></td>
</tr>
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</table>

### General Partner Information

<table>
<thead>
<tr>
<th>Street</th>
<th>City</th>
<th>State or Province</th>
<th>Country</th>
<th>Nationality</th>
<th>Occupation</th>
<th>Date of Birth</th>
<th>Telephone Number</th>
<th>Fax Number</th>
<th>E-mail Address</th>
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<tbody>
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</table>

Please provide the information for each general partner.

A general partner is a partner who participates fully in the profits, losses and management of a partnership and who is personally liable (i.e. jointly and severally with other general partners) for the partnership debts.

If there are more than two General Partners, please attach another sheet if necessary.
**General Partner Information**

<table>
<thead>
<tr>
<th>Name</th>
<th>Street</th>
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<tbody>
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<table>
<thead>
<tr>
<th>City</th>
<th>State or Province</th>
<th>Country</th>
<th>Zip Code or Postal Code</th>
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<table>
<thead>
<tr>
<th>Nationality</th>
<th>Occupation</th>
<th>Date of Birth</th>
<th>Telephone Number</th>
<th>Fax Number</th>
<th>E-mail Address</th>
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On a case by case basis after prior review with the BMA these requirements may be waived for persons intending to hold a small percentage of shares in the BEC or in circumstances where the BEC will have a large number of shareholders and/or have a complex ownership structure. Please contact Ruby L. Rawlins or Bernett Cox to discuss any possible waiver situations and we recommend you provide us with more information rather than less which we can evaluate with you.

A Personal Declaration Form must be completed and signed by each General Partner if the Partnership beneficially owns, directly or indirectly, 5% or more of the BEC.
Form for completion by:
✓ All shareholders, ultimate beneficial owners, Officers, Directors and authorised signatories.
✓ instructing parties (other than regulated institutions, law firms and similar instructing parties) of a Bermuda company, as part of our “know your client” procedure required by law.

**Bermuda Company Name:**

<table>
<thead>
<tr>
<th>Full Name of Applicant</th>
<th>First Name</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Middle Name(s)</td>
</tr>
<tr>
<td></td>
<td>Surname</td>
</tr>
</tbody>
</table>

**Specimen Signature**

**Residential Address**

<table>
<thead>
<tr>
<th>City</th>
<th>State/Province</th>
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**Date of Birth**

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</table>

**Place of Birth**

**Nationality**

**Tel. #**

**Fax #**

**E-mail Address**

**Reason for requiring compliance**

- [ ] Incorporation/Continuation of Company, Partnership, etc.
- [ ] Amalgamation
- [ ] Acquisition by issue of shares
- [ ] Authorised signatories on Bank Account(s) (initial/additions/changes)
- [ ] Acquisition by transfer of shares
- [ ] Other (Please describe on separate sheet)

**Occupation**

- [ ] If self employed, check box

**Employer/Business Information**

<table>
<thead>
<tr>
<th>Name of Employer/Business</th>
<th>City</th>
<th>State/Province</th>
<th>Country</th>
<th>Zip/Postal Code</th>
</tr>
</thead>
<tbody>
<tr>
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</table>

**Tel. #**

**Fax #**

**E-mail Address**

**Identity Documents to be Attached**

- [ ] Passport; or
- [ ] Driver Licence (with photo); or
- [ ] Other National Photo ID Card; and
- [ ] Personal Declaration Form

Copies of identity documents must be accompanied with recognizable photographs certified by a third party professional

**Section Must Be Completed By Certifying Third Party Professional**

(eg: attorney, banker, business executive, accountant, minister, law enforcement officer, etc.)

<table>
<thead>
<tr>
<th>Print Full Name of Person</th>
<th>Signature of Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certifying Identity Document</td>
<td>Certifying Identity Document</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Professional Title</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>D    / M / YR</td>
</tr>
</tbody>
</table>

**Other comments by client and third party professional if any**

**For office use only**

Approved by

<table>
<thead>
<tr>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>D    / M / YR</td>
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<table>
<thead>
<tr>
<th>Original filed Compliance folder, date</th>
</tr>
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<tr>
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</tbody>
</table>
Form for completion by:

- Authorised Director or Officer as part of our “Know your client” procedure required by law.

**Bermuda Company Name _____**

<table>
<thead>
<tr>
<th>Registered Name of Entity</th>
<th></th>
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</table>

<table>
<thead>
<tr>
<th>Registered Office Address</th>
<th></th>
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</table>

<table>
<thead>
<tr>
<th>City</th>
<th>State/Province</th>
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<table>
<thead>
<tr>
<th>Country</th>
<th>Zip/Postal Code</th>
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</table>

<table>
<thead>
<tr>
<th>Tel. #</th>
<th>Fax #</th>
<th>E-mail Address</th>
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<tbody>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Date of Incorporation, etc</th>
<th>Jurisdiction of Incorporation/Formation</th>
<th></th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>D / M / YR</th>
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<table>
<thead>
<tr>
<th>Principal Operating or Mailing Address (if different from above)</th>
<th></th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>City</th>
<th>State/Province</th>
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<th>Zip/Postal Code</th>
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</tr>
</tbody>
</table>

**Reason for requiring compliance**

- [ ] Incorporation/Continuation of Company, Partnership, etc.
- [ ] Amalgamation
- [ ] Acquisition by issue of shares
- [ ] Authorised signatories on Bank Account(s)
- [ ] Initial/additions/change
- [ ] Acquisition by transfer of shares
- [ ] Other (Please describe on a separate sheet)

**If Public Company,** print Stock Exchange Listing and attach

- [ ] Print Full Name of Stock Exchange listing

**If Private Company,** print names of Ultimate Beneficial owner(s)

- [ ] Print Full Name of Ultimate Beneficial Owner(s)

**If Beneficial owner(s) is a Trust,** print name of Trust and Trustee

- [ ] Print Full Name of Trust
- [ ] Print Full Name of Trustee

**If Partnership,** print name of Partnership and General Partner(s)

- [ ] Print Full Name of Partnership
- [ ] Print Full Name of General Partner(s)

**Private companies** must attach

- [ ] Current certificate of good standing or similar documentation; and
- [ ] Copy of Incorporation Certificate;
- [ ] Individual documentation

<table>
<thead>
<tr>
<th>Print Full Name of Authorised Person</th>
<th>Current Position of Authorised Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signing for and on behalf of the Company</td>
<td>Director, Officer</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Signature of Authorised Person</th>
<th>Date D / M / YR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signing for and on behalf of the Company</td>
<td></td>
</tr>
</tbody>
</table>

For office use only

<table>
<thead>
<tr>
<th>Approved by</th>
<th>Date D / M / YR</th>
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<tr>
<th>Original filed Compliance folder, date</th>
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<th>D / M / YR</th>
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</tbody>
</table>

**NB:** All persons are required to complete Personal Declaration and compliance forms for Individuals**
**PERSONAL DECLARATION**

<table>
<thead>
<tr>
<th>Name of Entity in connection with which this declaration is being completed:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surname:</td>
</tr>
<tr>
<td>Complete forename(s):</td>
</tr>
<tr>
<td>Known by other name(s):</td>
</tr>
<tr>
<td>Any previous name(s):</td>
</tr>
<tr>
<td>Name of Spouse:</td>
</tr>
<tr>
<td>Residential Address: (P.O. Box not acceptable)</td>
</tr>
<tr>
<td>Country of Citizenship</td>
</tr>
<tr>
<td>Date &amp; Place of issue:</td>
</tr>
<tr>
<td>Date of Birth:</td>
</tr>
<tr>
<td>Place of Birth:</td>
</tr>
<tr>
<td>Occupation:</td>
</tr>
<tr>
<td>Present Employer:</td>
</tr>
</tbody>
</table>

1. A separate declaration must be completed and signed by each individual proposing to have a beneficial interest of 5% or more in a company to be registered. In respect of partnerships, a declaration is to be completed by the general partner(s), where the general partner is an individual.

2. Questions 1 - 6 must be completed by each individual proposing to have a beneficial interest of 5% or more in a company to be registered. In respect of partnerships, a declaration is to be completed by the general partner(s), where the general partner is an individual.
GUIDE TO THE BERMUDA INSURANCE MARKET

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS YES PLEASE PROVIDE DETAILS IN WRITING IN RESPECT OF THAT ANSWER.

1. Do you have any interest in any company or partnership registered or formed in Bermuda?  Yes  No
2. Have you ever been refused consent to register a company or form a partnership in Bermuda?  Yes  No
3. Are you or have you ever been an undischarged bankrupt?  Yes  No
4. Have you ever been convicted of a criminal offence involving fraud or dishonesty?  Yes  No
5. Has fraud or dishonesty been proven against you in any civil proceedings?  Yes  No
6. Have you ever been the subject of a judicial or other official enquiry?  Yes  No

Questions 7 - 10 must be completed where the entity proposed to be registered or formed is to carry on investment business or is a collective investment scheme.

7. Have you or any entity that you have been associated with, ever been refused or had revoked a licence, permit or other authorisation to provide investment business to the public in any jurisdiction?  Yes  No
8. Are you a member in good standing of a self regulatory organisation?  Yes  No
8a. If yes, name the organisation(s):

9. Have you ever been the subject of investigation, proceeding or other enquiry by a self regulatory organisation of which you are or were a member?  Yes  No
10. Have you or any entity that you have been associated with, ever been refused or had revoked a licence, permit or other authorisation to conduct investment business in any jurisdiction?  Yes  No

I hereby certify that the information in this Declaration is true to the best of my information, knowledge and belief.

Signed: ____________________________
Dated: ____________________________
Bermuda Exempted Company
GENERAL NOTES

Introduction

These notes apply to the formation of a Bermuda Exempted Company ("BEC"), generally speaking a company not carrying on business in Bermuda, and assist in the completion of the associated Questionnaire and the additional compliance documentation to enable Appleby Spurling Hunter ("Appleby") to proceed with the incorporation of a BEC.

Please contact Ruby L. Rawlins, Manager – Incorporation, direct telephone # 441 298 3552 or Bernett Cox, Deputy Manager – Incorporation, direct telephone # 441 298 3200 if you require assistance on any aspect of the incorporation process.

It will generally take three (3) to five (5) days (two (2) weeks in the case of certain types of companies requiring special licences such as certain companies supplying investment advice, certain trust companies, mutual funds and insurance/reinsurance companies) to incorporate a BEC from the date of submission of an application to incorporate and subject to satisfying any queries of the Bermuda Authorities. Before proceeding with the incorporation we require the completed Questionnaire, Personal Declarations, Compliance Forms and materials and the agreed retainer. We will contact you if following review of all the information and documentation you provide to us, we require further information from you. In cases where a genuine emergency can be established, the Bermuda Authorities may expedite the incorporation process. Please notify Ruby L. Rawlins or Bernett Cox immediately if your incorporation is an emergency.

Section [2] - Name Reservation

Selecting the Company name

Select the company name and alternatives carefully, bearing in mind that the full company name must appear on all company stationery. Facilities in Bermuda accommodate the use of Roman characters, digits and symbols (eg., @, &, $, C) in company names.

Bermuda may be included in the name of the BEC, but cannot be the first word. No company will be permitted to register with a name that includes the words “Majesty”, “Chamber of Commerce”, “Municipal”, “Chartered”, “Co-operative”, “Building Society” or, which, in the opinion of the Registrar of Companies, is undesirable or offensive.

If the requested company name(s) contain initials, the Registrar of Companies will need to know what (if anything) the initials represent.

The company name must end with “Limited”, “LIMITED” or the abbreviation “Ltd.” or “LTD.” to denote that it is a limited liability company. The Minister of Finance may dispense with the word “Limited” if the BEC is to be formed for promoting art, science, religion, charity, sport or any other useful objects and intends to apply any profits in promoting its objects and prohibits dividend payments. If an unlimited
liability company is required, please contact Ruby L. Rawlins or Bernett Cox who may put you in touch with an attorney from Appleby to discuss the incorporation further.

Name Reservation Process

The name(s) of the company must be reserved with the Registrar of Companies to ensure that it is available. It is important that alternative names are specified because a company will not be permitted to reserve a name which is identical to, or which closely resembles, the name of a previously registered company. The Registrar does, however, permit affiliated or subsidiary companies to register with similar names.
### Section [3] - Business Information

**Business Purpose**
Care should be taken in selecting the main business activity of the company so that its objects can be tailored accordingly and an attorney from Appleby with the requisite expertise can be assigned to the file. It is recommended that you supply a business plan outlining the general nature of all the activities (especially in cases where the company proposes to carry on a novel form of business).

**Restricted Business**
The Companies Act 1981 designates certain types of business as “restricted business activities” (eg. mutual funds, unit trusts, banking, licensed trust companies and professional services) which can only be undertaken with the consent of the Minister of Finance. Please refer to section 3 of our Questionnaire for a complete list of these businesses. While insurance, investment and trust businesses are the subject of additional laws and regulations, a BEC is regularly formed to engage in restricted business, insurance, investment and trust businesses but these companies may take longer to incorporate. Should you select any of the above business types, an attorney from Appleby will contact you.

**Prohibited Business**
The Companies Act 1981 further designates certain types of business as “prohibited business activities” and bars companies from engaging in these activities (trafficking in armaments, except as authorized by law operating lotteries or gaming (even over the Internet), and except as authorised by law trading in controlled drugs).

**Types of Companies**
Bermuda companies generally fall within two (2) principal categories:

- (a) local companies which are incorporated by Bermudians to trade primarily in Bermuda; please refer to our separate Questionnaire and Guidance Notes for the incorporation of local companies. These notes do not apply to these companies, and
- (b) exempted companies which are incorporated for the purposes of conducting business outside Bermuda and these notes apply to these companies.

A BEC may be structured as follows:

- (a) The liability of the members of the company is limited by the Memorandum of Association to any amount that remains unpaid on the shares held by them (a “limited liability company”); or
- (b) The liability of the members of the company is limited to the amount the members undertake to contribute to the company’s assets in the event of it being wound up. These companies may only be established for specific (generally charitable) purposes and do not pay dividends (a “company limited by guarantee”); or
- (c) The liability of the members of the company is not limited (an “unlimited liability company”).

**Investment Business**
Under the Investment Business Act 2003 a licence is required by any person carrying on investment business “in or from within” Bermuda, unless there is an exemption available under this Act. Any person claiming an exemption from the requirement to hold a licence is required to register under this Act claiming an exemption.
### Section [4] - Share Capital

**Par Value**
Shares must be denominated in a particular currency (other than Bermuda dollars). Moreover, shares must have a stated or face value referred to as the par value. As a matter of practice, most companies opt for a par value of US$1.00. Please note that under Bermuda law, “no par value” shares are not permitted.

**Minimum Authorised Share Capital**
The minimum authorised share capital of a BEC is the equivalent in a foreign currency of $12,000.00, except for a mutual fund company in which case, the minimum is the equivalent in a foreign currency of $1.00 and for an insurance or reinsurance company it is dependant on the class of business. The minimum share capital represents the amount that must be issued to the shareholders of the company (although not, with the exception of insurance companies, necessarily paid up by shareholders). A company cannot reduce its share capital below this minimum.

**Capitalisation of Insurance Companies**
In the case of insurance companies, the minimum authorised, issued and paid-up capital depends upon the type of business being undertaken. For an insurer carrying on general business, excluding life insurance, the minimum is the equivalent in a foreign currency of $120,000.00; for a life insurance company the minimum is the equivalent in a foreign currency of $250,000.00 and for an insurer combining both classes of business the minimum is the equivalent in a foreign currency of $370,000.00. For a company carrying on excess liability business or property catastrophe reinsurance the minimum increases to $1,000,000.00 and to $1,250,000.00 if it also carries on life insurance business. The Insurance Regulations also provide for a solvency margin in accordance with a prescribed formula that may require higher capitalisation than the minimum. If you wish to incorporate an insurance company an attorney from Appleby will contact you.

**Share Premium**
Under Bermuda law, shares can be issued at a premium but not at less than the par value (referred to as a discount). Premium represents the sum payable in excess of the par value of the shares. For example, if the shares of the company will be issued for $10.00 each and the par value is $1.00, the premium is $9.00.

Please note that premium is included in determining the Annual Government Fee (see next page).
**Annual Government Fee**

The annual Government fee is based on the BEC’s “assessable capital”. For most companies, the assessable capital is the amount of the company’s authorised share capital plus its share premium account (if any). Different or additional fees are payable in respect of certain types of businesses (e.g. foreign sales corporations and management of unit trusts) or in certain other situations on which an attorney from Appleby can advise. The appropriate fee payable is determined in accordance with the following table:

<table>
<thead>
<tr>
<th>Assessable Capital</th>
<th>Government Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>$12,000</td>
<td>$1,780.00</td>
</tr>
<tr>
<td>$12,001-$120,000</td>
<td>$3,635.00</td>
</tr>
<tr>
<td>$120,001-$1,200,000</td>
<td>$5,610.00</td>
</tr>
<tr>
<td>$1,200,001-$12,000,000</td>
<td>$7,475.00</td>
</tr>
<tr>
<td>$12,000,001-$100,000,000</td>
<td>$9,345.00</td>
</tr>
<tr>
<td>$100,000,001-$500,000,000</td>
<td>$16,695.00</td>
</tr>
<tr>
<td>$500,000,001 or more</td>
<td>$27,825.00</td>
</tr>
</tbody>
</table>

If the company is incorporated on or after 1st September, half of the relevant fee is payable for the balance of the year.

**Nominee Services**

It is worth noting that the public may inspect the share register of a BEC. In the interest of privacy, shareholders may wish to hold shares in a BEC through a nominee structure. Understanding this need for confidentiality, Appleby offers nominee services (for an additional fee) whereby an Appleby owned nominee company will be the registered holder of shares in the BEC. The issued shares must be fully paid at the outset if shareholders want to avail themselves of Appleby’s nominee services. Kindly contact Ruby L. Rawlins or Bernett Cox for more information. The beneficial owners will be known to the Bermuda Monetary Authority (“BMA”), the regulatory body that vets companies to be incorporated in Bermuda, in confidence subject only to exceptions arising out of specific legislation.
Section [6] - Ownership Information

Bermuda Government policy requires disclosure of the information stated below for all direct, intermediate and ultimate beneficial owners of a BEC. The information is submitted to the BMA. By vetting these persons, the BMA seeks to ensure that those who establish companies are people of integrity. It should be noted that the BMA consent is also required for post-incorporation issues and transfer of securities in a BEC among non-residents. By law, all information disclosed to the BMA is kept strictly confidential and is not revealed to any other body, subject only to exceptions arising out of specific regulations such as the Proceeds of Crime Act 1997 (as amended), the Bermuda Monetary Act 1968 (as amended) etc.

Bermuda’s Proceeds of Crime Act 1997 (as amended) and Proceeds of Crime (Money Laundering) Regulations 1998 aim to prevent and discourage money laundering on or through institutions based on the Island. Appleby supports the Government in its drive to enhance Bermuda’s reputation as a premier offshore jurisdiction and a respectable country in which to do business. Moreover, we at Appleby are keen to satisfy ourselves that we know our clients and the nature of their businesses and Compliance Forms will be required to be completed with certified copies of identity information before Appleby will incorporate a company. Please refer to section 6 of our Questionnaire for further details.

<table>
<thead>
<tr>
<th>Individual as Beneficial Owner</th>
<th>Individuals must disclose their names, addresses, nationalities, occupations and dates of birth. Individuals who will directly or indirectly beneficially own 5% or more of a BEC must also provide a signed Personal Declaration. Again please refer to Section 6 of our Questionnaire for further details.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Company as Beneficial Owner</td>
<td>A public company must advise the BMA of the recognized Stock Exchange on which it is listed.</td>
</tr>
<tr>
<td>Private Company in the Ownership chain</td>
<td>A private company must indicate its name, address, place and date of incorporation and further is required to fully disclose the identity of all intermediate and ultimate beneficial owners.</td>
</tr>
<tr>
<td>Partnership in the Ownership chain</td>
<td>If the partnership is a limited liability partnership, only the general partner(s) needs to be disclosed and if they are individuals the name(s), address(es), nationality(ies), occupation(s) and date(s) of birth must be provided. If the general partner is a trust, partnership or private company the additional information under the relevant section of these notes must be provided. A general partner is a partner who participates fully in the profits, losses and management of the partnership and who is liable jointly and severally with other general partners for the partnership’s debts. If the partnership interest or units are listed on a recognized Stock Exchange, the BMA must be advised of the Stock Exchange on which the partnership is listed.</td>
</tr>
</tbody>
</table>
Where it is proposed that a trust owns shares in, or is a beneficial owner of the proposed BEC, the existence of the trust must be disclosed to the BMA on a wholly confidential basis subject only to exceptions arising out of specific legislation. In particular, a trust must disclose the date and jurisdiction of settlement, the name, address, nationality, occupation and date of birth of all trustees and settlors and Personal Declarations must be supplied in relation to the settlor and the beneficiaries if the trust will beneficially own directly or indirectly five percent (5%) or more of the BEC. Where the beneficiary is a minor the Personal Declaration is completed by the Settlor.

In the case of a Discretionary Trust no information on the beneficiaries and no Personal Declaration is required.

Types of Trust

Generally, a trust is the legal relationship created by a person who establishes the trust (the settlor) and the persons or corporations willing to undertake the office of trustee (the trustees) whereby certain assets or property (the trust fund) are declared to be held by the trustees for the benefit of certain parties (the beneficiaries). Please note the various types of trust that can exist:

(a) **Personal (Fixed Interest)**
   A trust in which the interest of each beneficiary is determined by the trust documents.

(b) **Personal (Discretionary)**
   A discretionary personal trust is for the benefit of a class of beneficiaries that is ascertained or ascertainable. The trust document establishes the method by which the trustee determines the interest of each member of the class.

(c) **Purpose (Charitable)**
   A charitable purpose trust is for the benefit of charities named or for charitable purposes defined in the trust deed. Broadly speaking, such purposes comprise the relief of poverty, the advancement of education, the advancement of religion or other purposes beneficial to the community.

(d) **Purpose (Business)**
   A trust structure in which the trustee is instructed to use the trust fund with a view to satisfying certain commercial purposes.

(e) **Hybrid**
   A trust structure which embodies features of both personal and purpose trusts. An example of a hybrid trust would be a trust that establishes two funds: one for the provision of family benefits and the other for assisting charities.
<table>
<thead>
<tr>
<th><strong>Date of Settlement</strong></th>
<th>The settlement date is the date that the trust was established. It must be a current or past date and cannot be a date in the future.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Country of Settlement</strong></td>
<td>The jurisdiction of settlement is the place where the trust was established.</td>
</tr>
<tr>
<td><strong>Settlor</strong></td>
<td>The settlor is the person or entity that establishes the trust and/or a person who contributes property to the trust.</td>
</tr>
<tr>
<td><strong>Trustee(s)</strong></td>
<td>A person who holds property on trust for another (a beneficiary) and who is charged with carrying out the trust. Generally, individuals who have reached the age of majority act as trustees. Licensed trust companies also often act as trustees.</td>
</tr>
<tr>
<td><strong>Beneficiary(ies)</strong></td>
<td>A beneficiary is the person who enjoys or who is entitled to the benefit of the trust property. Every trust must have beneficiaries who are either named in the document constituting the trust or capable of being ascertained (e.g. employees for the time being of a named company). Any legal person or corporation can be a beneficiary.</td>
</tr>
<tr>
<td><strong>Waiver</strong></td>
<td>On a case by case basis after prior review with the BMA the ownership disclosure requirements to the BMA may be waived for persons intending to hold a small percentage of shares in the BEC or in circumstances where the BEC will have a large number of shareholders and/or have a complex ownership structure. Please contact Ruby L. Rawlins or Bernett Cox to discuss any possible waiver situations and we recommend you provide us with more information rather than less which we can evaluate with you.</td>
</tr>
<tr>
<td><strong>Compliance</strong></td>
<td>At the time of submitting a completed Questionnaire, Appleby also requires completion of the appropriate Compliance Form(s) with the appropriate certified identity documentation. Please refer to Section 6 of the Questionnaire for further details.</td>
</tr>
</tbody>
</table>
### Section [7] - Directors & Officers

#### Directors Appointment

The Companies Act 1981 imposes various duties and responsibilities on directors with regard to the operation of a company. In particular, the board of directors is vested with the power of managing the business of the company. A BEC must have at least two (2) directors who must be individuals. There is no statutory maximum number of directors, although the bye-laws (or shareholders in general meeting) may prescribe a minimum or maximum number.

#### Directors Qualifications

Under the Companies Act 1981, an undischarged bankrupt in any country may not act as director or otherwise be concerned in the management of any company except with permission of the Bermuda Supreme Court. Also where any court convicts any person of an offence relating to the affairs of a company which in the opinion of the court involves dishonesty the court may order that such person shall not participate in the management of any company without the leave of the Supreme Court. In addition, the bye-laws may exclude a person from being a director of the company if he is a minor, a bankrupt, mentally ill and/or the bye-laws may require the individual to be a shareholder of the company or to have particular professional qualifications.

#### President or Chairman

Every BEC must elect or appoint two (2) of its directors to act as president and vice-president or as chairman and deputy chairman. Typically, such persons are also the most senior officers of the company. It should be noted that no specific legal duties, rights or powers attach to the titles other than those that the bye-laws would ordinarily provide. For instance, the president or chairman is generally responsible for chairing board and shareholders’ meetings and may have a casting vote.

#### Officers

In relation to a BEC, all directors and secretary(ies) are officers. A resident representative is also considered to be an officer but only for the purposes of including his name in the register of directors and officers. Appleby Corporate Services (Bermuda) Ltd., an Appleby affiliate, can provide services of a secretary and/or resident representative.

#### Register of Directors

A BEC is required to keep a definitive public register of its directors and officers at its registered office. If any changes occur, the company must update the register within fourteen (14) days. The register must contain the directors’ and officers’ present names and addresses.

#### Compliance

At the time of submitting a completed Questionnaire, Appleby also requires completion of the appropriate Compliance Form(s) with the appropriate certified identity documentation. Please refer to Section 6 of the Questionnaire for further details.
Section [8] – Organisation

Registered Office

Every company incorporated in Bermuda must have a Registered Office in Bermuda which cannot be a post office box. Appleby is pleased to offer its address as the Registered Office for any Bermuda Company.

Custody of Share Certificates

Bermuda law provides that as soon as practicable after the allotment of any of its shares (and, in any case, within two (2) months after a demand for a certificate of the shares has been made by the person to whom they have been allotted), a company must complete and have ready for delivery the certificates representing those shares (save where the conditions of issue otherwise provide).

For security reasons, share certificates can be lodged with Appleby in a secure vault. The vault is staffed by a vault custodian who supervises access to the vault. All vault transactions (e.g. placement and retrieval of documents) are under the instruction of a responsible attorney.

Establishing a Bermuda Office

Most BECs do not have and are not required by the Bermuda Authorities to have a physical office in Bermuda. However, a physical operating presence in Bermuda may be desired or required. If this is the case, you may need further legal advice in the following areas:

(a) Generally speaking Ministerial consent is required for a BEC to carry on business in Bermuda. Ruby L. Rawlins or Bernett Cox will put you in touch with an attorney from Appleby if this must occur;

(b) Commercial issues (e.g. advising on business contracts to be concluded for the new company) and employment law issues;

(c) Property (Appleby has been fully engaged in effecting the expatriation of a number of clients of substantial means to Bermuda. We can assist in the location of, leasing and/or purchase of homes and office space);

(d) Management Services (Reid Management Ltd. can assist with the transport of personal effects, driver’s license, telephone and fax connections, etc.); and

(e) Immigration (Appleby can advise and assist in securing a work permit for you to become an “employee” of the new company).

Corporate Administration Services

Appleby Corporate Services (Bermuda) Ltd., which is staffed by trained administrators, will provide corporate administration services.
Bermuda Banks

There are four (4) licensed banks in Bermuda: the Bank of Bermuda Limited, the Bank of N.T. Butterfield & Son Limited, the Bermuda Commercial Bank Limited and Capital G Ltd. Appleby can assist with the opening of a bank account on behalf of the new BEC if requested with the incorporation process including standard resolutions, bank account opening mandate and satisfying the bank’s compliance requirements. You will need to advise us of the currency of the account, the authorised signatories and the extent of each signatory’s authority.

Accounting Records

The Companies Act 1981 requires Bermuda companies to keep proper records of account with respect to:

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and/or expenditure takes place;

(b) all sales and purchases of goods by the BEC; and

(c) the assets and liabilities of the BEC. The records of account may be kept either:

(i) at the registered office of the BEC or at such other place in Bermuda as the directors think fit, or

(ii) at some place outside Bermuda provided that the accounting records are available to the directors at a place in Bermuda so that they can ascertain the financial position of the BEC at the end of each three month period.

A BEC is free to choose the generally accepted accounting principles (GAAP) of a country other than Bermuda (e.g. the United States or United Kingdom).

Reid Management Ltd.

This entity, an Appleby affiliate, can assist with the maintenance of accounting records. It is staffed by qualified accountants supported by a range of administrative personnel with considerable experience in management and accounting services.

Appointment of Auditor

We encourage companies to appoint an auditor. The major international auditing firms all have offices in Bermuda. It is not necessary to appoint a Bermuda based auditor.

The auditor is appointed by the shareholders in a general meeting and the appointment is generally for one year or until the close of the next annual general meeting of the company.

Auditors Responsibilities

Unless waived (see below), Bermuda law requires the annual production of audited financial statements in accordance with GAAP (i.e. of Bermuda or another recognised jurisdiction). The financial statements of the company together with an auditor’s report must be signed by two (2) directors and then presented to the shareholders in a general meeting.

There is no requirement to file the audited financial statements with any Bermuda Authority.
**Financial Year End**  
Companies are free to choose their own financial year-end for accounting purposes. Typically, companies specify a 31 December or 31 March year-end.

**First Accounting Period**  
The first accounting period refers to the initial accounting period of the newly incorporated company (i.e. with respect to which financial statements will be prepared). Even if presentation of audited financial statements is waived (see below), an accounting period must be selected. The first accounting period may be shorter or longer than twelve (12) calendar months.

**Waive Audited Financials**  
It is possible for all members and directors of a company to waive the auditor appointment and/or the preparation and presentation of audited financial statements either in writing or at a general meeting, in respect of a particular interval. However, in providing administration services Appleby Corporate Services (Bermuda) Ltd. will require the preparation of management accounts every financial quarter (even when the company has waived the preparation and presentation of audited financial statements).

**Additional Services**  
Appleby and its affiliates are available to provide you with a range of services, for example:
- Corporate Administration and Management Services
- Accounting and Payroll Administration
- Estate Planning and Administration
- Trust Advice and Administration
- Property Advice
- Trademarks

The services listed above are by no means exhaustive. Examples of other services commonly provided include: asset financing, insurance and e-commerce. If you require further professional advice, please contact Ruby L. Rawlins or Bernett Cox who will put you in touch with an attorney from Appleby.
EXHIBIT 3

PRE-INCORPORATION INFORMATION FORM

To be filed with Forms C-1 and C-2
by proposed insurers.

1. State the name of the Company.

______________________________________________________________________________________

2. State the full address of -
   (a) the registered office of the Company in Bermuda

______________________________________________________________________________________
   (b) the principal office of the Company in Bermuda.

______________________________________________________________________________________
   (c) the registered office and the principal business address abroad (in case of company incorporated abroad).

______________________________________________________________________________________

3.a State date and place of incorporation.

______________________________________________________________________________________

3.b State the basic characteristics of the Company by ticking the appropriate box under (i) and (ii).

(i) Company organised by shares [ ]
   Mutual Company [ ]

(ii) Exempted Company [ ]
Permit Company

3.c  (i) State the amount of the issued and paid-up capital at present, and the date paid in.

(ii) Has the whole of the paid-up capital been subscribed in cash? If not, give full details.
4.a Will the Company be writing unrelated risks (i.e. risks of persons who, apart from the insurance contract itself, have no connection or association with the Company).

(i) as a direct insurer ______________________________________________________________

(ii) as a reinsurer ________________________________________________________________

4.b If 4.a (i) and 4.a (ii) are both answered in the negative, explain the nature of the connection or association that exists between the Company and those persons whose risks the Company intends writing either directly or as a reinsurer.

___________________________________________________________________________________

___________________________________________________________________________________

4.c State the category of insurance business which the insurer proposes to write (i.e. general business only, long-term business only or both general and long-term business).

___________________________________________________________________________________

4.d State the class or classes (e.g. property, casualty, marine, aviation) of general insurance business which the Company intends to write and state estimated gross and net premium by class of business for the first 2 years of operation. If it is intended to write products liability risks or professional liability risks, or both, state estimated gross and net premium in respect of each separately.

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Year 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross</td>
<td>Net</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

4.e State when the Company intends to commence writing the above class or classes of business.

___________________________________________________________________________________

4.f In respect of general business, give estimated income for each of the first two years on as realistic a basis as possible using the following format -

Year 1        Year 2

Gross Premiums written
Less Reinsurance premiums ceded

Net Premiums written
Less increase (plus decrease) in Unearned Premiums

Net Premiums Earned
Plus Investment Income
Plus other insurance income

SUBTOTAL

APPLEBY
Net Losses and loss expenses incurred
Reserve for claims incurred but not reported (if applicable)
Commissions and brokerage incurred
General and administrative expenses
Personnel costs
Other expenses
Income taxes (if applicable)

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SUBTOTAL</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Estimated Net Income for Year</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

N.B.1 The Regulations provide for a solvency margin in accordance with the following formula -

<table>
<thead>
<tr>
<th>General Business Premium Income Net</th>
<th>Relevant Amount (maximum paid-up Capital and Surplus)</th>
</tr>
</thead>
<tbody>
<tr>
<td>BD$ 600,000 or less</td>
<td>BD$ 120,000</td>
</tr>
<tr>
<td>BD$ 600,001- BD$6,000,000</td>
<td>1/5th of GBPI</td>
</tr>
<tr>
<td>BD$6,000,001 and above</td>
<td>1/10th of GBPI plus BD$600,000.</td>
</tr>
</tbody>
</table>

N.B.2 The Regulations provide for a minimum liquidity ratio for general business as follows -

“The value of the relevant assets of an insurer carrying on general business shall be not less than seventy-five per centum of the amount of its relevant liabilities, unless the insurer is a section 24(6) composite.”

4.g In respect of long-term insurance business, state as an appendix set out in the format shown below, on as realistic a basis as possible, the estimated volume of business to be transacted during each of the first two years, giving for each type of policy the number of contracts, the total sums assured or amounts of annuity per annum, and the annual or single premiums - figures should be given both gross and net of reinsurance and should relate to world wide business. A final table should summarise the total premium income.

<table>
<thead>
<tr>
<th>ORDINARY LONG TERM BUSINESS PLAN</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Year 1</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type of Policy</th>
<th>No. of Contracts</th>
<th>Total premium income</th>
<th>Total sums insured or amounts or annuity per annum</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Gross</td>
<td>Net of Reinsurance</td>
</tr>
</tbody>
</table>

**Note:** Same format for year 2 as for year 1

5. Give particulars of any business other than insurance business which the Company proposes to carry on.
6.a Give name of and limits carried by primary carrier, if any.

6.b State the maximum net retention by class of business, for any one risk per occurrence.

6.c State layer of retention (primary or XXX excess of XXX) by class of business.

6.d State whether annual aggregate (i.e. stop loss) reinsurance has been/will be arranged. If so, state maximum annual aggregate net losses to be retained by class of business.
7. Set forth in the columns below the nature and extent of the existing or proposed reinsurance arrangements in respect of each class of business, including in particular the names of, and, where they have been rated by recognised rating organisations, the most recent ratings assigned to, the insurance companies or associations of underwriters which will reinsure each class of the Company’s business and the amount which will be reinsured by each. (If more than ten companies will reinsure a class business, the names of only the principal reinsurers need be stated.)

<table>
<thead>
<tr>
<th>Name</th>
<th>Rating</th>
<th>Class of Insurance</th>
<th>Amount Reinsured</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

8.a State the full name and address of the following who have accepted their appointment, attaching formal evidence of acceptance of appointment duly signed -

(i) Principal Representative (must be resident in Bermuda).

(ii) Insurance Manager (if Company has one).

(iii) Approved Auditor.

(iv) (Where required) Loss Reserve Specialist.

8.b For companies carrying on long-term business - state the full name and address of the Approved Actuary, attaching formal evidence of acceptance of appointment duly signed.

9.a Indicate by ticking the appropriate boxes which of the following are located in Bermuda -

(i) general ledger □

(ii) general journal □

(iii) subsidiary ledgers (referred to in the general ledger) □

(iv) cash books - receipts and disbursements □

(v) premium registers □

(vi) loss registers □

(vii) reinsurance reports □

(viii) daily reports of claim files □

(ix) copies of policies □

(x) copies of reinsurance treaties and agreements. □
9.b  Will those of the foregoing business records which will be kept in Bermuda enable the directors to ascertain within a reasonable period and with reasonable accuracy the Company’s position at the end of each three month period? Please answer “Yes” or “No”. If No, please explain.

____________________________________________________________________________________

9.c  Give the addresses where such records are located in Bermuda.

(i)  

____________________________________________________________________________________

(ii) 

____________________________________________________________________________________

(iii) 

____________________________________________________________________________________

10.  State the date on which the Company’s financial year will end.

____________________________________________________________________________________

11.  If the answer to question 4.a was in the affirmative -

(a) state the method or methods by which the business will be obtained (e.g. by the Company’s own employees, by brokers or agents, or by both methods).

____________________________________________________________________________________

(b) state the way in which settlement of claims will be handled (e.g. by the Company, by outside loss adjusters or assessors, or by other agents with authority to settle claims).

____________________________________________________________________________________

(c) give details of any connections or associations (including in particular, a connection or association of a financial kind) which exists between any of the brokers, agents, loss adjusters and assessors referred to in (a) and (b) above, and any director of the Company, any director it is proposed at present to appoint, any person having a majority shareholding in the Company, or any other person on whose directions the directors of the Company or any of them act or will act.

____________________________________________________________________________________

(d) give details of any loans which the Company has made, or proposes to make, to any officer of the Company or his spouse or to any partnership in which an officer of the Company or his spouse has an interest.

____________________________________________________________________________________

(e) give details of any loans or investments, actual or proposed, to or in any subsidiary or associated company or any company at any general meeting of which any officer of the Company or any person controlling the Company, or his spouse, is entitled to exercise, or control the exercise of, one third or more of the voting power.

____________________________________________________________________________________
EXHIBIT 4

1. The Company

• Brief detail on the proposed company and proposed programme;
• Would include class of insurer;
• Would state here that company will make an Internal Revenue Code Section 953(d) election.

2. Background Information

• Provide details on beneficial ownership of new company;
• If single parent captive, describe it business, place of incorporation, its annual revenues, its ticker symbol (if any);
• Refer to the beneficial shareholder's personal declaration and statement of net worth if an individual or annual report or audited financials if beneficial owner is a corporate entity

3. Business Purposes

Reasons may include:

• The formation of the Company will allow the proposed company to retain appropriate portions of its property and casualty risks.
• Access to foreign and domestic insurance and reinsurance markets allowing greater flexibility in the structuring and pricing of terms, conditions, coverages and retentions for the proposed Risk Management Programme.
• Assuming greater control of aspects of the proposed company’s Risk Management Programme including claims handling, loss control and safety.

4. Acknowledged Risks

• Provide details, as necessary.

5. Capital Structures

• Indicate the specific dollar amounts of the share capital and contributed surplus of the company. ie, share capital of US$120,000 and contributed surplus of US$880,000.
• If any of the capital is to be paid by way of LOC provide details that the security is by way of an evergreen LOC from a recognised banking institution.
6. Governance [can be included but not necessary]

The initial officers of the Company will be:

- President and Chief Executive Officer - [                      ]
- Vice President - [                      ]
- Treasurer - [                      ]
- Secretary - Appleby Corporate Services, Ltd.
- Assistant Secretary - [                      ]
- Assistant Treasurer - [                      ]

The initial board of directors will consist of:

- [                      ] (Chairman)
- [                      ] (Deputy Chairman)
- [                      ]
- [                      ]
- [                      ]

Attached under Tab [  ] are Biographical Summaries of the Company’s Directors and Officers.

7. Administration and Service Providers

Provide name and address of company's service providers

- Lawyers (not required)
- Auditors
- Insurance managers (managers)
- Principal Representative (PR)

[The Company will not initially be seeking reinsurance. Include as necessary]

- Loss Reserve Specialist (LRS)
- Approved Actuary (AR)
- Resumes for the managers, PR, LRS and AA should be included as well as preliminary acceptance letters

8. Proposed Business

- provide detail here on type of coverage(s), limits and excess.
9. Financial Projections

- a reference to the five-year financial projections should be made and where applicable the assumptions thereto (Note: they will be attached as an appendix or found in a tabbed section of the application)

10. Registered and Principal Office

- Note the address of the Company’s registered and principal office

11. Taxation [include if necessary]

- If applicable, note that the company will be a Controlled Foreign Corporation for purposes of taxation by the US and state governments, and will make an Internal Revenue Code section 953(d) election, and, consequently, will be taxed as a US taxpayer.

EXHIBIT 5

XYZ (BERMUDA) LTD. — BUSINESS PLAN

The Company

It is proposed to incorporate XYZ (Bermuda) Ltd. (the Company) as a Bermuda exempted insurance company for the purpose of providing property and casualty reinsurance to its 100% parent, XYZ National Insurance Company, a California insurance company (XYZ California). It is proposed that, notwithstanding the affiliation between the Company and XYZ California, the Company be registered in Class 2, on the basis that there are third parties involved, albeit at a step removed from the Company. These third parties are the 350 claimants associated with XYZ California’s outstanding claims on its property and casualty business, together with the as yet unknown number of future claimants associated with its IBNR losses (approximately 500).

The Business Purpose of the Company

XYZ California wishes to incorporate the Company to provide a means of reducing its own reserving requirements in the State of California in respect of a book of poorly performing property and casualty business (the P & C Book) written by a previous management. As described below, Tillinghast has rendered certain estimates in respect of XYZ California’s reserves, whereby they should be increased. However, XYZ California prefers not to increase its reserves by the
suggested amount because it believes them to be overly conservative, and, in any event, XYZ California believes that the P & C Book reserves can properly be discounted; however, such discounting is not permitted by California insurance regulations. Thus, in order to remove the reserves relating to the P & C Book and to be able to discount them, it is proposed to reinsure the P & C Book with the Company, in a transaction that has already been approved by the California Department of Insurance.

A further motivation for hiving off the P & C Book into the Company is the prospective letter-rating from Best’s. Now that XYZ California is to receive a rating, it wishes to minimise the effect on its continuing and profitable book of workers’ compensation business. The California Department of Insurance agrees with this approach, taking the view that the new management of XYZ California have successfully rescued its business, and that the P & C Book should not undermine their achievements.

As detailed in the section on the reserves below, the reserves can afford to decrease by a sizeable margin and the Company still meet its obligations. In the unlikely event that it cannot, it has an agreement in place with XYZ California whereby all its cash needs will be funded by XYZ California to the full extent of the surplus of XYZ California.

XYZ California wishes to obtain reinsurance for the P & C Book from the Company. XYZ California will retain primary liability on the P & C Book with policy limits of first dollar to $1 million, with $500,000 being reinsured by a combination of ABC Re together with a large combination of top-rated reinsurers, better described below. It is proposed that XYZ California obtain additional reinsurance coverage by way of a transfer to the Company of the reserves of XYZ California relating to the P & C Book. XYZ California is motivated to obtain reinsurance in this way so as to be able to increase the amount shown in its reserves in relation to all its liabilities (P & C and workers comp). This has been approved by the Department of Insurance of the State of California.

About the Shareholder

The shares in the Company will initially be held by XYZ California, which was incorporated in California on 24 February 1976, and a copy of its certificate of incorporation is attached as Exhibit 1. However, XYZ California only commenced significant operations in 1986. XYZ California is engaged in writing workers’ compensation insurance principally in the State of California and, up until 30 September 1993, was engaged in writing commercial property and casualty insurance. Effective 1 October 1993 XYZ California withdrew from property and casualty business because prior management had written numerous poorly performing P & C Book policies. The P & C Book is now being run off under rigorous supervision by new management and ownership of XYZ California, after the dismissal en masse of the former managers upon a change of ownership.
Aside from the conduct of the P & C Book, the former CEO of XYZ California was, together with certain minor shareholders, unsatisfactory in a number of ways, and they have been entirely removed from the business of XYZ California. The present management and controlling shareholders of XYZ California are wholly unconnected with the prior personnel, and the credentials of XYZ California are now impeccable. XYZ California is currently in good standing in the State of California, and a copy of its Certificate of Compliance is attached as Exhibit 2. XYZ California enjoys a rating of BBB from Standard & Poor’s. In June 1995, XYZ California was also accorded an A.M. Best Financial Performance Rating of 6 which translates to an overall rating of B++ according to the attached Guide to Best’s Ratings. Best’s has indicated that XYZ California will receive a letter rating in October 1995, and it is fully expected that this will be a B++. A copy of extracts from the ratings manuals for Standard & Poor’s and Best’s is attached as Exhibit 3.

Almost immediately after the incorporation of the Company, there will be a transfer by dividend of the Company’s ownership from XYZ California to its 100% parent, XYZ National Insurance Group, Inc. (Group), which was incorporated in California on 29 March 1985, under the name Coastal Holdings, Ltd. to raise the capital necessary to acquire XYZ California and to increase XYZ California’s capital and surplus. Group is now a widely-held company with more than 500 shareholders, and, in consequence, reports to the US Securities and Exchange Commission (SEC) as well as California state regulatory authority. A copy of the SEC Registration Statement for Group is enclosed as Exhibit 4. Whilst Group is not listed on any stock exchange as yet, there is an over-the-counter market for Group's common shares, and 50,000 to 500,000 shares trade each month.

Affiliates of ABC Reinsurance (Bermuda) Limited have a direct interest in Group's common shares of approximately 18% on a fully-diluted basis through warrants issued in two transactions taking place in 1992 and 1994. Of these interests, 8% was acquired in a 1992 transaction between Group and International Insurance Investors, L. P., a Bermuda limited partnership in which ABC Re is the largest partner. In addition, other partners in that partnership control approximately 20% of Group’s common shares on a fully-diluted basis.

The further 10% interest of ABC Re was acquired in 1994 via a Bermuda limited partnership known as XYZ National Capital L.P. In addition, ABC Re owns $18 million or 100% of Group's preferred shares.

Four of Group’s nine Board members are connected either directly or indirectly with ABC Re or the 8% limited partnership.

There are also significant insurance relationships between XYZ California and ABC Reinsurance Limited and EFG Reinsurance (both ABC Re affiliates). This relationship is described in detail below.
**Capitalisation of the Company**

The Company is to be capitalised at $16.5 million, being authorised share capital of $120,000 together with a contribution to surplus comprising two elements: $1.38 million in cash and securities relevant for the purposes of the Insurance Act 1978 and the balance being made up of an assignment to the Company by XYZ California of the proceeds of the reinsurances recoverable by XYZ California from the ABC Re affiliates. This is regarded as a substantial and collectible asset, and there is no available cash substitute for it, by reason of the funds-withheld nature of the reinsurance programme between XYZ California and ABC Re. In all events, the receivables are regarded as substantive and valuable, given that ABC Re has acknowledged that they are payable and they are secured by letters of credit from Swiss Bank Corporation. Accordingly, the receivables should be viewed as of equal value to any other asset recognised by the Insurance Act 1978.

XYZ California will also transfer to the Company approximately $23 million in assets, being equivalent to XYZ California’s reserves in respect of the ultimate losses expected in relation to the P & C Book. A further $10 million will also be added to the Company’s reserves in respect of anticipated IBNR losses immediately after the reinsurance transaction is consummated.

In addition, the Company and XYZ California will enter into an Operating Agreement described below, whereby XYZ California will fund all of the Company’s cash needs not covered by its capital or reserves. Generally, given that Group now files with the SEC there is a strong motivation on the part of XYZ California and Group to ensure that the Company remains able to meet its obligations and in that regard, there will always be funds made available to the Company to cover losses on the P & C Book.

The capitalisation of the Company will reduce the surplus of XYZ California from $67 million to $52 million, which even if the liability on the P & C Book were to revert wholly to XYZ California, would be adequate to cover the remainder of claims on the P & C Book. Further, XYZ California is under-leveraged in its premium writings being well within the 3:1 limit in California.

**The Operating Agreement**

Attached hereto as Exhibit 5 is a copy of the Operating Agreement. The Operating Agreement is made between XYZ California and the Company and provides that XYZ California will fund 100% of the Company’s cash needs, and all other aspects of the Company’s operations, until such time as the P & C Book obligations, whether or not reported, and whether or not recorded at closing on the Company’s books, have been satisfied. XYZ California will manage the run-off of the P & C Book.
The Proposed Insurance Programme

The insurance programme is a one-time cession to the Company of the P & C Book. There will be no portfolio transfer or assumption of the P & C Book, but rather a reinsurance agreement between the Company and XYZ California whereby the Company will provide reinsurance coverage to XYZ California in respect of the P & C Book. The coverage will be 50% quota share of the P & C Book, whereby the Company will pay up to $500,000 any one occurrence. The Company will not retrocede any of this business. Ultimately, the P & C Book is 100% reinsured by the Company together with the reinsurers named in Schedule F - Part 3 of the Annual Statement made by XYZ California, a copy of which is attached hereto as Exhibit 6, together with the ABC Re stop loss cover provided to XYZ California, of which $15 million has been allocated to the P & C Book and therefore assigned to the Company as part of its capitalisation.

The reinsurance agreement will operate on a funds withheld basis. Accordingly, nearly all of the assets of the Company will be held by XYZ California.

There will be no other underwriting by the Company of any business whatsoever, and a restriction on the Company’s licence to that effect would be appropriate.

Loss Assumptions

The Company expects its ultimate known losses on the P & C Book to amount to $23 million, together with a further $10 million in respect of IBNR. This assumption is based on an analysis by Tillinghast, the actuaries to XYZ California. A copy of the report prepared by Tillinghast is supplied herewith as Exhibit 7.

Payments of losses by the Company appearing in the five-year pro forma financial statements incorporated in the Pre-Incorporation Form are calculated net of reinsurance.

Greater detail of the loss assumptions is contained in a letter dated 6 October 1995 addressed by the Chief Financial Officer of XYZ California to Bermuda counsel to the Company, a copy of which is attached hereto as Exhibit 8.

The 30 June 1995 Quarterly Statement of XYZ California to the California Insurance Department, which details its loss history, is submitted herewith as Exhibit 9.

The Reserves

XYZ California currently holds approximately $23 million of unpaid loss and expense reserves in respect of the P & C Book. XYZ California's aggregate reserves at 30 September 1995, including both the P & C Book and its workers' compensation reserves, computed before cessions to ABC
Re and EFG Reinsurance ABC, approximate $156 million. Tillinghast’s mid-point estimate supplied by their 30 September 1995 valuation is $164 million. However, XYZ California believes this is a conservative estimate, which would probably have been decreased significantly in the light of recent changes in case reserves and IBNR reserves. Tillinghast considers reserves to be ‘reasonable’ if they are not less than 95% and not more than 110% of $164 million of their mid-point estimate. Thus the bottom of the ‘reasonable’ range is $156 million. XYZ California carries reserves slightly in excess of that amount. However, notwithstanding XYZ California’s own view of the conservatism of Tillinghast’s estimate, XYZ California prefers to be at the mid-point, namely $164 million, and the inability to do so is attributable to the P & C Book. By reinsuring out to the Company XYZ California will be able to raise its reserves to the desired mid-point figure. XYZ California’s current level of reserving has been acceptable to its own Board and to the California Department of Insurance. However, given the position of Group as an SEC-reporting company under public scrutiny, XYZ California now wishes to bring its reserves in line with the Tillinghast mid-point estimate. For GAAP purposes the increase in P & C reserves was taken in the second quarter of 1995, but, with the concurrence of the California Department of Insurance, the reserve increase was deferred for statutory purposes pending completion of the formation and licensing of the Company.

Reinsurance

The Company will not seek retrocessional cover. However, the Company will be the beneficiary of the reinsurance proceeds of XYZ California relating to the P & C Book. XYZ California cedes claims and claims adjustment expenses to the reinsurers listed in Exhibit 6 under various contracts that cover individual risks, classes of business, or claims occurring during a specific time. Reinsurance was ceded by XYZ California on pro rata, per risk excess of loss, and aggregate bases. The P & C Book is 100% reinsured.

Financial Projections

Attached to the Pre-Incorporation questionnaire is a five-year financial projection prepared on the basis of the Tillinghast estimates. It is not expected that the Company will become insolvent, and that the P & C Book will be successfully run off.

The Insurance Relationship with ABC Re

XYZ California has obtained certain reinsurance coverages from ABC Reinsurance Limited and EFG Reinsurance as are described in detail in the notes to XYZ California’s financial statements as at 31 December 1994, at page F-18, a copy of which is attached hereto as Exhibit 10.
Insurance Management

The proposed insurance managers and principal representative of the Company are Management (Bermuda) Ltd., who will undertake compliance with all statutory requirements of the Insurance Act 1978, including the maintenance of all necessary insurance records in Bermuda. However, the run-off of claims underlying the P & C Book will continue to be handled by XYZ California, with claims on the Company under the reinsurance agreement being dealt with by bordereaux against the funds withheld.

Auditors

The auditors will be KPMG. The principal audit work will be carried out in California, liaising with the Bermuda office of KPMG.

Loss Reserve Specialist

The Loss Reserve Specialist to the Company will be Tillinghast, based in Irvine, California.
EXHIBIT 6

BERMUDA

THE INSURANCE ACT 1978
(Act No. 39 of 1978)

THE INSURANCE APPLICATIONS REGULATIONS 1980
(Section 4 of the Act)

Form 1B

1. State the name of the Company.

______________________________________________________________________________________

2. State the full address of -

(a) the registered office of the Company in Bermuda

______________________________________________________________________________________

(b) the principal office of the Company in Bermuda.

______________________________________________________________________________________

(c) the registered office and the principal business address abroad (in case of company incorporated
    abroad).

______________________________________________________________________________________

3.a State date and place of incorporation.

______________________________________________________________________________________

3.b State the basic characteristics of the Company by ticking the appropriate box under (i) and (ii).

(i) Company organised by shares 

Mutual Company 

(ii) Exempted Company

Permit Company 

3.c (i) State the amount of the issued and paid-up capital at present, and the date paid in.

______________________________________________________________________________________

(ii) Has the whole of the paid-up capital been subscribed in cash? If not, give full details.

______________________________________________________________________________________
4.a Will the Company be writing unrelated risks (i.e. risks of persons who, apart from the insurance contract itself, have no connection or association with the Company).
   (i) as a direct insurer
   (ii) as a reinsurer
4.b If 4.a (i) and 4.a (ii) are both answered in the negative, explain the nature of the connection or association that exists between the Company and those persons whose risks the Company intends writing either directly or as a reinsurer.
4.c State the category of insurance business which the insurer proposes to write (i.e. general business only, long-term business only or both general and long-term business).
4.d State the class or classes (e.g. property, casualty, marine, aviation) of general insurance business which the Company intends to write and state estimated gross and net premium by class of business for the first 2 years of operation. If it is intended to write products liability risks or professional liability risks, or both, state estimated gross and net premium in respect of each separately.

<table>
<thead>
<tr>
<th></th>
<th>Year 1</th>
<th>Year 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Net</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

4.e State when the Company intends to commence writing the above class or classes of business.
4.f In respect of general business, give estimated income for each of the first two years on as realistic a basis as possible using the following format -

<table>
<thead>
<tr>
<th></th>
<th>Year 1</th>
<th>Year 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross Premiums written</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less Reinsurance premiums ceded</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Net Premiums written</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less increase (plus decrease) in Unearned Premiums</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Net Premiums Earned</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plus Investment Income</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plus other insurance income</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SUBTOTAL</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Net Losses and loss expenses incurred
Reserve for claims incurred but not reported (if applicable)
Commissions and brokerage incurred
General and administrative expenses
Personnel costs
Other expenses
Income taxes (if applicable)
SUBTOTAL

Estimated Net Income for Year

N.B.1 The Regulations provide for a solvency margin in accordance with the following formula -
### General Business Premium Income Net

| BD$ 600,000 or less | BD$ 120,000 |
| BD$ 600,001 - BD$ 6,000,000 | 1/5th of GBPI |
| BD$ 6,000,001 and above | 1/10th of GBPI plus BD$600,000. |

N.B.2 The Regulations provide for a minimum liquidity ratio for general business as follows -

“The value of the relevant assets of an insurer carrying on general business shall be not less than seventy-five per centum of the amount of its relevant liabilities, unless the insurer is a section 24(6) composite.”

4.g In respect of long-term insurance business, state as an appendix set out in the format shown below, on as realistic a basis as possible, the estimated volume of business to be transacted during each of the first two years, giving for each type of policy the number of contracts, the total sums assured or amounts of annuity per annum, and the annual or single premiums - figures should be given both gross and net of reinsurance and should relate to world-wide business. A final table should summarise the total premium income.

#### ORDINARY LONG TERM BUSINESS PLAN

| Year 1 | 
| --- | --- | --- |
| Type of Policy | No. of Contracts | Total premium income | Total sums insured or amounts or annuity per annum |
| | | Gross | Net of Reinsurance | |
| | | | |

Note: Same format for year 2 as for year 1

5. Give particulars of any business other than insurance business which the Company proposes to carry on.

6.a Give name of and limits carried by primary carrier, if any.

6.b State the maximum net retention by class of business, for any one risk per occurrence.

6.c State layer of retention (primary or XXX excess of XXX) by class of business.

6.d State whether annual aggregate (i.e. stop loss) reinsurance has been/will be arranged. If so, state maximum annual aggregate net losses to be retained by class of business.
7. Set forth in the columns below the nature and extent of the existing or proposed reinsurance arrangements in respect of each class of business, including in particular the names of, and, where they have been rated by recognised rating organisations, the most recent ratings assigned to, the insurance companies or associations of underwriters which will reinsurance each class of the Company’s business and the amount which will be reinsured by each. (If more than ten companies will reinsure a class business, the names of only the principal reinsurers need be stated.)

<table>
<thead>
<tr>
<th>Name</th>
<th>Rating</th>
<th>Class of Insurance</th>
<th>Amount Reinsured</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
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<td></td>
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</tbody>
</table>

8.a State the full name and address of the following who have accepted their appointment, attaching formal evidence of acceptance of appointment duly signed -

(i) Principal Representative (must be resident in Bermuda).

(ii) Insurance Manager (if Company has one).

(iii) Approved Auditor.

(iv) (Where required) Loss Reserve Specialist.

8.b For companies carrying on long-term business - state the full name and address of the Approved Actuary, attaching formal evidence of acceptance of appointment duly signed.
9.a Indicate by ticking the appropriate boxes which of the following are located in Bermuda -

(i) general ledger 

(ii) general journal 

(iii) subsidiary ledgers (referred to in the general ledger) 

(iv) cash books - receipts and disbursements 

(v) premium registers 

(vi) loss registers 

(vii) reinsurance reports 

(viii) daily reports of claim files 

(ix) copies of policies 

(x) copies of reinsurance treaties and agreements. 

9.b Will those of the foregoing business records which will be kept in Bermuda enable the directors to ascertain within a reasonable period and with reasonable accuracy the Company's position at the end of each three month period? Please answer “Yes” or “No”. If No, please explain.

______________________________________________________________________________________
______________________________________________________________________________________

9.c Give the addresses where such records are located in Bermuda.

(i) ____________________________________________________________________________________
______________________________________________________________________________________

(ii) ___________________________________________________________________________________
______________________________________________________________________________________

(iii) ___________________________________________________________________________________
______________________________________________________________________________________

10. State the date on which the Company’s financial year will end.

______________________________________________________________________________________

11. If the answer to question 4.a was in the affirmative -

(a) state the method or methods by which the business will be obtained (e.g. by the Company’s own employees, by brokers or agents, or by both methods).

______________________________________________________________________________________

(b) state the way in which settlement of claims will be handled (e.g. by the Company, by outside loss adjusters or assessors, or by other agents with authority to settle claims).

______________________________________________________________________________________
(c) give details of any connections or association (including in particular, a connection or association of a financial kind) which exists between any of the brokers, agents, loss adjusters and assessors referred to in (a) and (b) above, and any director of the Company, any director it is proposed at present to appoint, any person having a majority shareholding in the Company, or any other person on whose directions the directors of the Company or any of them act or will act.

____________________________________________________________________________________

____________________________________________________________________________________

(d) give details of any loans which the Company has made, or proposes to make, to any officer of the Company or his spouse or to any partnership in which an officer of the Company or his spouse has an interest.

____________________________________________________________________________________

____________________________________________________________________________________

(e) give details of any loans or investments, actual or proposed, to or in any subsidiary or associated company or any company at any general meeting of which any officer of the Company or any person controlling the Company, or his spouse, is entitled to exercise, or control the exercise of, one third or more of the voting power.

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

We certify that to the best of our knowledge and belief all of the information given in this application is true and correct and that all estimates given are true estimates based upon facts which have been carefully considered and assessed.

(Signed) _____________________________________________ date _____________________________

(Director)

(Name) ___________________________________________________________________________

(Signed) _____________________________________________ date _____________________________

(Resident Director)

(Name) __________________________________________________________________________

(Signed) _____________________________________________ date _____________________________

(Principal Representative)

(Name) __________________________________________________________________________

Note: Any information supplied pursuant to this form will be dealt with in CONFIDENCE in accordance with Section 52 of the Act.
Bermuda’s insurance environment and regulations make it a choice domicile for the incorporation of a special purpose vehicle (SPV) for insurance derivative transactions. A SPV is colloquially called a ‘transformer’ company because it ‘transforms’ insurance risk into capital market instruments which can be traded by investors.

The usual form of derivative transaction takes the form of a credit default swap which is an agreement between two parties where one is a seller of credit protection and the other a buyer of credit protection. The seller agrees to compensate the buyer on the occurrence of a particular credit event such as a bankruptcy or a default on a loan. The buyer pays an annual premium to the seller. Neither party need have any interest in the underlying asset unlike an insurance contract where the insured must have an ‘insurable interest’ for the contract to be enforceable.

Over the last 50 years, Bermuda has built itself a reputation for this type of high-end transactional work. Complex, innovative structures are developed routinely for issue from Bermuda. There are many reasons to incorporate a SPV in Bermuda, to structure complex finance and derivative transactions on the Island and to revisit the documentation on standard transactions to see if client interests are being best served.

The principal reasons for choosing Bermuda are set out below.

A. REPUTATION

Bermuda is widely perceived as a blue chip offshore financial centre (not just in insurance). The Island (although recently under attack from some elements in the US due to its popularity for US corporate inversions) has been untouched by scandal, which has plagued other offshore jurisdictions. Bermuda companies are well-known to, and readily accepted by, the world’s major stock exchanges.
Professionals can, therefore, be confident of securities commission reviews which do not balk at a Bermuda situs for the incorporation of a SPV. Likewise, investors are confident that Bermuda's probity and legal system are protecting their interests. This is reflected in the fact that large numbers of Bermuda companies are registered on major stock exchanges around the world.

B. COMPETITIVE PRICES

Contrary to popular belief, Bermuda is no more expensive for the establishment and continuing management of a SPV than any of the other major offshore jurisdictions. Standard incorporation fees and out-of-pocket expenses are comparable with the Cayman Islands, Guernsey and other such jurisdictions. Indeed, by reason of Bermuda's superlative professional infrastructure, it is arguable that clients obtain substantially more for their money.

C. ONE-STOP INSURANCE MARKET

Bermuda is the second-largest reinsurance market in the world after New York and is much more than a ‘paper’ jurisdiction. Some argue that since the arrivals of the new Class 4 insurers post September 11 and Hurricane Katrina, that Bermuda is now the leading reinsurance market. Enormous professional resources are readily available. Accordingly, it is possible to effect all layers of a transaction in Bermuda on a one-stop shopping basis. This, naturally, reduces structural costs and the professional time necessary to complete them.

D. SEGREGATED ACCOUNTS COMPANIES ACT 2000 (AS AMENDED)

The Segregated Accounts Companies Act 2000 (SAC Act) as discussed in detail in Chapter 16 can be of huge benefit to derivative transactions as the transformer company can transact several deals via separate segregated cells. The legislation effectively segregates assets and liabilities per client account, but protects general creditors and the public. Further, the SAC Act is structured to ensure maximum recognition in foreign jurisdictions, by employing trust and contractual concepts recognised under private international law. The obvious benefit of segregated accounts, as they relate to a SPV, is the substantial economies of scale that can be achieved for successive securitisations and derivative transactions. The need for a new SPV for each transaction, therefore, falls away.

E. TRANSFORMER COMPANY STRUCTURE

A transformer company is typically registered as a Class 3 insurer. It enables underlying insurance and reinsurance obligations to be hedged or covered by the issuance of financial instruments (swaps, options, puts and calls) in the capital markets. ‘Transformation’ is assisted by the SAC Act in its ability to effect a segregation of the assets and liabilities related to a risk or a bundle of risks from the assets and liabilities of other programmes within the company (see above).
F. UNIQUE STRUCTURES POSSIBLE THROUGH PRIVATE ACTS

Bermuda is unique in being able to offer to clients the ability to petition the Bermuda Parliament for the enactment of special legislation in favour of a client company. Private Acts (as they are known) are dealt with in detail in Chapter 6. Such private legislation is instrumental in effective innovative structures that a client may propose, which would otherwise not be permitted under either the Companies Act or common law. Thus in the past derivative transactions have been structured by ‘designer’ companies created for the purpose, with a Private Act obtained to give unique characteristics to the corporate powers of the company concerned. Since the passing of the SAC Act, it is no longer possible to incorporate a segregated accounts company using a Private Act as the relevant provisions are now statute pursuant to the new public act which is the appropriate route to follow.

G. REGULATORY FLEXIBILITY — SECTION 56 DIRECTIONS

Bermuda’s reputation rests on sound but flexible regulation. There is sufficient oversight to ensure probity and solvency; however, the government does not mandate the business methods of Bermuda companies. Thus, policy forms and rates for insurers are at the discretion of management. Additional flexibility may be achieved, even in relation to statutory matters for insurers, by way of a direction pursuant to Section 56 of the Insurance Act 1978 (Act) (Section 56 Direction) from the Authority. These directions allow variations from the solvency and accounting rules in appropriate cases, such as for SPVs which are fully-funded or whose risks are 100% matched by assets, reinsurance or capital instruments.

H. DESIGNATIONS — SECTION 57

In addition to the flexibility conferred by Private Acts or Section 56 directions to SPVs or transformer companies, derivatives transactions can also benefit from public legislation which enables the Authority to designate an instrument as being an investment contract and not an insurance contract or gaming or wagering. Section 57 of the Act provides for either the issuer or the holder of the instrument to make an application. The provisions have the effect, in Bermuda, of putting the instrument outside the operation of the Act and the statutes and common law relating to betting, gaming and wagering. The benefit to the parties is that designation of an instrument as a non-insurance instrument means an investor who is not permitted or licensed to engage in insurance business in Bermuda may hold such an instrument. For an insurer issuing such a designated instrument, the Act solvency requirements do not apply.

I. TAX ASSURANCE

Like most offshore financial centres, Bermuda does not levy income or capital taxes. By way of assurance to foreign-owned companies incorporated on the Island, a certificate is issued by the
Minister of Finance confirming that no such taxes will apply to the company until at least 2016. Regular extensions of the time limit are made.

J. PRIVACY/PUBLIC FILINGS/PROSPECTUS REQUIREMENT

While Bermuda is by no means secretive, the Island does maintain confidentiality concerning the identity of sponsors of commercial transactions. Further, there is usually no requirement to file private transaction documents with any public authority, no matter how large the transaction. The main exception, not unexpectedly, is for public offerings. However, even there, Bermuda operates a flexible regime which allows disclosure only at the level required by any appointed stock exchange on which the securities are to be listed. If there is to be no listing, the statutory disclosure items in Bermuda are of a routine and unexceptional nature.

K. SPEED

As a complement to flexibility, commercial objectives can be achieved more quickly in Bermuda than in many other jurisdictions. In urgent cases, incorporations and licensing approval can be effected within two to four weeks (or sooner), while the insurance licence issuance process takes approximately one week from the date of approval of the application.

L. PROFESSIONAL EXPERTISE

Fifty years of serving the financial community have produced a core of excellent professionals working and living in Bermuda. Investment managers, commodities traders, insurance underwriters and brokers, lawyers and accountants, operate in Bermuda and are fully competent to handle the most complex structured finance and insurance derivative transactions. Response times and depth of knowledge are equal to the expectations of large city firms.

M. ONGOING MANAGEMENT

Once a SPV is incorporated, it will have a corporate existence of its own, particularly if it holds a licence as an insurer or as a mutual funds company. Bermuda has the expertise to provide the continuing management of such companies at rates equivalent to any other jurisdiction, but with the added advantage of close proximity to the United States and a superlative physical environment for board and management meetings.
N. CUTTING EDGE TELECOMMUNICATIONS

Initial instructions and subsequent management for a SPV are rendered seamless by the excellent communications which Bermuda enjoys. The Island is fully-wired into the Internet, and has first-rate satellite and fixed link communications. Whether responding to London, New York, Hong Kong or California, documentation flows easily and quickly through the system.
A Bermuda company has a number of ways in which it can raise additional capital. The first of these often is by way of an initial public offering of the company’s shares. This procedure is dealt with in detail in Chapter 10. The second option is by way of a private offering of the company’s shares to a limited number of investors or a limited category of sophisticated investors. The group of new insurance companies organising in Bermuda in the aftermath of Hurricane Katrina have certainly favoured this option. The third option is by way of debt security issuances (rather than equity issuances) in the form of notes, debentures or bonds. The procedures in respect of the second and third options are discussed below.

A. EQUITY

It is extremely common for private companies to use equity financing as a means of acquiring additional capital, especially for newly-formed companies although often equity investors will acquire non-voting preferred shares with a right to receive dividends. The right attaching to such shares will be either set out in the bye-laws of the company or in a certificate of designation annexed to the bye-laws of the company, or as determined by the board on issuance.

The drawback of equity financing is, fundamentally, that shareholders in return for their investment acquire a right of ownership in the company, which naturally evokes a desire for that shareholder to protect such interest. Where a shareholder acquires voting rights in a company in return for their investment, they then acquire certain statutory rights which can, collectively, impede the managers from progressing the company as they see fit. More often than not though, the shares issued for purposes of funding a company will be preferred shares of a non voting nature with rights of dividend and preference on liquidation so that this will not prove problematic.
In Bermuda, all offerings must comply with Part III of the Companies Act 1981 (the Act) which regulates all offers to the public and requires the issuance and filing of a prospectus. Please see Chapter 10 for further details.

In the US, the use of a private offering allows for an offering of securities to individuals or entities for which a registration with the Securities and Exchange Commission (SEC) is waived. In order for a US corporation to avail itself of a private offering the company must fall under a specific category of exemption which essentially exempts the company from having to register their offering with the SEC. Onshore counsel are engaged in order to ascertain the exemptions available for use by the company, and also to ensure that the Blue Sky laws (essentially state securities laws) are complied with. Exemptions from the requirement to register with the SEC will depend upon the potential investors, the amount of capital to be raised and the timing of the offering. Appleby will typically co-ordinate with onshore counsel to ensure that any offering made by an exempted company is in compliance at all times with both Bermuda and US security laws.

For a Bermuda company to conduct a private offering usually to select investors or venture capitalists, will in most cases produce what is known as an offering or private placement memorandum. The offering memorandum will need to contain specified information both financial and otherwise, about the company and its principals so that the potential investors can make an informed choice as to whether or not to invest in the company. Typically the principals, officers and attorneys (both onshore and in Bermuda) will liaise to create an offering memorandum, and the directors will need to provide input further as it is ultimately the directors who will have to sign off on the issuance of the final form offering memorandum.

The company will need to take into consideration a number of different elements in the preparation of the offering memorandum, including the number and nature of the potential investors. An offer to two venture capitalist or accredited individuals will not necessarily produce the same offering memorandum as would be prepared for an offer to 100 retailers. From an onshore perspective, consideration will need to be given to whether the potential investors constitute accredited or non accredited status as there are separate exemptions and disclosure requirements for each.

The amount of capital sought to be raised by the private offering will also need to be assessed. The capital figure should be determined to be at a level that will provide the company with adequate funding for its short- to medium-term goals and objectives, but should not be set at an unreasonable level such that it is difficult to achieve the set capital objective amount. It may be that the company is looking to raise capital in set stages through further rounds of financing which should also be taken into consideration for purposes of the current offer. Additionally, the company may be looking at raising finance through a contemporaneous or subsequent public offering.
The securities to be offered and the terms of their preferred nature will need to be assessed and evaluated as against the structure of the company.

An offering memorandum must contain certain disclosures, for example, the potential risk factors which relate to the company, the principals and indeed the equities to be offered. The company will need to disclose all risk factors which it can foresee and disclose all risk factors which are specific to the company, its directors and officers and its securities. The offering memorandum will disclose the financial performance of the company to date, where applicable, and will include most recent audited financials in most cases. Where a company has just recently been formed it will not have a financial history to disclose and indeed this would be considered to be a risk factor for purposes of the offering which must be disclosed in the offering memorandum. The offering memorandum should also contain information on the structure of the company and the type of business written by the company, information on the principals of the company and present capital structure of the company as well as on the securities being offered pursuant to the offering memorandum. Information on how to subscribe for the shares being offered will also necessarily be included in the offering document.

It is important that appropriate disclosures are made in the offering memorandum and it is for this reason that appropriate counsel must be sought.

B. DEBT

Debt most commonly acquired in the form of loans, notes, bonds or debentures can be a cheap method of financing particularly where interest rates are fixed and where such interest rates are depressed over extended periods of time. Where financial institution lending is available, for example in terms of lines of credit or letter of credit facilities made available to companies, then the company can enjoy access to larger amounts of capital where the cost to the company is easily calculable in terms of fixed interest payments over a given period of time. The advantages of this are obvious for financial planning purposes.

Debt as a mode of financing is also preferable where a company is not looking to dilute the existing shareholding in the company. Using this method, a company can preclude the involvement of third-party pressures (particularly where shareholders would have acquired voting shares in the company) and involvement to a degree in the management or day-to-day running of the company.

In order to access financial institution lending, a company will need to have a good credit history coupled with the ability to secure some of its substantial assets against the debt. Without this, as is particularly the case for start-up companies, the likelihood of financial institutions gambling on the credit viability of a company is slim, and it is often for this reason that start-up companies need to find alternative methods of financing.
Alternatively, a company can themselves issue debt in the form of debentures comprised of debenture stock or bonds to debenture holders, whereby the company agrees to pay back the principal sum loaned at a fixed or otherwise determinable date in the future, with interest being paid to the holder at regular intervals. Again, interest considerations in terms of the current and predicted financial economy will have to be analysed.

Holders of debt instruments and lenders usually rank higher than equity owners on the liquidation of a company which they have a debt interest in, and will therefore have a greater chance of recovering their investment in the event that the company is liquidated or dissolved. Bond/note holders are usually unsecured creditors although the holders will usually recover their interests before equity holders on liquidation of a company. It is particularly due to the preferred liquidation position of the debt holders that their interest is seen as less risky and therefore are usually entitled to lower rates of return on their debt holding than holders of preferred securities.
Prior to 11 September 2001, there was a gradual increase of newly-incorporated insurance companies in Bermuda, with 84 incorporated in 1999 and 94 incorporated in 2000. Notably, in 2001, the number of newly-incorporated insurance companies dramatically increased to 109. This was mostly due to the number of Class 4 insurance companies doubling from nine in 2000 to 18 in 2001, representing a significant amount of new capital being introduced into Bermuda’s insurance market; these nine companies had a total capitalisation of approximately US$15 billion. Furthermore, eight of these nine companies were incorporated soon after 11 September 2001.

As of January 2006, a total of 25 new Class 4 insurers had been incorporated and licensed since 11 September 2001. One of the main reasons why the 25 new companies were incorporated in Bermuda was because public stock exchanges recognised Bermuda as a properly regulated and quality jurisdiction. As a result, Bermuda companies generally find it easy listing their shares on the US stock exchanges (for instance of the aforementioned 25 new Class 4 start-ups incorporated since September 2001 seven of their holding companies have already gone public and registered their shares on the New York Stock Exchange or NASDAQ, Endurance Specialty Holdings Ltd., Montpelier Re Holdings Ltd., Platinum Underwriters Holdings, Ltd., AXIS Capital Holdings Limited, Aspen Insurance Holdings Limited, Quanta Capital Holdings Ltd. and Allied World Assurance Holdings Ltd.).

Registering a company on a US Stock Exchange is a lengthy process raising numerous issues for the company’s management and board of directors.

This chapter aims to outline the process of listing the shares of a Bermuda exempted company on a US stock exchange. In particular, this chapter will focus on the following:
• incorporation;
• publication and filing of a prospectus;
• what does not constitute an offer to the public;
• delivery of prospectus;
• contents of a prospectus;
• financial statements;
• continuous offerings;
• exceptions to filing requirements;
• registration of shares (IPO);
• regulatory consents; and
• liability.

A. INCORPORATION

Chapter 7 of this Guide sets out in more detail the application process to incorporate a Bermuda insurance company. It is important to note that the majority of the Bermuda insurance companies, whose holding companies are registered on a US stock exchange, are licensed as Class 4 insurers in Bermuda. The remainder are Class 3 insurers. When incorporating a Bermuda company, which is to be licensed as a Class 4 insurance company, there are unique aspects for the shareholders to consider prior to submitting the application to the regulatory authorities and the Insurers’ Admissions Committee (IAC).

Most insurance companies prefer to focus more on conducting their insurance business instead of focusing on complex shareholder issues and raising additional capital. As a result, the majority of these insurance companies are incorporated with a holding company as their sole shareholder, whose shares are then registered on a US stock exchange. All exempted companies pay an annual government fee based on the company’s assessable capital — the combination of the company’s authorised share capital and share premium account. Under Bermuda law, a holding company whose Memorandum of Association (the Memorandum) provides that the holding company’s principal object is holding as beneficiary the entire issued share capital of another exempted company which has, as an object in its Memorandum, the object of carrying on ‘insurance business’ as defined in the Insurance Act 1978 (Insurance Act) would only be required to pay the lowest annual government fee.

Notably, the holding company is still allowed to have the standard objects of (b) – (v) of the Second Schedule of the Companies Act 1981 (the Companies Act), even if its Memorandum contains a special object that allows for the holding of all the shares of another company. Hence, the holding company would still be able to conduct all the necessary financial transactions on behalf of itself and its insurance subsidiary and pay the lowest annual government fee possible (currently $1,780). Otherwise, if the holding company has an assessable share capital of more
than $501 million then it would have to pay an annual government fee of $27,825. Furthermore, the holding company would only hold the minimum number of shares required under Bermuda law for the relevant class of insurer (eg, shares amounting to US$1 million for a Class 4 insurer) and contribute the rest of its funds to the insurance company as contributed surplus.

The application to incorporate the holding company is usually submitted to the Authority concurrently with the application to incorporate the holding company’s insurance subsidiary as a result of the holding company’s principal object being to hold as beneficiary all the shares in an insurance company. Please refer to Exhibit I which sets out the approval process in relation to obtaining permission from the Authority and the IAC in order to incorporate the holding company and the insurance company.

B. PUBLICATION AND FILING OF A PROSPECTUS

Part III of the Companies Act requires that any offer of shares, debentures, debenture stock, bonds, stock, notes, units of a unit trust, warrants conferring an option to acquire shares or other securities of the company, made to the public requires a prospectus to be published and filed with the Registrar of Companies (the Registrar) in Bermuda prior to, or as soon as reasonably practicable after, the publication of such a prospectus. The Companies Act does not specifically define what constitutes an offer to the public, but instead specifies what does not constitute an offer to the public (please see Section C of this chapter ‘What is not an offer to the Public?’).

When filed with the Registrar the prospectus must be signed by or on behalf of all the directors or provisional directors of the company. As a matter of practicality, in most instances the Bermuda attorney signs the prospectus on behalf of all the other directors pursuant to the authority granted to him by a power of attorney executed by all the directors of the company. The filing of the prospectus will be accompanied by a certificate signed by an attorney confirming that the prospectus has been accepted or received by an appointed stock exchange or competent regulatory authority as a basis for offering shares to the public. Nevertheless, in the majority of these cases the prospectus would already include similar information as required by the Companies Act (for more detail, please refer to Section E of this chapter ‘Contents of a Prospectus’).

Where the prospectus is not received or accepted as a basis for offering shares to the public by an appointed stock exchange or a competent regulatory authority the prospectus will have to be filed with a written statement from the auditor of the company, dated within seven days prior to the date of such filing, which confirms either: (i) the auditor’s consent to the inclusion of his name in the prospectus to be issued by the company as having accepted the appointment as auditor of the company; or (ii) the auditor’s consent to the inclusion in that prospectus of any or all reports prepared by him and a certificate of a Bermuda attorney certifying that the prospectus contains the particulars required by the Companies Act.
C. WHAT IS NOT AN OFFER TO THE PUBLIC?

As mentioned above, the Companies Act does not define what constitutes an offer to the public. However, Section 25(4) of the Companies Act stipulates that the following will not be treated as an offer to the public:

- an offer to existing holders of shares in the company of the same class as the shares in the offer without any right of renunciation;
- an offer without any right of renunciation to the holders of convertible debentures, or debentures having subscription rights in respect of shares into or in respect of which the right of conversion or subscription exists;
- an offer certified in writing by an officer of the company, on behalf of the board of directors, which the board considers as not being calculated to result, directly or indirectly, in the shares becoming available to less than 35 persons;
- an offer having a private character, whether by reason of the connection between the company issuing the shares and those to whom they are issued or otherwise (this is the common exception that rent-a-captive insurance companies rely upon);
- an offer certified in writing by an officer of the company on behalf of the board of directors to be an offer which the board considers as not being calculated to result, directly or indirectly, in shares becoming available to persons other than persons whose ordinary business involves the acquisition, disposal or holding of shares, whether as principal or agent; and
- when a direction is granted by the Minister of Finance (the Minister) (please refer to Section E of this chapter ‘Contents of a Prospectus’).

D. DELIVERY OF PROSPECTUS

The Companies Act specifically addresses that a prospectus in relation to a public offering needs to be ‘published in writing’. However, there is no reference to whether a prospectus needs to be delivered to the offerees or anyone else.

Most subscription agreements will either refer to the prospectus itself or otherwise incorporate the contents of the prospectus. As a result, it is always in the best interest of the directors, officers and promoters of the company to ensure that the subscribers to the offering have subscribed for their shares on the basis of the final filed version of the prospectus, and not a previous draft. Therefore, we encourage clients to submit to all offerees the version of the prospectus which was filed with the Registrar and ensure that the prospectus satisfies the requirements of the Companies Act.
E. CONTENTS OF A PROSPECTUS

The Companies Act requires that a prospectus contain the following information:

a. the names, descriptions and addresses of the promoters, officers or proposed officers;
b. the business or proposed business of the company;
c. the minimum subscription which, in the opinion of the promoters, directors or provisional directors must be raised by the issue of the shares in order to provide for the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters:

(i) the purchase price of any assets purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;
(ii) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company;
(iii) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters;
(iv) working capital (Please note that most prospectuses provide that there is no minimum amount to be raised pursuant to the requirements of Part III of the Companies Act);
(v) any rights or restrictions on the shares being offered;
(vi) all commissions payable on the sale of the shares referred to in the prospectus and the net amount receivable by the company in respect of the sale;
(vii) any shareholding in the company of an officer or director of the company;
(viii) financial statements of the company prepared in accordance with the Companies (Financial Statements and Auditor’s Report) Rules 1995 (the Financial Rules);
(ix) a report or statement by the auditor of the company prepared in such manner and containing such information and copies of such documents as shall be required by the Financial Rules; and
(x) the date and time of the opening and closing of the subscription lists.

As noted above in Section C, the Minister has the discretion, on application, to waive any of the above requirements.

If the prospectus has been accepted by an appointed stock exchange or competent regulatory authority (as a basis for offering shares to the public) then the prospectus is not required to contain the particulars referred to above other than to state the minimum amount to be raised in the public offering (please refer to Section E.c. above).
F. FINANCIAL STATEMENTS

Where a prospectus is not registered on an appointed stock exchange (please refer to Section H of this chapter ‘Exceptions to Filing Requirements’ for a list of appointed stock exchanges) the prospectus will have to contain certain financial information pursuant to the Financial Rules. The Financial Rules set out three different scenarios in relation to the financial information that needs to be attached to the prospectus, which are as follows:

- where a company is going to publish a prospectus prior to the directors of the company approving the company’s financial statements for its first financial period or six months after the close of the company’s first financial period, the financial statements attached to the prospectus need to specify whether the company has commenced business, declared or paid any dividends, approved any financial statements to be laid before a general meeting of the company and whether the company has any audited financial statements;
- where a board of directors of a company has approved financial statements not more than 18 months prior to the date of the issue of the prospectus, then the prospectus only has to contain the most recent financial statements of the company; and
- where financial statements were prepared more than 18 months prior to the date of the issue of the prospectus, then the financial statements have to contain a balance sheet, statement of results of operations, statement of retainer earnings or deficit or certain other statements and notes.

In all instances, the financial statements of the company must include a summary of unaudited financial information in respect of the immediately preceding five financial year ends or in respect to such shorter period as may be available. The summary of unaudited financial information must address items in the balance sheet, statement of results of operations, and statement of changes in financial position.

G. CONTINUOUS OFFERINGS

If a company continuously offers shares to the public, and the particulars of the company’s prospectus cease to be accurate in a material respect, the company has to publish supplementary particulars disclosing the material changes and file a copy of the supplementary particulars with the Registrar as soon as reasonably possible.

It should be noted that the Companies Act does not define what is material, however some examples of what might be material would include: (i) wholesale changes to the board of directors; (ii) officers; and (iii) any change in the business plan of the company. It is also worth noting that the financial statements of the company that are attached to the original prospectus will have to be updated to continue to comply with the requirements of the Financial Rules.
H. EXEMPTIONS TO FILING REQUIREMENTS

A company does not have to file and publish a prospectus:

- where the shares are listed on an appointed stock exchange and the rules of the appointed stock exchange do not require the company to publish and file a prospectus; or
- where the company is subject to the rules or regulations of a competent regulatory authority and such rules or regulations do not require the company to publish a prospectus, except where exemption from publication of a prospectus is given by reason of the offer being made only to persons who are resident outside the jurisdiction of the authority; or
- where the Minister has waived the filing and publishing requirements set out above.

The Minister has granted waivers in the past based on special circumstances. However, we would envision the number of waivers to decrease as a result of the additional flexibility that Part III of the Companies Act now provides to companies. The appointed stock exchanges are:

- The Alberta Stock Exchange*
- American Stock Exchange, Inc.
- Australian Stock Exchange Ltd.
- The Bermuda Stock Exchange
- The Bolsa de Madrid
- Boston Stock Exchange, Inc.
- Bourse de Montreal
- Canadian Dealing Network
- Canadian Venture Exchange
- The Commission de Surveillance du Secteur Fianancier
- EASDAQ
- The Irish Stock Exchange
- JASDAQ Market
- The Johannesburg Stock Exchange
- The Kuala Lumpur Stock Exchange
- London Stock Exchange
- London Stock Exchange – Alternative Investment Market (AIM)
- NASDAQ
- New York Stock Exchange, Inc.
- New Zealand Stock Exchange
- Oslo Børs
- Paris Bourse
- Shanghai Stock Exchange
- Singapore Exchange Securities Trading Limited
- Societe de la Bourse de Luxembourg S.A.
- The Stock Exchange of Hong Kong Ltd.
• Swiss Exchange
• Tokyo Stock Exchange
• The Toronto Stock Exchange
• The TSX Venture Exchange
• Vancouver Stock Exchange*
• Viennese Stock Exchange.


The competent regulatory authorities are:

• Australian Securities and Investment Commission
• Austrian Federal Ministry of Finance
• Bermuda Monetary Authority
• Hong Kong Securities and Futures Commission
• The Commission de Surveillance du Secteur Financier
• The Monetary Authority of Singapore
• Luxembourg Commissariat aux Bourses
• Ontario Securities Commission
• Swiss Exchange
• United States Securities and Exchange Commission
• Financial Services Authority.

It is always possible to apply to the Minister to have a stock exchange or regulatory authority, not listed above, approved as an ‘appointed stock exchange’ or ‘competent regulatory authority’, respectively.

I. REGISTRATION OF SHARES/INITIAL PUBLIC OFFERINGS (IPOs)

This section will focus on the requirements under Bermuda law of Bermuda exempted companies registering their shares on public exchanges in the United States.

1. Appointed Stock Exchanges

As noted above, the main US stock exchanges, namely the New York Stock Exchange, NASDAQ, American Stock Exchange and Boston Stock Exchange, are all deemed to be appointed stock exchanges under Bermuda law. As a result, when one of these exchanges accept the listing of a Bermuda company's shares, the prospectus, in which the shares were being offered, needs only set out the minimum amount to be raised pursuant to the offering even though most of the other particulars would already have been inserted in the prospectus pursuant to the relevant stock exchange’s rules and regulations.
Further, the prospectus must be published and filed with the Registrar in Bermuda prior to, or as soon as reasonably practicable after, the publication of the prospectus. The filed copy of the prospectus must be signed by or on behalf of all the directors or provisional directors of the company and be accompanied by a certificate from an attorney (please refer to Section B of this chapter ‘Publication and Filing of a Prospectus’).

2. **Preparation for an IPO**

Prior to a company filing its registration statement and prospectus with the relevant US stock exchange, a company will have to review its organisational documents to ensure that they comply with relevant US legislation and stock exchange rules. Some of the legal issues which should be addressed are as follows:

- **Annual general meetings** — It would be prudent for the company to hold its annual general meeting prior to the company’s public offering as the subsequent increase in shareholders, once the company has successfully registered its shares, will make it more difficult for the company to hold its annual general meeting. This fulfils the Bermuda law requirement that a company hold an annual general meeting once a year.

- **Bye-laws** — The company should review its bye-laws to ensure they contain the special requirements that arise as a direct result of having the company’s shares registered on a US stock exchange. Some of the important issues to review in the company’s bye-laws are whether: (i) the indemnity provisions are as broad as possible; (ii) the voting controls are adequate considering there would be more US-domiciled shareholders; and (iii) the qualifications to be a director of the board are adequate.

- **Committees** — Certain US Exchanges and the Sarbanes-Oxley Act require a company to have committees in place along with written charters for each committee (eg, an audit committee, compensation committee and nominating/corporate governance committee). Most companies appoint and approve the committees and charters as soon as possible after their incorporation. Additionally, some companies go one step further by altering their bye-laws to make it a necessity that the company forms the committees in order to ensure that they comply with the US stock exchange rules and the relevant US statutes.

- **Share capital** — It is very important that the company verifies it has sufficient authorised share capital available to be issued pursuant to the terms of its prospectus. If the company does not have enough authorised share capital, the company will have to increase its share capital to allow for the shares to be issued pursuant to its offering.
3. **Opinions**

The Securities Exchange Committee will require Bermuda counsel to the company to issue: (i) an opinion covering the authority of the company to issue the shares of the company; and (ii) an opinion covering the tax disclosure set out in the registration statement.

In addition, the New York Stock Exchange also requires an opinion from Bermuda counsel. Generally, the opinion will opine on the following: (i) whether the company’s outstanding shares and the shares to be issued pursuant to the Registration Statement are validly issued, fully paid and non-assessable; (ii) whether all necessary approvals of the Governmental authorities of Bermuda have been duly obtained for the issue by the company of the shares; and (iii) that the shareholders of the company will bear no personal liability for the debts or obligations of the company as a result of their status as shareholders of the company.

**J. REGULATORY CONSENTS**

Prior to the prospectus being published and filed with the Registrar, if required, the company must ascertain whether: (i) it has to apply to the Authority for its consent, pursuant to the Exchange Control Regulations 1973, for ‘the issue and the free transferability of the shares being offered, pursuant to the terms of the offering, to non-residents of Bermuda’, or (ii) a general permission of the Authority already applied to the offering.

On 1 June 2005, the Authority issued a new policy (the Policy) in relation to the issue and transfer of all securities, specifically equity securities. An ‘equity security’ is defined in the Policy as ‘a share issued by a Bermuda company which entitles the holder to vote for or appoint one or more directors or a security which by its terms is convertible into a share which entitles the holder to vote for or appoint one or more directors.’ The importance of this new policy was that a company, in certain circumstances, no longer had to apply to the Authority for specific permission for the issue and transfer of securities involving persons who are non-residents of Bermuda where the Authority had already granted a general permission.

1. **Equity Securities Listed on an Appointed Stock Exchange**

Where any equity securities of a company are listed on an appointed stock exchange, general permission is automatically granted for the issue and subsequent transfer of any securities of the company from and/or to a non-resident, for as long as any equity security of the company is so listed.
2. **Equity Securities NOT Listed on an Appointed Stock Exchange**

In the case of a company which does not have any equity securities listed on an appointed stock exchange, or whose equity securities become de-listed from such an appointed stock exchange, general permission is automatically granted for the issue and subsequent transfer of any securities, other than an equity security, from and/or to a non-resident. The Authority will consider the following when deciding whether it should grant permission to a company who wants to issue equity securities:

- whether the prospectus/offering document contains the standard Authority disclaimer:

  ‘Approvals or permissions received from the Authority do not constitute a guarantee by the Authority as to the performance or credit worthiness of the company. Furthermore, in granting such approvals or permissions, the Authority shall not be liable for the performance or default of the company or for the correctness of any statements made or opinions expressed in this prospectus’;

- whether the prospectus satisfies the requirements of the Companies Act;
- who the equity securities are being offered to; and
- whether the prospectus makes commercial sense.

When the equity securities of the company are de-listed from an appointed stock exchange, the existing general permission of the Authority, set out above, would no longer apply. As a result the company would have to apply to the Authority for a new specific consent to allow for the issue and free transferability of the equity securities on a non-appointed exchange (for example, the OTC Bulletin Board).

**K. LIABILITY**

1. **Liability for Board of Directors, Officers and Promoters of a Company**

The board of directors, officers and promoters of a company should realise that pursuant to the Companies Act, they can face civil and/or criminal liability.

a. **Civil Liability**

The Companies Act provides that: (i) every director or officer of the company at the time the prospectus was issued; (ii) all the promoters of the company; and (iii) every person who has authorised the issue of the prospectus of the company shall be liable to pay compensation to persons who have subscribed for any shares and suffered any loss or damage by reason of any untrue statement included therein. However, no person shall be liable if he withdraws his consent
before the issue of the prospectus; the prospectus was issued without his authority or consent; had reasonable grounds to believe an untrue statement to be true; or he relied upon a statement of an expert.

Where directors, officers and promoters of the company do not exercise a reasonable degree of care in providing information for the subscription agreement of the prospectus, and the information of such subscription agreement is found to be untrue, the directors, officers and promoters can be liable under common law for negligent mis-statement or breach of contract.

b. Criminal Liability

The directors, provisional directors and promoters of the company shall be liable to a fine of $1,000 if they fail to file a prospectus. Also, the directors of the company shall be liable to a fine of $1,000 if supplementary particulars of a prospectus in relation to a continuous offering are not filed, as required pursuant to Section G of this chapter ‘Continuous Offerings’.

Where any person makes or authorises the making of an untrue statement in the prospectus such person will be liable: (i) on conviction on indictment, to imprisonment for a period of five years or to a fine of $5,000 or both; (ii) or on summary conviction to imprisonment for a period of one year or to a fine of $2,000 or to both, if they made or authorised the untrue statement. If the person proves either the statement was immaterial or at the time he made the statement he had reasonable grounds to believe it was true then he would not be liable.

It should be noted that in any event, the directors and officers of a company always need to act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill as a reasonably prudent person would exercise in comparable circumstances.

2. Liability for Expert Information

Experts shall be liable under civil law for any untrue statement in the prospectus that invites persons to subscribe for shares in the company. On conviction such expert shall be liable to pay compensation to all persons who subscribed for any shares on the faith of the expert’s untrue statement and experienced loss or damage as a result.

Experts shall be criminally liable for making or authorising the making of an untrue statement in the prospectus. On conviction an expert can be liable on indictment and penalised in the same manner as any person that makes or authorises the making of an untrue statement.
However, a competent expert would not be liable under criminal and civil law for any untrue statement if he had reasonable grounds to believe and did believe the statement was true in the prospectus or after becoming aware that the statement was untrue before the prospectus was issued he had given reasonable public notice of dissociation with the prospectus and the reasons thereof. Unfortunately, the Companies Act does not address what public notice would mean for this section of the Companies Act. It is recommended that, at the very least, the expert would notify the board of directors of the company, the promoters of the company and any agents or investment mangers of the prospectus.
EXHIBIT I

Review of Application by IAC & BMA Insurance Division

- 'No objection' letter provided to BMA Company Division; BMA Company Division considers shareholder application
  - reject
  - approve

- Request for more information until satisfied
  - reject

- Provide more information on shareholders

- approve

Incorporate the Company
Bermuda has been termed ‘The World’s Risk Capital’, not only because it is the second-largest insurance market next to New York, but also because the large insurers and reinsurers incorporated here are physically located on the 21 square mile island paradise. The term ‘one-stop shopping’ is certainly true when it comes to Bermuda, and more companies are interested in incorporating and establishing a physical presence in Bermuda.

This chapter aims to educate the principals of such start-ups and companies thinking of redomiciling, on four key elements that one should know to ensure that the process of establishing a physical presence in Bermuda is as seamless as possible. Section A of this chapter will focus on options for starting up, re-locating or employing management services in Bermuda. Many of the services detailed in this chapter can be provided by the firm’s affiliate company, Reid Management Limited, or any one of the many management companies operating in Bermuda. Section B of this chapter sets out the laws in Bermuda concerning the employment of personnel. This chapter will not only highlight some of the key provisions of the Employment Act 2000 but will also discuss Bermuda’s immigration policies and procedures relating to the hiring of Bermudian and non Bermudian staff. Section B also covers an employer’s pension obligations to Bermudian staff under the National Pension Scheme (Occupational Pensions) Act 1998 and pertinent regulations. Section C of this chapter will focus on finding suitable office space and accommodation for overseas temporary and permanent employees. The final section of this chapter will deal with wealth management particularly concerning the non-Bermudian employees of the company. Employee benefits including employee share schemes, share incentive plans and employee benefit trusts are discussed as part of executive compensation under this final section.

Establishing a physical presence in Bermuda can be overwhelming; however, the firm has inter-disciplinary teams specialising in employment and immigration, property, trusts and estate planning as well as affiliated companies such as Reid Management Limited, mentioned above, and Appleby
Trust (Bermuda) Ltd., which is a licensed trust company each of which can assist any client’s needs.

SECTION A — OPTIONS FOR ESTABLISHING AN OPERATIONAL BASE IN BERMUDA

When planning a move to Bermuda, it is often beneficial to seek local advice and assistance, to ensure all the available options have been considered. For example, before committing to opening a fully staffed office with all the associated costs and logistical problems, one should consider the alternative solutions for establishing ‘mind and management’ in Bermuda; outsourcing administrative and accounting functions or appointing a local insurance manager may prove to be more cost-efficient solutions.

Whether restructuring an existing corporate organisation or beginning a brand new venture, the correct decision can mean the difference between having a successful business or being caught up in a bureaucratic mess. An initial consultation with Appleby’s management and accounting services affiliate, Reid Management Limited (REID) could assist in determining the best solution for a particular organisational structure and subsequently avoiding potential pitfalls.

Just as there are multitudes of corporate structures, there are many different combinations of services available in Bermuda to assist companies in providing the best possible service to their customers. In fact, clients have commented that they are pleasantly surprised at the wealth of talent and expertise available on the Island, often under one roof.

A selection of the options available are reviewed below:

- fully staffed office;
- serviced office facilities;
- outsourcing;
- appoint local manager (the preferred route for many new insurance entities); and
- primary or secondary listing on Bermuda Stock Exchange (BSX).

1. Fully Staffed Office

If this is the chosen route, no matter whether the office is established prior to writing the first policy, or a year or so later when the volume of business justifies the employment of full-time personnel, here are just a few of the key areas which may need to be considered and which we can provide assistance with:
### Project Key elements/areas of concern

**Finding premises**
- locate suitable space and negotiate with landlord
- install furniture
- connect services (power, communications, mailbox)
- arrange temporary facilities until new office is ready
- engage service and maintenance providers — computer engineers, cleaners, couriers, suppliers, water, etc.

**Moving key personnel from head office**
- apply for work permits (after local adverts and interviews)
- find residential accommodation (temporary or permanent)
- arrange relocation (driving test, purchase transport, medical tests, schools)

**Engaging local staff**
- understand local market conditions (qualified staff are snapped up quickly and salaries can be higher than you might anticipate)
- advertise, interview, appoint
- consider temporary staff as a short-term option
- can certain functions be efficiently outsourced?

**Researching local employer’s obligations**
- learn provisions of Bermuda Employment Act and Bermuda Pension Scheme (Occupational Pensions) Act
- register to pay Payroll Tax and Social Insurance (arrange competent personnel to complete monthly returns — benefits paid by employer are also taxable)
- select health insurance, group life and pension plan providers
- register pension plan for Bermudian employees with the Pension Commission. Appoint administrator/trustee to arrange for registration and to administer the pension plan.

**Other**
- appoint auditors
- set up accounting system
- open bank accounts — with the new anti-money laundering measures in place, it helps to enlist the services of someone familiar with local compliance documentation requirements to minimise delays
- establish other local relationships
- principal representative (as required under the Insurance Act 1978) — decide whether to appoint independent or in-house
- consider establishment of a pension plan for non-Bermudian employees
- consider establishment of employment benefit plans to incentivise or compensate senior employees
Obviously, the process of physically moving a company and its operations to a different country can be an extremely capital intensive undertaking. It is often beneficial to have the ability to delay the decision to open a physical office or to take on non-key staff, either indefinitely or until the new venture reaches the appropriate stage in the business plan where such additional costs can be justified. REID has found that the following two options can often address this problem for clients quite effectively.

2. **Serviced Office Facilities**

This type of service is readily available in Bermuda. Since one pays only for the space and employee hours that are actually required, serviced office arrangements are typically advantageous for smaller organisations. At the same time, by delegating many of the administrative chores, executives are able to devote their time exclusively to the core business. This is especially beneficial if senior staff travel frequently.

Serviced office facilities offered by several local companies including REID would comprise a combination of the following services depending upon client requirements:

- unrestricted office space;
- appropriate signage;
- computer and Internet access for any persons who may be employed by or seconded to the client company from time to time;
- reception and secretarial support during normal office hours;
- telephone and fax — answered in accordance with specific corporate style if required;
- provision of meeting room and associated support facilities;
- cleaning and maintenance of all facilities and equipment;
- daily management services for business activity, eg, correspondence, processing and recording of banking, claims payments, payable and receivable transactions plus monthly bank reconciliation; and
- provision of accounting and financial reporting services.

3. **Outsourcing**

Many companies setting up in Bermuda find it efficient to outsource some or all of their back office functions either temporarily or permanently where confidentiality issues may arise (eg, payroll). Examples of functions which some of REID’s clients have effectively outsourced include:

1. Functions for which a full-time staff member is not (yet) required:
   - provision of office accounting services and/or reporting;
   - monitoring bank accounts;
provision of payroll services (weekly or monthly), including calculation and payment of Bermuda Payroll Tax and Social Insurance;

- preparation of annual financial statements; and

- co-ordinating meeting and travel arrangements.

2. supervision, control and statutory compliance functions:

- providing second local signatory on bank accounts;
- independent local director;
- principal representative under the Insurance Act 1978;
- preparation of annual statutory financial statements; and
- registrar and transfer agent.

3. technical and specialised functions:

- claims handling — may be subcontracted back to Ceding Company to save doubling processing costs without gaining additional data or reporting;
- loss adjusting;
- legal counsel;
- investment advisers;
- software and IT support;
- actuarial reporting;
- broking; and
- reinsurance procurement.

Many companies arrive in Bermuda with existing working relationships in place, which cover these services; otherwise, the relevant expertise is usually readily available on the Island.

4. **Appointment Local Manager**

In conjunction with one or all of the above options or as a solution in itself, the most traditional method of managing a Bermuda insurance company is to appoint a local insurance manager. Insurance managers are licensed and regulated. The Bermuda Monetary Authority (the Authority) must approve each appointment.

An insurance manager will provide a principal office in Bermuda maintaining a complete set of records (including accounting, insurance policy documentation, claims and statutory) for each client company and handling most of the day-to-day administration including the provision of company officers if required. Some local insurance managers employ their own in-house specialist practitioners and can, therefore, offer additional services such as claims handling, loss adjustment,
underwriting, reinsurance broking and actuarial expertise to clients who do not have existing relationships or their own in-house teams in these disciplines.

There are many experienced insurance management firms in Bermuda. Prospective employers normally meet with representatives from several service providers to find the one whose specialist knowledge and range of services best matches their requirements.

Usually, but not necessarily, where an insurance manager is appointed, the same firm is also appointed to be Principal Representative (the duties of the Principal Representative under the Insurance Act 1978 are covered in more detail in Chapter 17).

An insurance manager is typically appointed as an alternative to establishing a physical office on the Island. However, some companies in the early stages of setting up their own office also choose to appoint a local insurance manager (such as REID) to handle specific business or statutory functions, working alongside a small Bermuda-based administration team who will handle day-to-day duties, until a full self-managing executive team is established in Bermuda. As noted above, this type of arrangement can be beneficial as executive staff are free to concentrate on technical matters, such as underwriting claims control, investment and business development.

5. **Primary or Secondary Listing on Bermuda Stock Exchange (BSX)**

As more particularly discussed in Chapter 10, many insurance companies have had an initial public offering of their shares and are now registered on one or more US stock exchanges.

Many Bermuda companies are now seeking to register their shares on the BSX. In some instances, client corporations are not looking to physically move their locations, but to increase exposure to the world financial markets and take advantage of increased liquidity and recognition through listing their securities on a recognised stock exchange. Even companies who are already listed on a major international exchange derive benefit from a secondary listing on the BSX to cement their presence in the premier offshore jurisdiction of Bermuda.

With critics becoming more vocal and government regulators and lawmakers becoming more vigilant in their pursuit of ‘unpatriotic’ firms, the need to be seen as a true offshore company, a Bermuda company, is becoming ever more important. Crystallising a company’s image and reinforcing the company’s connection to Bermuda is an important step in solidifying itself as a true offshore entity.

The argument made by many insurance companies in the past for making the move to an offshore locale was that it was due to the regulatory environment, and not simply for purposes of avoiding tax issues. However, as noted above, regulators have been hard at the heels of these companies and
are prepared to introduce penalties for companies that are deemed to have moved to a tax haven jurisdiction simply in order to stave off the burden of taxes.

The following are some of the key benefits as noted by the BSX for developing a secondary listing:

- firmly reinforces connection to Bermuda as its domicile or offshore business location (key for certain tax issues);
- raises company profiles both locally and internationally. Gives a message that it is a good domestic corporate citizen, as well as reducing ‘exempt company’ barriers;
- daily pricing quoted in local news media;
- provides an alternative offshore trading venue for international investors; and
- offers extended trading hours.

As a practical issue, it has been noted that maintaining ongoing listing requirements on many exchanges may be difficult due to share price volatility (ie, share price falls below that which is allowed by the exchange). Having a secondary listing can offer the ‘insurance’ needed to maintain ongoing trading of the entity’s securities.

Our affiliate, Reid Services Limited (RSL), has been established specifically to provide the necessary expertise to assist companies in listing their securities on the BSX. In the essential role of listing sponsor, RSL (or another local service provider selected by the client) will provide the necessary link to get the securities listed on the BSX. RSL is registered to act as a listing sponsor for the following types of securities:

- secondary listings of equity securities;
- collective investment schemes (CIS), including mutual funds, unit trusts and limited partnerships;
- debt securities; and
- depository receipts.

Please note that any primary listings of equity securities (including listings on the Mezzanine Market), must be sponsored in conjunction with a trading member of the BSX instead of a listing sponsor.

In general, after completing the listing of client company securities, the listing sponsor would continue to act as the ongoing sponsor in accordance with BSX regulations and provide the following services:

- act as the issuer’s principal channel of communication with the BSX, and maintain close contact with the issuer;
• ensure that the issuer complies with its continuing obligations under the Listing Regulations; and
• respond promptly to all enquiries made by the BSX.

As an additional option, depending upon the size of the issue and the level of trading activity expected, RSL could also provide registrar and transfer agent services. This may be particularly beneficial where a separate register needs to be maintained for classes of share not freely marketable — for example, employee share options.

6. Summary

As noted above, there is a wealth of resources available in Bermuda. For information on potential insurance management services visit the following site: www.bermuda-insurance.org/bim/home.nsf/index2.html.

There are many factors to consider when establishing an offshore base; most functions can effectively be moved to Bermuda, but every organisation has different needs and some functions may be most efficiently handled by using external service providers. We can assist you in selecting the best structure for your business when establishing your physical presence and commencing what we hope will be a long and profitable relationship with Bermuda.

If you have questions on any topic from this chapter, please do not hesitate to contact Reid Management Limited or any member of the Appleby Insurance Team. Contact details are found at the back of this Guide.
SECTION B — EMPLOYMENT IN BERMUDA

1. The Employment Act 2000

The Employment Act 2000 (the Act) was passed by Parliament in 2000 and became fully operative on 1 March 2002, after a transitional period during which the Act was in part operational. The significance of this piece of legislation is that it for the first time introduced a regime governing the relationship between employers and employees on a micro level. The Act was amended by the Employment Amendment Act 2006 (Amendment Act) in relation to termination and winding-up of a company.

Shortly after the Act became law, Appleby responded to the needs of our clients by the formation of the Employment and Immigration Team. The Act revolutionised the way in which employment law operated in Bermuda, as there had previously been no omnibus act governing day-to-day relations between employers and employees. We have since spent a good deal of time explaining and raising awareness of the elements of the Act, recognising that we are at a stage where the Act is still fairly new to employers, employees and the government.

It should be noted that the requirements of the Act are the absolute minimum acceptable by law. Where, therefore, an employer has pre-existing benefits which are superior to the benefits contained in the Act, those benefits represent the obligations of the employer, and not the lower standard in the Act.

2. Statement of Employment

The Act calls for Statements of Employment to be provided by the employer to each of its employees not later than one week after the employee begins employment. It should be noted that while the Act mandates that every employee should receive a Statement of Employment, it does not provide that every employee should receive a Contract of Employment. However, the Statement of Employment is not a Contract of Employment, therefore, our recommendation is that every employee receives for his own protection a Contract of Employment as well as the Statement.

The Statement of Employment is a relatively detailed document and must contain salient specified details of the employment relationship, including salary, job title and brief description of the employee’s job, length of notice the employee must give or receive with respect to termination, details of any pension provided eg, under the National Pension Scheme (Occupational Pensions) Act 1998 or otherwise and disciplinary/grievance procedure. The foregoing list is not exhaustive.

The Act also provides specific guidance in respect of vacations, maternity leave, bereavement leave, sick leave and antenatal care.
3. Termination of Employment

The Amendment Act clarified this area of employment law. While the Act arguably gave the employer the right to terminate the Contract of Employment at any time, provided that the employer is prepared to give notice or payment in lieu of notice to the employee, the Amendment Act introduced certainty to this area of the law. Under Section 18, an employee’s Contract of Employment may only now be terminated by an employer for a valid reason connected with the ability, performance or conduct of the employee or the operational requirements of the employer’s business. Any termination has to be in accordance with the notice provisions of Section 20 of the Amendment Act or the Contract of Employment, whichever is more favourable to the employee.

Furthermore, the Amendment Act provides that employers must apply the progressive disciplinary provisions of Section 26 or 27 before giving notice of termination.

In relation to repeated misconduct, the misconduct must be short of gross misconduct, which would entitle the employer to dismiss summarily, and must occur at any time within six months of a written warning having been issued to the employee. Termination for unsatisfactory performance occurs when an employee is given a written warning and specific instructions in regard to how the unsatisfactory performance may be improved, but fails to improve the unsatisfactory performance over a period of six months.

In the cases of repeated misconduct and unsatisfactory performance, if there is no transgression by the employee within six months of the initial warning, then the initial warning becomes inoperative. A subsequent act of repeated misconduct, for example, seven months after the first, starts the process anew, ie, in order to be actionable, there must be a further act within a six-month period.

The Amendment Act preserves for employers the ability to dismiss an employee summarily for serious misconduct.

4. Work Permits

In an April 2001 ministerial statement, the Minister for Labour announced that the government would introduce term limits, specifying a date beyond which work permits will not normally be renewed. In theory, this will put an end to any tendency to apply automatically for renewals of work permits without there being a genuine interest in attracting, recruiting and training Bermudians. Term limits mean that, as a general rule, work permit holders will be limited to a maximum term of six years unless they are exempt. These exemptions are possible where businesses can demonstrate that they are good corporate citizens. The criteria for good corporate citizens include matters such as actively attracting, recruiting and training Bermudians, the ability to demonstrate the same and disclosing full information about the selection procedure, including the interview process.
The Minister has stated that the government is conscious that term limits will not be appropriate for every position and that businesses will require continuity if they are to be viable. It recognises that it cannot expect to fill every job from within the local labour pool. Like other jurisdictions, Bermuda is competing to attract workers with skills that are in short supply, not just in Bermuda, but across the world. It would be wrong if term limits led us to lose such people. For this reason, the government has given an undertaking that the system will be flexible. In an appropriate case, the work permit period may be extended from six years to nine years.

Term limits will not apply to positions and persons who are proven to be key to the success of a business; nor will they apply to those categories where there is a demonstrable, severe shortage, either because scarce resources worldwide have a local impact, or there are shortages locally owing to the exceptional high demand. Where a credible case has been made and the business submitting the application has proven itself to be a good corporate citizen, term limits will not apply.

As recently as January 2007, the Minister reiterated his commitment to add clarity to the matter of term limits. Such a statement has not yet been forthcoming.

5. Expedited Permit

There is a procedure currently in place, which allows a company to obtain a temporary permit in respect of an employee on an expedited basis. The process takes approximately two full working weeks. Pursuant to this procedure, one would need to present to the Department of Immigration a brief description of what the individual’s precise functions at the employer will be, together with information with respect to the company. That information is usually limited to the company’s business, address and date of incorporation. One will also need to provide a general description of the function that the applicant would perform for the company in Bermuda and his professional background.

In the event that there is sufficient time, the permit will be obtained together with a re-entry permit. In the event of a genuine emergency where there is no time to wait for the physical permit to be obtained, a landing permit is also required. The government fees with respect to the temporary permit are $500 and the fee for the landing permit is $27 (both Bermuda and US dollars accepted). Once the individual is in Bermuda and working pursuant to the temporary work permit, there is a three-month period, which may be extended for a further three months only, within which to make an application for a full permit. There is no obligation on the Bermuda government to grant a full permit merely because a temporary permit has previously been granted.
6. **Periodic Permit**

A periodic permit may be issued on behalf of an individual who is then allowed to enter Bermuda any number of times during the validity of the permit. These permits are generally issued to individuals who are required to pay periodic working visits of a few days or a few weeks at a time to Bermuda.

The person working in Bermuda on a periodic permit is not a resident, but a visitor. Normally, a person entering Bermuda on a periodic permit is given permission to stay for 21 days. If that individual is required to be in Bermuda for a longer period, that individual must apply in the usual way to the Immigration Department for a visitor’s extension. Usually, such permits are granted to a specific employer to hire a person in a particular job for a period of less than 18 months. Having said that, it is not unusual for back-to-back annual periodic permits to be applied for and granted. Indeed, it is not unusual for periodic permits to be granted on an annual basis of up to five years.

7. **Usual Procedure**

The third option is to make an application for a full permit while the non-Bermudian individual is abroad. This process usually takes approximately 10 to 12 weeks from the date of submission of the application, but frequently takes longer.

The position must first be advertised in one of our local newspapers and any qualified Bermudian applicants must be interviewed. The advertisement must run for three consecutive days in the Government Gazette. The deadline for responses should be at least two weeks hence. There are instances in which one can apply to the government for a waiver of the requirement to advertise on the special circumstances of the case eg, the individual coming to Bermuda has the trust and confidence of senior management and is the only one capable of performing the task.

A Statement of Employment must be submitted with every application for a work permit. Statements of Employment include, but are not limited to, such things as: the job title and a description of same, the salary and pension benefits, if any, the hours of work, any probationary period and length of vacations.

One must also submit a police certificate in respect of first time applicants for a work permit.

The applicant must also complete the Immigration Department’s application form. Each and every relevant section of the form needs to be completed before it may be submitted. We should point out as a word of caution that, in the event that the application form is only partially completed and submitted, the Immigration Ministry will decline to process the application.
It is usual for permit holders to be accompanied to Bermuda by a spouse or partner. In the event that this is the case, the Immigration Department will require fairly stringent information with respect to the spouse/partner to be included when the original application is made. Frequently, the spouse/partner will not work in Bermuda.

The Immigration Department has a policy rationale of allowing only two dependent children to accompany a couple to Bermuda. The expressed rational for this is that Bermuda has such a delicate infrastructure that it is impractical to subject it to heavy population. This policy does from time to time cause hardship to couples with more than two children. On a case-by-case basis, the government does allow the policy to be relaxed, but this is rare.

Finally, the Immigration Department does have a policy of granting permits to an unmarried individual who is accompanied by a partner, including a partner of the same sex. The condition under which the partner will be allowed to reside in Bermuda is that the relationship continues and that the partner on a work permit undertakes to be financially responsible for his/her partner. In the event that the relationship ends, the Immigration Department will insist upon the dependent partner’s departure from the Island.

The above presents a snapshot of Immigration and Employment issues. In each case, the Employment and Immigration Team would be happy to provide further information or process applications.

8. **Pension Plans**

The National Pension Scheme (Occupational Pensions) Act 1998 (the Act) and the regulations thereunder set out the requirements to be followed in establishing a pension fund for Bermudian employees. The Act requires every employer of a Bermudian (which includes the spouse of a Bermudian) to maintain a pension plan that is registered with, and regulated by, the Pensions Commission in accordance with the Act. The pension plan may be a defined benefit plan or a defined contribution plan. The employer is required to contribute 5% of the pensionable earnings of the employee to the pension scheme. Pensionable earnings include overtime payments, commissions and bonuses (but not overtime pay for hours in excess of 35 hours per week, severance or gratuities) up to a maximum of $200,000. The employer may choose to contribute on behalf of the employee more than the 5% statutory minimum. However, whereas the statutory minimum employer contribution is not subject to tax, any amount in excess of the employer’s statutory minimum is subject to payroll tax. The employee is required to contribute 5% of pensionable earnings which is deducted from salary. Non-Bermudian employees may be included in a pension scheme, but their participation is not compulsory. Voluntary pension plans and employee benefit schemes are considered in Section D below.
The employer may establish its own plan for its Bermudian employees or may participate in a financial institution plan offered by an approved pension administrator on the island. The Act provides for an employer to administer the pension plan. However, it is usual to appoint a third-party administrator. The administrator must be a local company incorporated under the Bermuda Companies Act 1981 whose objects and powers as stated in its Memorandum of Association enable it to carry on pension plan administration. The administrator is regulated by the Pension Commission and is responsible for the record-keeping of the plan members, and for the various filings, including the annual information report, prescribed under the Act and regulations. Depending on the servicing structure, plan assets may be settled with the administrator or with a separate trustee or nominee on behalf of the trustee. An investment investor usually selected by the employer is appointed by the trustee/administrator to invest the plan assets in accordance with pre-set and prescribed guidelines.

Where the employer employs both Bermudian and non-Bermudian employees, one approach is to establish parallel pension plans by trust deed, the provision of which mirror each other except for the prescribed lock-in and portability rules which must be included in the plan for Bermudian employees pursuant to the Act.

The Trust Group at Appleby can assist you with product design issues and plan structure, document preparation and review. The Trust Group also provides legal advice relating to the employer's obligations under the Act.

SECTION C — REAL PROPERTY ISSUES

1. General Property Holding Powers

(i) Local companies — The Companies Act 1981 (as amended) (Act) effectively imposes restrictions in respect of a company's ability to hold an absolute or freehold interest in land in Bermuda. Generally, only a local company is permitted to acquire such an interest. A local company is defined in the Act as being a company incorporated in Bermuda, with not less than 60% of its shares being beneficially owned by Bermudians.

(ii) Overseas companies — An overseas company, which is defined in the Act as a 'body corporate' incorporated outside Bermuda, is precluded from engaging in any form of business in Bermuda including entering into a lease or tenancy agreement without first obtaining a permit issued by the Minister of Finance (Minister) in accordance with Section 134 of the Act. Once an overseas company receives a permit, it will usually be permitted to enter into a lease or tenancy agreement in respect of land (bona fide) required for its own business purposes for a term not exceeding 50 years, without requiring any further permits or consents. It may also, with the Minister's prior consent, be permitted to enter into a lease in respect of residential property for a term not exceeding 21 years. This is provided such property is required for the purpose of providing accommodation or recreational facilities for its officers.
and employees. If a lease relating to residential property is to subsist for a term exceeding five years, an overseas company will, in addition to the Minister’s consent, require the prior consent of the Minister of Labour, Home Affairs and Public Safety (Immigration Minister). This requirement is included in the provisions of the Bermuda Immigration and Protection Act 1956 (as amended) (Immigration Act).

(iii) Exempted companies — An exempted company, which is defined in Section 127 of the Act (inter alia) as a company incorporated in Bermuda, that does not qualify as a local company, may enter into a lease or tenancy agreement in respect of land (bona fide) required for its own business purposes for a term not exceeding 50 years without any form of consent. An exempted company may, with the Minister’s prior consent, also enter into a lease or tenancy agreement in respect of residential property for a term not exceeding 21 years, provided such property is required for the purpose of providing accommodation or recreational facilities for the company’s officers and/or employees. These powers are included in Section 129 of the Act, as well as in the First Schedule to the Act. The powers contained in the First Schedule are often incorporated into an exempted company’s Memorandum of Association by reference.

2. General Comments Regarding Consents and Permits

In order to avoid contravening the Act, an exempted company, or an overseas company, ought to ensure that any premises obtained on the basis of a consent, a permit or otherwise in accordance with the Act, are used strictly for the stated purpose. By way of example, if the permit or consent specifies that the relevant premises be used for a company’s own business purposes, the premises should not be occupied by other parties on the basis of sub-letting arrangements on the part of that company.

The penalty for contravening the Act can include criminal liability for the company in question as well as for its directors or officers. It can also include the escheat of the property in question to the Crown and the revocation of the company’s permit or consent.

3. Applying for Permits and Consents

Section 134 of the Act outlines the procedures that should be followed by an overseas company when applying for a permit. Normally, the main purpose for the application will be to empower the company to carry out its primary business in Bermuda and any land holding powers will simply be ancillary to the primary purpose. Section 143 of the Act sets out the standard property holding powers which automatically accompany the grant of a permit.

Where an overseas or exempted company opts to take residential property in its own name in order to provide accommodation or recreational facilities for its officers or employees, the application
to the Minister may be submitted in letter form. The letter should include the key terms of the lease including particulars of the premises, the proposed rent and the term of the lease. The parties to the lease should be specified and the officers or parties who intend to occupy the premises should also be specified. To date, these requirements have not been set out in the Act or in any other policy statement produced by government and therefore application requirements can vary from transaction to transaction. There is no application fee associated with such an application and the timeframe for securing a consent of this nature is usually about five working days.

4. **Negotiating and Agreeing Leases/Subleases**

While the provisions contained in leases and subleases in Bermuda can be similar, there is no such thing as a standard form commercial lease or sublease in Bermuda. For this reason, local legal advice should be sought before signing any lease or sublease. This advice should also be sought before signing any term sheet or offer letter relating to any proposed lease or sublease.

The information that ought to be obtained and considered when negotiating the terms of a lease or a sublease in respect of commercial premises should include the following:

- A professionally prepared plan should be supplied to the tenant and the premises should be described by reference to that plan.

- The plan should show the premises as well as any common areas that will be enjoyed with the premises.

- Any alterations or fit-out requirements ought to be addressed at the earliest possible stage, especially if the alterations or fit-out works will affect the date of occupation and the payment of rent. The works should also be shown on a plan (if possible), for the sake of clarity. Additionally, the landlord should be asked to confirm whether or not the works will need to be removed upon the expiration of the lease, because any related obligations on the part of the tenant should, in turn, be included in the lease.

- If the rent and service charge (if any) are being calculated on a square foot basis, the plan should show the square area of the premises. The square area of the rentable space contained in the building (as a whole), should also be confirmed by the landlord because this is often relevant to the rent and service charge calculations.

- The proposed term of the lease together with the term of any option to renew should be agreed between the parties at the earliest possible stage.
• Any rights that will be enjoyed with the premises such as car parking rights should be confirmed by the landlord with sufficient certainty. Similarly, any rights that will be reserved by the landlord, such as the right to pass through a specific portion of the premises, should be confirmed.

• If a sublease (as opposed to a lease) is being proposed and it expressly refers to covenants contained in the head-lease that will need to be observed and performed by the tenant, the tenant should be provided with a copy of the head-lease.

• The rent and the facilities included in the rent should be stated with clarity. Rental rates for quality business premises in Bermuda currently range from about $35 per square foot to about $70 per square foot per annum. In addition to the rent, a service charge will normally be payable by the tenant. Service charge rates tend to range from $5 to $15 per square foot, per annum. Both the rent and the service charge are normally payable in advance and on a monthly basis. A professional commercial rent surveyor or agent can be consulted for the purpose of confirming whether or not a rent or a service charge being demanded by a landlord, represents a fair market rate.

• The mechanism for effecting rent increases during the proposed term or during any optional term should be specified with clarity. Normally, rent increases will either be agreed by reference to the open market rent that will be payable in respect of the premises from time to time, or by reference to the Consumer Price Index. The Consumer Price Index is an inflation-linked index produced by the government’s Statistics Department. A mechanism for resolving any disputes relating to rent increases should also be agreed between the parties and incorporated into the lease.

• Any service charge specified by the landlord should draw reference to the particular services and outgoings that are included in the charge. Most service charges, for example, cover the costs of maintaining the exterior and structure of the building, as well as the costs of cleaning and maintaining all of the internal common areas and plant, but the service charge may extend to cover annual outgoings paid by the landlord such as Land Tax, Corporation Tax and building insurance. The lease should, in any event, place the landlord under an obligation to provide an annual accounting of the actual service charge related expenses. Typically, leases will permit the landlord to recover any shortfall between the service charge expenses actually incurred during the course of a lease year and the service charge moneys paid in advance by the tenant. Equally, leases will typically provide that the tenant receive a credit if the service charge moneys actually paid by the tenant during any given lease year exceed the service charge related expenses actually incurred by the landlord. The service charge is normally calculated on the basis of the square area of the premises as a percentage of the square area of the whole building, but in some instances the tenant is simply required to pay a ‘reasonable proportion’ of the service charge and related expenses incurred by the
landlord. In any event, both the method of calculation and the services that are included ought to be clearly stated by the landlord at the outset.

- The covenants on the part of a tenant that are typically incorporated into a lease, include (inter alia) obligations such as to pay the rent and any service charge, to maintain the interior of the premises in good repair and to use the premises for office use only. While these covenants tend to be similar in most leases, one of the most controversial covenants tends to be the tenant’s alienation covenant. While the tenant will not normally be permitted to sublet, assign or otherwise deal with its premises without the landlord’s consent, some leases do provide the tenant with the ability to sublet or share space with its affiliates without the landlord’s consent. Quite often the definition of ‘affiliate’ appearing in Section 86 of the Act, which essentially amounts to a parent/subsidiary relationship where there is 50% or more voting control being exercised by the parent company, will be incorporated into a lease.

- The issue of insurance should also be raised with the landlord. The landlord should be asked to either supply a copy of his insurance policy relating to the building, or to confirm whether or not the policy contains a waiver of subrogation rights on the part of the insurer in respect of any tenants occupying the building. If such a clause does not exist, the tenant should ensure that either its interest (as tenant) is noted on the landlord’s insurance policy or failing that, the tenant should put its own insurance in place. The tenant should in any event, ensure that it is covered for public liability.

5. **Termination of Tenancies**

Normally, a commercial lease will subsist for a fixed term and it will terminate without any further notice or act on the part of either the landlord or the tenant at the end of the term specified in the lease.

A lease will not normally be capable of being terminated by either party before the expiration of the term unless there is a material breach committed by one of the parties. The Landlord and Tenant Act 1974, which governs all commercial leases in Bermuda, provides that notwithstanding a breach on the part of either a landlord or a tenant, a lease is not capable of being terminated without an Order of Court. This means that a landlord cannot simply lock a tenant out of the premises for a breach of the lease. It also means that a tenant cannot simply cease paying rent and vacate a premises due to a breach on the part of a landlord. An application to the Court to terminate a lease tends to be a relatively time consuming procedure and an order for termination can take months to obtain.
6. **Security of Tenure**

There is no statutory protection for business tenants upon lease expiry. It is therefore commonplace for tenants to negotiate contractual options to renew. Any conditions precedent to renewal must be observed strictly or the right to renew will fall away.

7. **Subletting**

An exempted company should not enter into any sublease or space sharing arrangement in respect of its premises in the absence of a licence issued by the Minister in accordance with Section 129A of the Act. A specific licence is required because subletting and space sharing activities are viewed by the Bermuda Government as ‘doing business in Bermuda’ within the meaning of Section 129A(1) of the Act. This perception applies even if such activities are conducted on a one-off basis and in the absence of a profit element. Doing business in Bermuda is generally precluded unless specifically sanctioned by the Minister. Any exempted company interested in subletting or sharing space should seek local legal advice before commencing negotiations with potential sub-tenants.

In order to obtain a licence pursuant to Section 129A, a formal application must be submitted to the Minister that includes supporting documents. The Licence application must be accompanied by a $1,000 fee. If the licence is granted, a further $1,000 is payable each January whilst the licence subsists. All fees are payable to the Accountant General. Licences generally subsist for not more than five years and relate to specific premises. The Minister may impose conditions including that the tenant not make a ‘profit’ from the subletting. The processing time for obtaining a licence is around six to eight weeks. Since the Minister can unilaterally refuse to grant a licence without giving a reason, a company should not take more space than it immediately requires on the assumption that it will be able to sublet surplus space at will.

8. **Individuals and Land**

Non-Bermudians are not permitted to acquire the freehold in land in Bermuda without first obtaining a licence to acquire land in accordance with the provisions of the Immigration Act. A licence is also required by a non-Bermudian in order to enter into any lease or tenancy agreement for a term extending beyond five years or having a right of renewal which might extend the term beyond this period. Any lease or tenancy agreement entered into in contravention of this requirement will be void.

Any officer or employee of a company interested in acquiring a long-term interest in land should review Appleby’s *Guide to the Acquisition of Residential Property in Bermuda by Non-Bermudians* which can be provided upon request.
SECTION D

1. Estate Planning Considerations for Personnel Relocating to Bermuda

When a corporation chooses to establish a physical presence in Bermuda it is often necessary or desirable to move key personnel from the head office to Bermuda. These individuals should give careful consideration to their personal estate planning to minimise taxes, protect/preserve assets, and to maximise growth of their net worth. While it is not possible in this format to deal with the subject matter in the detail it deserves, the following discussion is intended to highlight some of the consideration and planning opportunities, and will end with a brief discussion of trust law and private trust companies in Bermuda.

Since the majority of the non-Bermudian workforce will have term limits on their work permits, it is helpful to consider the estate planning process as consisting of three stages: (i) planning for arrival in Bermuda; (ii) planning while resident in Bermuda; and (iii) planning for departure from Bermuda. One of the major considerations in any estate plan is minimisation of taxes levied by those high tax jurisdictions where the individual has some connection. Accordingly, Appleby’s Trust Practice Group often works with the individual’s ‘onshore’ tax advisers to structure a comprehensive estate plan.

2. Planning for Arrival in Bermuda

When an individual is preparing to relocate to Bermuda from a high tax jurisdiction, onshore professional advice should be sought to: (i) minimise the tax consequences arising from becoming non-resident; and (ii) minimise the ability of the high tax jurisdiction to tax future earnings, profits or capital gains realised offshore. This may involve taking steps to effectively sever residency, renounce citizenship or change domicile. Consideration should also be given to the impact that the move might have on corporations or partnership interests owned/controlled by the individual, for example favourable tax treatment might be lost if the business becomes owned or controlled by a non-resident of the high tax jurisdiction.

It may be appropriate to consider the creation of ‘Emigration Trusts’ to hold assets and/or provide for relatives that will be remaining behind. It may also be appropriate to consider structures that will be used to hold those assets or investments that will be expatriated from the high tax jurisdiction. This often involves the creation of a Bermuda corporation and/or a Bermuda trust to provide asset protection or to avoid any forced heirship rules that exist in jurisdictions outside of Bermuda.

3. Pension Trusts and Employee Benefit Trusts

The new employer and the employee may also give consideration to employee benefit and stock option plans that are flexible enough to deal with the migrant non-Bermudian workforce. These
are commonly dealt with through flexible employee benefit trust structures. The employer may choose to establish a registered or an unregistered pension trust for their non-Bermudian workforce. In this case, an application for registration is made to the Registrar General pursuant to the Pension Trust Funds 1966 Act. The letter of application, a copy of the trust deed and the plan in prescribed form must be filed with the Registrar General with the applicable fee. Registration may qualify the plan as a pension scheme in certain onshore jurisdictions with an attendant tax benefit when the funds are repatriated to the employee’s home country. Onshore tax advice should be sought in the particular case. A registered trust may last indefinitely and is not subject to perpetuity rules.

The employer may consider various incentive compensation and bonus opportunities for its international workforce. In this regard, our trust group can work with the employer to design employee share schemes, executive share options, share incentive plans, longevity and compensation awards which may be governed by one trust deed and administered by a local Bermuda trustee. Our affiliate Appleby Trust (Bermuda) Ltd (Appleby Trust) is available to provide trustee services. Appleby Trust is a local trust company regulated and licensed by the Bermuda Monetary Authority to conduct trust business in Bermuda. The capable staff at Appleby Trust is familiar with employee benefit trusts and can be consulted in all aspects of administration.

4. Planning while Resident in Bermuda

Once the immigrant becomes resident in Bermuda, it will be necessary to review their will, power of attorney, living will/health care directive, and other related documentation to ensure compliance with local laws. Further, the preparation of a new will that complies with Bermuda law may be an important element in demonstrating a change in residence and domicile. Consideration should also be given to methods that can be used to effectively distribute assets to relatives in high tax jurisdictions. In many instances the use of an *inter vivos* or testamentary trust can substantially reduce the beneficiaries’ exposure to taxes in their home jurisdiction.

Naturally, many of the onshore considerations still apply when creating an estate plan, such as continuity and retention of family businesses and properties, sheltering property from potential creditors, forced heirship laws of certain jurisdictions, protection of the family fortune from dissipation by less responsible family members, and providing for charitable/philanthropic purposes. Bermuda offers some additional planning vehicles/opportunities that are typically not available in other jurisdictions. For example, the purpose trust and private trust companies have been used by many high net worth individuals as part of their family office structures and to achieve their philanthropic objectives.

In Bermuda it is common for people with Bermudian status to own Bermuda real estate through a trust structure to minimise the incidence of stamp duty (i.e. ‘taxes’ of up to 15% of the value of the property) that arise on the death of the individual. The costs of implementing this structure are substantially reduced if it is created at the time the property is purchased, particularly if non-Bermudian funds are used.
5. Planning for Departure from Bermuda

When the time comes to leave Bermuda, the individual should again engage in an estate planning exercise. Depending upon the country where the individual will be establishing residence or domicile they should consider whether it is appropriate to create a trust or corporate structure to protect against possible exchange controls, political instability, nationalisation or similar measures to mitigate sovereign risk. Their new residence may also have forced heirship laws and consideration should be given to how these provisions might be avoided where appropriate.

Prior to relocating to a taxing jurisdiction professional assistance should be sought to identify what steps should be taken to minimise taxes, probate fees, stamp duties, gift/inheritance and other forms of taxes that may be levied in the new jurisdiction. This may involve the creation of ‘immigrant trusts’, or other trusts or corporate structures to hold assets that do not need to be brought ‘onshore’. Alternatively, where there will be an investment into the new jurisdiction to purchase real estate or other assets, it may be appropriate to invest through an offshore corporation or trust.

Finally, the individual should also give consideration to the impact that the move might have on corporations or partnership interests owned/controlled by the individual. For example, favourable tax treatment might be lost if the business becomes owned or controlled by a resident of the high tax jurisdiction.

6. Trusts in Bermuda

a. General Trust Law

Bermuda has been in the business of trusts for the past 50 years and has developed a formidable reputation as being one of the premier offshore jurisdictions in which to develop trust structures. Bermuda’s practitioners have considerable experience in the field of trusts and are used to dealing with trust matters with people from all over the world, particularly with individuals whose legal systems do not derive from the English common law.

Bermuda has been at the forefront in the creation of the purpose trust, which was first introduced by the Trusts (Special Provisions) Act 1989. This statute was amended by the Trusts (Special Provisions) Amendment Act 1998 and has led to expanded opportunities for the use of purpose trusts. Purpose trusts are discussed below.

A trust is a legal relationship and not a separate legal entity. The relationship is created by the person wishing to create the trust (the ‘settlor’ or the ‘grantor’) and the trustees (the persons willing to undertake the office of trustee). As part of this relationship property (the ‘trust fund’) is declared to be held by the trustees for the benefit of certain parties (the ‘beneficiaries’) or for certain purposes.
A trust has the following characteristics:

- The assets constitute a separate fund and are not a part of the trustees’ own estate.

- Title to the trust fund stands in the name of the trustees or in the name of another person on behalf of the trustees.

- The trustees have the power and the duty, in respect of which they are accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon them by law.

While, in the case of a discretionary trust, the trustees will have wide discretionary powers (although they may sometimes be constrained by the requirement for the consent of a third party such as the protector), the trust deed will often be supplemented by an informal and confidential letter from the settlor or grantor to the trustees setting out his wishes on such matters as the amount and timing of distributions, investments, employment of advisers, those who should be regarded as primary beneficiaries and so forth. While this letter is nonbinding and intended for the trustees’ guidance only, the trustees will generally respect the settlor or grantor’s wishes and strive to act in accordance with them.

Some advisors prefer to see an attorney/client privileged memorandum, which is not supplied to the trustees, but instead retained on the attorney’s file.

It is not uncommon for the trust deed to provide for the appointment of a protector. There is no statutory definition of a protector; the function of a protector and his duties and responsibilities are essentially whatever the trust deed provides. The protector is often a close friend or professional adviser of the settlor or grantor, and should be familiar with the circumstances and needs of the beneficiaries, the family background and dynamics, and the wishes of the settlor or grantor. The protector may be an individual or a committee, or combination of individuals, or a corporation.

The powers and duties of a protector may vary from case to case, but almost invariably the protector will be given the power to appoint and remove trustees and, perhaps, to change the law which governs the trust. There may also be a requirement for the trustees to obtain the protector’s consent before exercising certain of their powers (for example, powers to add or remove beneficiaries, to appoint investment managers, to declare an early termination date and so forth) or to act in accordance with directions given by the protector. A decision needs to be made whether the protector is to be given fiduciary obligations or not and the trust deed will reflect this decision.

b. Purpose Trusts
The non-charitable purpose trust was introduced in Bermuda in 1989. These trusts do not have beneficiaries, only purposes. They are particularly useful for philanthropic purposes, which are
slightly outside the tax definition of charitable. They have been established in Bermuda so that they are tax neutral. Examples of trusts created are those for humanitarian assistance and promotion of peace.

Purpose Trusts have also had considerable appeal when used in tandem with private trust companies (referred to below).

7. **Private Trust Companies**

Private trust companies have become increasingly popular with clients who have created a family office structure, clients from civil law countries, or those who do not wish to use public trust companies. In very simple terms, it is a Bermuda company with trustee powers which is not required to be registered or licensed since it only acts as trustee for a limited number of connected/related trusts.

Through the use of a purpose trust, the settlor or grantor is separated from the ownership of the company which acts as the trustee of a family trust. Economic benefit accruing within the purpose trust is not an issue here because the required capitalisation of a private trust company is relatively nominal. A licensed trust company creates the purpose trust by way of declaration. The purpose of the trust is to hold shares in the private trust company. Family members can then sit on the board of this private trust company. It may also be used to insulate a licensed trustee from the risk associated with holding directly shares of a trading company.
The Insurance Act 1978, as amended, (Insurance Act) and related regulations apply to any person carrying on insurance business in or from within Bermuda, and provide for the registration of all insurers and insurance managers, brokers, agents and salesmen. No person shall carry on insurance business unless registered as an insurer under the Insurance Act, and the Bermuda Monetary Authority (Authority) has wide discretion to refuse registration. Under existing government policy, registration as an insurer and as an insurance manager, agent or broker is not possible within the same body corporate.

A. INCORPORATION, REGISTRATION, LICENSING AND REGULATION

1. Registration of Insurers

The Insurance Act provides for four classes of general business insurance licences. The Authority assigns the applicant to one of four classes depending on the relationship between the insurer, its shareholders and policyholders, and on the type and scope of its business. The Authority also has the power to vary the terms of registration, but must give notice to the insurer if it intends to do so (and must also take into account any written representation made by the insurer within such period as may be specified in the notice) other than on application by the insurer. The Authority may, on application, change the class of an insurer or change it from general business to long-term business, or vice versa. An insurer may also be licensed to carry on both general and long-term business.

In determining the class of a general business insurer, the Authority uses criteria set out in Sections 4B-4F of the Insurance Act, although the Authority has the discretion to grant a licence in a particular class, notwithstanding the strict definitions in those sections, if it considers it appropriate.
to do so, after taking into account the relationship between the shareholders, the policyholders and the public, and the level of regulation required. However, the Authority has no discretion to put a company into Class 4 unless it has, or will have before it carries on insurance business, a statutory capital of not less than $100 million.

The four classes are as follows:

**Class 1:** Pure captives, or companies which write coverage for a group of affiliates.

**Class 2:** Insurers owned by unrelated shareholders who insure the risks of any of those shareholders or their affiliates. These insurers may also insure business which, in the opinion of the Authority, is connected with the operations of the shareholders or their affiliates. These are, essentially, association captives and agency captives, which may write a maximum of 20% third-party business. Class 2 also includes certain pure or group captives which write a maximum of 20% third-party business.

**Class 3:** A catch-all class for insurers not falling into Classes 1, 2 or 4.

**Class 4:** This class applies to large carriers writing business including property catastrophe reinsurance or excess liability business. The provisions of the Insurance Act also contemplate that some large carriers may need to demonstrate during a capital raising exercise that they already hold a licence. However, since this class of licence requires substantial capital, this could be problematic if the capital has not yet been raised. Therefore, the Insurance Act permits registration, but not underwriting, at a much lower level of statutory capital ($1 million vs. $100 million to commence underwriting). Class 4 insurers must have a statutory capital of not less than $100 million; however, companies writing such business are generally not registrable in Class 4 if they are also registrable under Classes 1 or 2 (ie, all or substantially all of their premiums written come from related risks).

In determining whether or not to register an applicant insurer, the Authority must also take into account whether:

- the applicant appears to it to be a fit and proper body to be engaged in insurance business;
- the applicant has, or has available, adequate knowledge and expertise;
- any person to be concerned in the management of the business is a fit and proper person to be so concerned.
In addition, an applicant will not obtain registration until the Authority is satisfied as to the insurance programme generally and that the value of its assets exceeds its total liabilities by the prescribed amount. As well as determining the solvency margin, the regulations dictate how assets and liabilities should be valued for this purpose.

2. **Conditions of Registration, Incorporation and Capitalisation of the Company**

A Certificate of Registration is issued which will, in most cases, stipulate the following conditions:

- the insurer shall, at all times in and during the course of each financial year it carries on insurance business, meet and maintain the relevant solvency margin(s), liquidity and other ratios applicable by law thereto;
- the insurer shall not, without obtaining the prior written approval of the Authority write ‘unrelated risks’, as such expression is understood in the Insurance Act (applicable to Class 1 insurers only. Class 2 insurers have a similar condition which stipulates the amount of ‘unrelated risks’ (up to 20%) which the company can underwrite);
- the insurer shall not, without obtaining the prior written approval of the Authority, write any long-term business (or, in the case of a long-term business insurer, general business), as such expression is understood in the Insurance Act;
- where an applicant has indicated in its business plan that it intends to write reinsurance business only, the Certificate of Registration will typically include a further condition that the registrant may not write direct insurance. This will oblige the reinsurer to revert to the authorities should it later propose to include direct writings in its insurance programme.

3. **Share Capital Requirements for General and Long-term Business**

A distinction is drawn in the Insurance Act between an insurer which carries on general business and one carrying on long-term business (which should not be confused with business having a long tail, eg, liability insurance). Long-term business effectively reflects the customary business of a life assurance company.

The Insurance Act stipulates that any insurer carrying on general business in Classes 1, 2 or 3 must have paid-up share capital of at least $120,000. A Class 4 general business insurer must have paid-up share capital of at least $1,000,000. An insurer carrying on long-term business must have a paid-up share capital of at least $250,000. Insurers may be registered as a Class 1, 2 or 3 insurer and as a long-term insurer (insurers registered to carry on both categories of business are typically called ‘composites’) provided they have paid-up share capital of at least $370,000. A Class 4 composite insurer must have paid-up share capital of at least $1,250,000. The Insurance Act does contemplate registration of a Class 4 insurer (either general business only or both general and long-term business) before payment of the full amounts stipulated in the preceding sentences, provided that no insurance business is written until the insurer is fully capitalised, and provided
further that at least $120,000 in the case of general business only, and $370,000 in the case of a composite, is authorised, issued and fully paid before registration.

4. **Statutory Capital and Surplus**

There are also the following minimum capital and surplus requirements (which include the foregoing minimum authorised share capital requirements): Class 1 must have a minimum capital and surplus of $120,000 for general business only and $370,000 for composite business; Class 2 must have $250,000 for general business only and $370,000 for composite business; Class 3 must have $1 million for general business and $1.250 million for composite business; and Class 4 must have $100 million for general business and $100.250 million for composite business. Composite insurers must keep their general business capital, assets and liabilities segregated from their long-term business capital, assets and liabilities and, with one exception (a ‘Section 24(6) composite’), must file two returns — one dealing with the general business in its portfolio and one dealing with the long-term business.

5. **Admittance of Assets**

Under the Insurance Accounts Regulations 1980, as amended, where an insurer wishes to secure additional fixed capital by means of an irrevocable letter of credit or a guarantee in its favour, an asset may be recorded, with the approval of the Authority, and the statutory capital increased by a corresponding amount. Where such an asset is recorded, it must be shown net of any allowance for its collectability. Where additional fixed capital has been raised through a letter of credit or guarantee, the name of the person granting the letter of credit or guarantee must be disclosed in the notes to the statutory balance sheet.

6. **The Principal Representative**

Every insurer is required to maintain a principal office in Bermuda and to have a principal representative in Bermuda. In most cases, the latter will be the insurer’s insurance manager, and the principal office will be the office of the insurance manager. However, the Authority has the discretion to approve any person, whether a natural person or company, to serve as principal representative. The functions of the principal representative include: executing official documents on behalf of the insurer; taking responsibility for the insurer’s actions; and submitting of reports and the required declarations and returns to the Authority. The principal representative also has a statutory duty to report certain events relating to the insurer(s) it represents.

If the principal representative determines that the insurer is likely to become insolvent, or is certain that the insurer fails to comply with certain requirements, then it must immediately notify the Authority and submit a written report to the Authority within 30 days giving details of the case. Events giving rise to the submission of a report include:
• failure to comply substantially with a condition imposed upon the insurer by the Authority relating to a solvency margin or a liquidity or other ratio;
• failure to comply with any other condition imposed by the Authority;
• failure to comply with requirements or orders under certain provisions of Sections 20–22 of the Insurance Act relating to investment in Bermuda by non-resident insurance undertakings;
• failure to comply with a requirement or a condition specified in a direction given by the Authority under s. 56 (which permits the Authority to exempt an insurer from certain provisions of the Insurance Act, subject to such conditions as it may impose);
• involvement of the insurer in any criminal proceedings, whether in Bermuda or abroad; and
• the insurer ceasing to carry on insurance business in or from Bermuda.

Also, the principal representative must countersign any affidavit of a Class 4 insurer relative to either the payment of a dividend in excess of 25% of its statutory capital, or to a decrease in its capital of more than 15%. An insurer may not, without a reason acceptable to the Authority, terminate the appointment of its principal representative, and a principal representative may not cease to act for the insurer, unless 30 days’ notice of the intention to do so is given in writing to the Authority.

B. THE ACCOUNTING PROVISIONS

Perhaps the most onerous obligations imposed by the Insurance Act are in relation to the accounting provisions and the preparation of statutory financial statements in respect of the insurance business of an insurer for each financial year.

1. Statutory Financial Statements

These statements must be in the prescribed form set out in the Insurance Accounts Regulations 1980, as amended. The information included in the statements is designed to fulfill the following purposes:

• to give an early warning to any person examining the statements of any financial or operational difficulties into which the insurer’s business has fallen or might appear likely to fall; and
• to provide the basis upon which the Authority may in good time take action under the Insurance Act, or any other statutory power available to him or it, for the safeguarding of any element of the public interest involved in or affected by the insurer’s business.

A duty is imposed on every Class 1 insurer to have a copy of its statutory financial statements, together with the auditor’s report, available at its principal office for production to the Authority, if directed by it to produce it, not later than six months (or such longer period, not exceeding nine
months, as the Authority may allow) after the end of the financial year to which the statements relate. In addition, every Class 1 insurer must, within 21 days of its statutory financial statements becoming available, inform the Authority by written notice of that fact. The Insurance Act requires all insurers to keep their statutory financial statements at their principal office in Bermuda for at least five years. As well as keeping copies at their principal office, Class 2, 3 and 4 general business insurers and long-term insurers are required to file their statutory financial statements annually, in addition to their statutory financial returns (described below). In their filings with the Authority, Class 4 insurers must include a schedule of their reinsurances, setting out the names and ratings of their reinsurers together with a statement of certain reinsurance accounting matters. The Insurance Act imposes monetary penalties for late filing.

2. **Maintenance of Financial Records in Bermuda**

The Insurance Act enables the issuance of regulations to require insurers to maintain certain financial and business records in Bermuda. The regulators have already distributed unofficial guidelines. The level of detail required varies with the class of insurer. The Authority is authorised to grant exemptions from some or all of the requirements in appropriate cases. Please see ‘Special Practice Notes’ below for further details.

3. **Approved Auditor**

The statutory financial statements have to be audited annually by the insurer’s approved auditor, that is to say, an auditor who has been approved by the Authority as the independent auditor of that insurer and who will report to the Authority on the declarations and returns submitted. The auditor is approved at the time of registration of the insurer under the Insurance Act and, under current policy, the Authority will only approve individuals or firms of chartered accountants resident in Bermuda. In this regard, it should be noted that all the major international accounting firms have local affiliates.

4. **Statutory Financial Returns**

At the same time, as notice of the availability of its financial statements is given to the Authority (for Class 1 insurers) or financial statements are filed (for Classes 2 to 4 and long-term insurers), the insurer must send to the Authority an audited financial return (referred to as the statutory financial return (the ‘Return’)) which is in a prescribed form. The Return is intended, among other things, to provide the Authority with a checklist of key characteristics of the insurer and comprises an audited analysis of prescribed ratios and statistical data. Where the insurer has carried on general business in the financial year, a general business solvency certificate will be filed with the Return. Where the insurer has carried on long-term business during the year, a long-term business solvency certificate will be required, accompanied by the certificate of the
insurer’s approved actuary. The cover sheet for the Return must disclose: the classes of business written; the amount of gross premium in respect of each class; whether there is any annual aggregate stop loss protection and, if so, the maximum amount for each class of business; and any other information necessary to describe the nature of the insurer’s business. The general business and long-term business solvency certificates must also include:

i. a statement as to whether the insurer has complied with all conditions attached to its Certificate of Registration; and

ii. if the answer to i. is negative, or the insurer has not met its minimum liquidity ratio (general business only) or solvency margin, a statement as to whether any corrective action has been taken. Details of any corrective action must be attached to the solvency certificate.

It may also be necessary to include with the insurer’s statutory filings an opinion from a loss reserve specialist (described below) as to the adequacy of the insurer’s loss reserves for general business. This requirement does not apply to most Class 1 insurers, but will apply if the insurer is discounting reserves to meet its solvency margin or if more than 30% of its business consists of professional liability business, in which case it must supply an opinion for each relevant year. Class 2 insurers must supply the opinion every three years (unless discounting reserves or writing more than 30% professional liability business, in which case it must supply the opinion for each relevant year) and classes 3 and 4 must supply the opinion annually.

If, in relation to a Class 1 insurer, the Authority detects anything amiss in the statutory filings, it may call for the production of the statutory financial statements in order to ascertain whether or not action needs to be taken to regulate the activity of the insurer. In respect of the other classes, the Authority can call upon the principal representative and insurance managers for further information.

5. **Statutory Ratios**

The Insurance Returns and Solvency Regulations 1980, as amended, provide that the Return includes three ratios as follows:

a. **Premiums to Statutory Capital and Surplus Ratio**
   This ratio describes the proportion that net premiums written by the insurer during the year bear to the insurer’s statutory capital and surplus as at the end of that year.

b. **Five-year Operating Ratio**
   This ratio describes the proportion that the insurer’s losses and expenses as a percentage of premiums (expressed cumulatively for the period of five consecutive years (including the relevant year)) bear to the insurer’s investment income (expressed in the same way).
c. **Change in Statutory Surplus Ratio**
This ratio is designed to reflect the proportionate increase or decrease in statutory capital and surplus since the end of the preceding financial year.

6. **Loss Reserve Specialist**

A loss reserve specialist is an individual (typically an actuary) approved by the Authority to opine on an insurer’s loss reserves. For a Class 1 insurer, where the gross premiums derived from professional liability insurance constitute more than 30% of the gross premiums written by the insurer during any year, the loss reserves relative to that business must be certified by way of an opinion from the insurer’s loss reserve specialist, which is filed with the insurer’s annual return. If the loss provisions relating to professional liability insurance cannot be separated from the rest of the insurer’s business for the purpose of the loss reserve specialist’s opinion, then the opinion must be given on the whole of the loss provisions. Further, where a Class 1 insurer is discounting loss reserves and it does not meet its general business solvency margin on an undiscounted basis (see 10. below for more details), it must file with the Authority a loss reserve specialist’s opinion on its loss and loss expense provisions. Class 2 insurers must file a loss reserve specialist opinion on loss reserves for their entire book of business every three years. If a Class 2 insurer is either writing more than 30% professional liability business or is discounting reserves in order to meet its solvency margin, it must file an opinion for each year either event occurs. All Class 3 and 4 general business insurers must file a loss reserve specialist opinion on loss reserves for the insurer’s entire book of business annually.

7. **Solvency Margin**

One of the purposes of the solvency certificate referred to earlier is to establish whether or not the insurer’s statutory assets exceed its statutory liabilities by an amount greater than the minimum solvency margin. This will be determined by reference to the following:

a. **General Business**
There are minimum solvency margins for each class, where the general business assets of an insurer must exceed its general business liabilities by the greater of:

1) **Capital Test**

- Class 1 — $120,000;
- Class 2 — $250,000;
- Class 3 — $1,000,000;
- Class 4 — $100,000,000.
2) Premium Test

For Classes 1, 2 or 3, where net premiums written in a given year do not exceed $6 million, the solvency margin is 20% of net premiums written. For premiums written in excess of $6 million, the solvency margin is $1.2 million plus 10% of the excess for Classes 1 and 2, and 15% of the excess for Class 3. Class 4 insurers must maintain a solvency margin of 50% of net premiums written. For Classes 1, 2 and 3, “net premiums written” means the net amount, after deductions of any premiums ceded by the insurer for reinsurance, of the premiums written by that insurer during that year in respect of its general business. In calculating its ‘net premiums written’ for the purpose of this test, a Class 4 insurer may only deduct any amount up to 25% of its gross premiums written for ceded reinsurance.

3) Loss Reserve Test

This test applies the relevant percentage to the insurer’s provisions for losses and loss expenses and other general business insurance reserves (lines 17 and 18, respectively, of the statutory balance sheet). The relevant percentage for this test varies by class: for Classes 1 and 2 it is 10%, for Classes 3 and 4 it is 15%.

Failure to maintain the required solvency margin carries particular consequences, other than being merely in breach of the Insurance Act. Class 3 or 4 insurers which fail to meet the required margins must notify and explain their position to the Authority. They may not pay dividends until the failure is rectified. Additionally, Class 4 insurers whose statutory capital falls to $75 million or less must include additional reports with their notification to the Authority, such as the opinion of a loss reserve specialist.

Class 4 insurers may not pay dividends of more than 25% of their statutory capital and surplus unless they file an affidavit stating that they will continue to meet the required margins. Class 4 insurers must also apply to the Authority and file an affidavit of solvency before decreasing their capital by more than 15%.

b. Long-term Business

The solvency margin for long-term business is $250,000.

c. Composites

An insurer licensed to conduct both general and long-term business must maintain a minimum solvency margin equal to the sum of the long-term business minimum solvency margin and the minimum solvency margin for the class of general business it is licensed for. For example, the minimum margin of solvency for a composite writing mainly third-party general business (Class 3) would be $1,250,000.
8. **Premium Writings Restriction**

The maximum net premium writings of a general business insurer are restricted by the operation of the solvency margin requirement. For Classes 1, 2 and 3, the basic ratio is 1:5 (one dollar of capital for every five dollars of net premiums written) for up to $6 million of net premiums written, after which the ratio becomes more generous (1:10 for Classes 1 and 2, 1:6.75 for Class 3). For Class 4 insurers, the basic ratio is 1:2 regardless of premium volume.

9. **Liquidity Ratio**

The Insurance Returns and Solvency Regulations 1980, as amended, provide for a minimum liquidity ratio for general business carriers. The liquidity ratio for such a carrier requires that the value of its relevant assets must be not less than 75% of the amount of its relevant liabilities. There are certain categories of assets which do not qualify as relevant assets; for example, real estate, investment in (or advances to) affiliates and certain unquoted securities. The liquidity ratio does not apply to insurers carrying on long-term business. Except in the application of the liquidity ratio requirement, neither the Insurance Act nor the regulations dictate or restrict the nature or allocation of an insurer’s investment portfolio.

10. **Discounting Loss Reserves**

Loss reserves may be discounted in the following situations:

i. where both the loss amount and the payment dates are fixed;  
ii. where neither the loss amount nor payment dates are fixed but the insurer's approved auditor is satisfied that the amount and payment profile are both reasonably ascertainable, either in the records of the insurer or in those of any group of companies of which the insurer is a member; and  
iii. where reserves are discounted, a provision for adverse deviations must be included to cover variations in loss amount, payment dates and interest rates. Also, where reserves have been discounted and the insurer does not meet its general business solvency margin on an undiscounted basis, then the discounted reserves (and the appropriateness of discounting) must be certified by way of an opinion from an approved loss reserve specialist.

C. **OTHER REGULATORY PROVISIONS**

1. **Classes of Business**

While the Authority may make regulations which, among other things, divide insurance business into classes for the purposes of any provision of the Insurance Act, no attempt is made in the
Insurance Act itself to do more than identify domestic business and to distinguish between general (stratified into four classes) and long-term business. Neither the Insurance Act nor any of the regulations attempt to mandate the wording of insurance or reinsurance policies.

2. **Long-term Business**

Any insurer engaged in long-term business is required to keep its accounts for this business separate from other business accounts. The insurer must appoint an actuary, approved by the Authority (approved actuary), whose duties will include the preparation of a certificate to be incorporated into the insurer's Return verifying the amount of the insurer’s liabilities outstanding on account of its long-term business. All receipts of an insurer’s long-term business must be credited to a special fund (long-term business fund). No payment may be made directly or indirectly from this fund for any purpose other than the insurer’s long-term business, except to the extent that there is surplus certified by the approved actuary to be available other than to policyholders. Again, dividends can only be declared or paid to people other than policyholders to the extent that the approved actuary certifies that the value of the assets in the insurer’s long-term business fund exceeds the liabilities of its long-term business.

It should be noted that any scheme under which the whole or any part of the long-term business of an insurer is to be transferred shall be void, unless it is made in accordance with the provisions of the Insurance Act and the Supreme Court of Bermuda has formally sanctioned the scheme. This does not, however, apply in relation to the transfer of long-term reinsurance business.

3. **Credit Life/Employee Group Business**

The Insurance Act makes allowance for certain types of credit life and employee group business to be exempted from the definition of long-term insurance. These contracts must: (a) not relate to domestic business (discussed in 5. below); (b) be expressed to be in effect for five years or less; and (c) not be automatically renewable or convertible. In the case of employee group business, they must also be made on a group insurance basis. In order for a specific type of credit life or employee group business to be deemed to be ‘excepted long-term business’, the insurer proposing to write the business must make an application to, and receive the approval of, the Authority to effect and carry out the business on that basis. Assuming a favourable outcome to the application, the credit life business or the employee group business would be dealt with as general business and, accordingly, the restriction set out in 2. above would have no application.

4. **Domestic Business**

Domestic business cuts across both general and long-term business and, in general terms, is defined to mean insurance business where the subject matter of the contract is local or domestic to Bermuda.
Risks of exempted companies are specifically excluded. Unless expressly authorised by licence, exempted companies are not permitted to write domestic business. However, reinsurance of domestic insurers by non-Bermuda entities is permitted.

5. Non-resident Insurance Undertakings

The Non-resident Insurance Undertakings (Long-term Insurers) Investment in Bermuda Order 1985 requires every insurer which is a non–resident insurance undertaking (ie, a foreign-incorporated insurer writing domestic business through the medium of a resident agent pursuant to a permit granted under the Non-Resident Insurance Undertakings Act 1967) to keep invested in Bermuda approved assets (referred to in the Insurance Act as ‘investment assets value’) at a level of 30% of the value of the insurer’s domestic liabilities, being liabilities outstanding on account of the insurer’s long-term business. Approved assets include mortgages on land in Bermuda, loans to the Bermuda Housing Corporation and such other assets as the Authority may approve.

As a result of the Companies Amendment Act 1992, the operation of certain parts of the Companies Act 1981 (Companies Act), including the compulsory winding-up provisions, has been extended to non-resident insurance undertakings.

6. Rent-a-Captives and Alternative Insurance Schemes

As an alternative to the incorporation of one’s own insurance company, it is possible to participate in the underwriting profit of one’s own risks by using a rent-a-captive. Essentially, this involves the placement of a company’s risks into an entity which it does not own, but with which there is a contractual agreement to return to the participant its share of the fees and commissions generated by the insuring entity as a whole.

In addition to rent-a-captives there are a number of other schemes whereby insured persons can control, more closely, some portion of their own risks. These include risk retention groups and self-insurance among others.

7. Permit Companies

In rare instances, it is possible for a foreign–incorporated insurance company to trade from Bermuda. However, such a company (other than a non-resident insurance undertaking) will first require a permit pursuant to Part XI of the Companies Act. These permits are granted only in exceptional circumstances; where the insurer can demonstrate to the satisfaction of the Minister that there is sufficient reason for requiring a permit as opposed to forming a Bermuda exempted company.
8. **Insurance Managers and Intermediaries**

Given the proliferation of insurance management companies in Bermuda, it will be necessary for any new company seeking to achieve registration as an insurance manager to produce evidence to the Authority that it will be introducing new business to Bermuda. The Insurance Act imposes few positive obligations upon insurance managers and intermediaries, once registered. An insurance manager is, however, required to maintain an accurate list of all insurers for which it acts as insurance manager, and must provide the Authority with a copy of that list if required by it in writing to do so. While cancellation of registration is not envisaged as the way to ensure compliance, provision is made for the Authority to cancel the registration of an insurance manager, broker, agent or salesman on any one of a number of different grounds; for example, that, in the opinion of the Authority:

- it has not been carrying on business in accordance with sound business principles;
- it has failed to comply with a condition of its registration; or
- it has supplied false, misleading or inaccurate information for the purpose of any provision of the Insurance Act or its related regulations.

9. **Mutual Companies**

It is possible to incorporate mutual companies (ie, companies without share capital where members are insureds) in Bermuda. Such companies are registered under the Companies Act in the same way as companies with share capital. Mutual companies, as defined in the Companies Act, carry on insurance and reinsurance business on the mutual principle. The Companies Act contains requirements for the maintenance of a reserve fund instead of a share capital and stipulates that the liability of members is limited to the amount of their unpaid premiums.

10. **Redemption/Purchase of Shares**

It should be noted that, in addition to a company’s ability to redeem preference shares at its option, the Companies Act enables redemption at the option of the holder if so authorised by the company’s Memorandum of Association. Further, the Companies Act also permits a company to purchase its own ordinary or common shares, if so authorised by its Memorandum of Association or bye-laws. This is particularly useful in the case of many group or association captives where the insureds are also shareholders and there is a requirement or an option for the shareholder to tender his shares to the captive upon his ceasing to be an insured. The Companies Act stipulates that any such redeemed or purchased shares shall be immediately cancelled because a Bermuda company cannot hold shares in itself or ‘treasury shares’ and the consideration for the redemption or purchase may be cash, other assets, or a mixture of cash and other assets.
11. Remedies of the Authority

The Insurance Act details the avenues which are open to the regulators where the insolvency of an insurer is feared, or where it appears to the Authority that an insurer is in breach of the Insurance Act or its licence. The Authority can, where it is satisfied that it is necessary in the interests of the policyholders, appoint an inspector with wide-ranging powers to investigate the affairs of an insurer. Any information obtained is, however, strictly confidential. If the Authority believes that there is a risk of the insurer becoming insolvent it can do any one or more of a number of things, having first given the insurer notice of its intentions and an opportunity to make representations to it. For instance, it can direct that:

- no new business or business of a specified description be accepted;
- aggregate premium writing be limited;
- no existing business be varied which will have the effect of increasing the insurer’s liability;
- no investments of a specified class be made;
- certain existing investments be realised within a specified period;
- no dividends or distributions be made;
- specified transactions be prohibited;
- written particulars relating to the insurer’s financial circumstances be provided;
- the opinion of a loss reserve specialist be obtained; or
- specified assets be maintained in Bermuda, or transferred to the custody of a specified bank.

As a final resort, winding-up proceedings can be initiated. The grounds for doing so are what might be expected; firstly, that the insurer is unable to pay its debts (as that expression is statutorily understood), and it will be deemed unable to do so if the value of its assets does not exceed its total liabilities by the prescribed amount; and, secondly, that the insurer has failed to satisfy an obligation imposed by the Insurance Act, in particular the obligation to prepare accounts or to produce statutory financial statements in response to a direction from the Authority.

D. SPECIAL PRACTICE NOTES

1. The Requirement to Keep Records in Bermuda

The Insurance Act provides that the Authority may direct insurers to keep proper records of account in Bermuda with respect to:

- all sums of money received and expended by the insurer and the matters in respect of which the receipts and expenditures take place;
- all premiums and claims relating to the insurer; and
- the assets, liabilities and equity of the insurer,
and any such directions may make different provisions in relation to Class 1 insurers, Class 2 insurers, Class 3 insurers, Class 4 insurers and long-term insurers.

No directions have yet been issued, however, guidelines issued by the Authority’s predecessor, the Registrar, in 1992 indicate what records are recommended to be kept in Bermuda. Regulations substantially the same as the guidelines may be issued, although there is no indication that the issuance of such regulations is imminent.

These guidelines provide that every registered insurer shall maintain at its principal office and/or registered office in Bermuda:

- financial statements;
- minutes of meetings of shareholders (members), directors and, if applicable, the following operating committees:
  - underwriting; and
  - finance;
- a general ledger;
- general journals;
- subsidiary ledgers (referred to in the general ledger);
- cash books;
- premium registers, including reinsurance;
- loss registers, including reinsurance;
- the names of any current insurers, including all those against which claims are outstanding; and
- underwriting limits by class, gross and net of reinsurance or the actual retention amounts for each policy or treaty.

The Authority is authorised to grant exemptions from some or all of the requirements in appropriate cases.

In addition, the Companies Act provides that every company shall cause to be kept proper records of account with respect to:

- all sums of money received and expended by the company and the matters in respect of which the receipts and expenditures take place;
- all sales and purchases of goods by the company; and
- the assets and liabilities of the company.

The records of account are required to be kept at the registered office of the company, or at such other place as the directors think fit, and shall at all times be open to inspection by the directors.
If the records of account are kept at some place outside Bermuda there must be kept, at an office of the company in Bermuda, such records as will enable the directors or a resident representative (if any) to ascertain with reasonable accuracy the financial position of the company at the end of each three-month period. If the company is listed on an appointed stock exchange, and it maintains its records of account at some place outside Bermuda, it must only maintain in Bermuda such records as will enable the directors or a resident representative (if any) to ascertain with reasonable accuracy the financial position of the company at the end of each six-month period.

The Insurance Act provides that (without prejudice to the provisions of the Companies Act outlined above), on application made to it for that purpose, the Authority may direct that an insurer be exempt from such of the insurance requirements noted above as may be specified in the direction.

2. Dividends and Distributions

The Companies Act provides that a company may not declare or pay a dividend or make a distribution out of contributed surplus if the directors have reasonable grounds for believing that the company is, or would after the payment be, unable to pay its liabilities as they become due, or that the realisable value of the company’s assets would thereby be less than the aggregate of its liabilities, its issued share capital and share premium accounts.

As a result of this requirement, and the solvency and liquidity requirements imposed by the Insurance Act, it is usual for an insurer’s board of directors to have regard to the written advice of the insurer’s insurance managers when considering whether to declare or pay a dividend or make a distribution out of contributed surplus. Such written advice provides the directors with an informed and reasonable basis for declaring dividends or distributions and is usually submitted to the board in the following terms:

- to the best of [the insurance manager’s] knowledge, information and belief, the declaration and payment of the dividend [or distribution, as the case may be] will not affect the insurer’s ability to continue its business operations and pay its liabilities as they become due;
- the company will, taking into account the proposed dividend or distribution, as the case may be, remain in compliance with the solvency requirements of section 54(1)(b) of the Companies Act, namely that the realisable value of the insurer’s assets exceeds the aggregate of its liabilities and its issued share capital and share premium accounts; and
- the payment of the dividend or distribution, as the case may be, will not cause the insurer to be in breach of any of the provisions of the Insurance Act 1978 and related regulations, including the statutory ratios provided for therein.

While Class 1, Class 2 and Class 3 insurers are required to comply with the solvency and liquidity requirements of the Insurance Act, a Class 4 insurer which proposes to declare a dividend greater than 25% of its statutory capital and surplus, must, in addition, have an affidavit signed by two
directors and its principal representative stating that margins will still be met after the payment of the proposed dividend.

3. **Section 56 Directions**

Section 56 of the Insurance Act gives the Authority the power to modify certain provisions of the Insurance Act and its related regulations (mostly dealing with determining the class of general business a proposed insurer should be registered in, margins of solvency, solvency certificates, statutory financial statements and statutory financial returns) in certain specific cases. This power is exercised in the form of what is referred to as a ‘Section 56 direction’. A Section 56 direction may be subject to such conditions as the Authority thinks fit and may be made with retroactive effect or revoked at any time by the Authority.

An application for a Section 56 direction will be appropriate where the public interest, which the Insurance Act is aimed at safeguarding, is not considered to be at risk.

4. **Section 57A Directions**

The Insurance Amendment Act 1998 introduced Section 57A to the Insurance Act. Section 57A gives the Authority the power to direct in writing (colloquially called a ‘Section 57A direction’) that a certain contract (including, but not limited to, insurance derivative instruments) is a ‘designated investment contract’ for the purposes of the Insurance Act. The section goes on to provide that being a party to a designated investment contract shall not constitute carrying on insurance business for the purposes of the Insurance Act, and a designated investment contract shall not constitute: (a) a contract of insurance, for any purposes; or (b) a bet for the purposes of the Betting Act 1975.

Either the issuer of the paper or contract or the holder of the same may make an application to the Authority for a Section 57A direction. The application fee is $1,200.

The effect of a Section 57A direction designating an instrument as a non-insurance instrument means that an investor who is not permitted or licensed to engage in insurance business in Bermuda may hold the instrument. For an insurer issuing such a designated instrument, the solvency requirements of the Insurance Act and its related regulations do not apply.

5. **The Non-resident Insurance Undertakings Act 1967 (NRIU Act)**

There are many representatives of overseas carriers in Bermuda. These are commonly referred to as non-resident insurance undertakings (NRIUs). Most NRIUs have engaged agents in Bermuda who receive commissions on premiums written. Most of these premiums arise out of the sale of life insurance policies.
The NRIU Act applies to any undertaking conducting insurance business of any kind other than: (a) a company incorporated in Bermuda under any Act; or (b) any other person or body of persons ordinarily resident in Bermuda, conducting insurance business from a place of business in Bermuda as principals to the insurance business undertaken in Bermuda and authorised by law so to do.

The term ‘insurance business’ is defined in the NRIU Act to include: making out or executing policies of insurance or insurance contracts; receiving any premium or giving credit therefor while receiving any other consideration therefor; paying out any sums under a policy of insurance or insurance contracts; and entering into or inducing or attempting to induce any person to enter into or take out any policy of insurance or insurance contract by advertisement or otherwise.

The NRIU Act requires NRIUs to act in accordance with the permit that is issued. There is currently a moratorium on the granting of further NRIU permits, but, in any event, the procedure dictates that requests for permits must be made in writing to the Minister, who has the right to grant and revoke permits. There is an annual fee requirement of $10,000 payable on or before 31 March of each year. The permit may be limited in duration to a time specified in the permit and shall be granted subject to such other conditions or limitations as the Minister may think fit to impose and as are cited in the permit.

Before revoking a permit, the Minister must cause a notice to be served on such persons conducting business on behalf of the NRIU as appear to the Minister to be equitable, and he is required to take into account any representations made by or on behalf of such persons.

The NRIU Act provides that any person conducting insurance business on behalf of an NRIU who fails to comply with any condition or limitation specified in the permit, commits an offence against the NRIU Act. Offences against the NRIU Act are to be prosecuted before a court of summary jurisdiction.

6. The Life Insurance Act 1978 (Life Act)

The Life Act applies only to contracts of ‘life insurance’ (as defined in the Life Act) made after the commencement of the Life Act and to all such contracts made in Bermuda unless the parties agree that some other law shall apply.

The Life Act prescribes the contents of policies, group policies, and certificates. The Life Act also defines what is and is not an insurable interest, and there are specific provisions dealing with the payment of premiums, default in paying premiums, the duty to disclose, incontestability, pre-existing conditions, the non-disclosure by the insurer, the effect of suicide, reinstatement, the designation of beneficiaries, the right to sue, the assignment of policies, and the general powers of the court in relation to disputes between an insurer and one of its insureds.
7.  **The Segregated Accounts Companies Act 2000**

The Segregated Accounts Companies Act 2000 became operative on 1 November 2000 (the Act). The Act was amended by the Segregated Accounts Companies Amendment Act 2002, which came into force on 14 June 2002 (Amended Act). The Act and the Amended Act are together referred to in this chapter as (SAC Act). The SAC Act provides that any company, to which the Companies Act applies, may apply to operate segregated accounts enjoying statutory divisions between accounts. The effect of such statutory division is to protect the assets of one account from the liabilities of other accounts. Thus, the accounts will be self-dependent, with the result that only the assets of a particular account may be applied to the liabilities of that account.

Previously, such a legal effect has only been obtained by means of a Private Act of the Bermuda Legislature. The statutory divisions between accounts do not create separate bodies corporate, but rather achieve within a single company what could otherwise be achieved by incorporating subsidiaries or by a company creating a floating charge over certain assets in favour of its obligations to particular clients. The SAC Act has several advantages over traditional routes to creating legal divisions between accounts. It is cheaper and less unwieldy than forming numerous subsidiaries and avoids issues of time, solvency and perfection in relation to charges. Most importantly, the SAC Act establishes substantive law governing the application of particular assets in favour of particular accounts and their respective liabilities. It also avoids the contractual limitations to effectively segregate the accounts of a single legal entity.

Furthermore, prior to the Amended Act, there was legal uncertainty as to whether segregated accounts of a company can enter into a binding contract with each other or with the general account. Indeed, the well-established principle of English law of contract is that in order to constitute a valid contract, there must be two or more parties to a contract. Thus, a legal person or company cannot contract with itself. Therefore, both the general account and the segregated accounts lack the legal capacity to enter into a binding agreement. However, it became apparent through experience with Private Acts that internal transactions are not uncommon, but rather have in the past simply been assumed to be valid. To remedy this unsatisfactory state of affairs, a number of specific provisions have been included in the SAC Act to validate internal transactions which may already have been entered into in respect of segregated accounts or separate accounts of Private Act companies who may register under the SAC Act. It should also be noted that contracts entered into prior to registration will be construed in accordance with the Private Act and those entered into after registration will be construed in accordance with the SAC Act. An exception to this is that inter-account transactions, even those entered into prior to registration, will be valid as though they were entered into under the provisions of the SAC Act. This is to assure the validity of inter-account transactions, which may already have been entered into in respect of segregated (or separate) accounts of Private Act companies which have subsequently registered under the SAC Act. Private Act provisions pertaining to matters other than the operation of segregated accounts are unaffected by the SAC Act.
In relation to creditors’ enforcement rights, special provisions are included in the SAC Act to ensure that creditors in respect of a particular segregated account will be in a position to enforce their claims against assets not linked to that account. The SAC Act implies a provision into every contract by which the parties agree that the liability will not be paid out of assets other than assets of the account to which the transaction is linked and that any recoveries in breach of the provision are held in trust by the recipient. The SAC Act also enables the company to make appropriate adjustments between accounts in case: (a) a creditor, in breach of the SAC Act, enforces its claims against assets not linked to the account with which the creditor has dealings; and (b) the company is unable to recover the sum. This provision will be particularly useful in cases where assets linked to a segregated account are located outside of Bermuda.

Existing insurance users that employ the concept of separate (segregated) accounts pursuant to a Private Act (of which there are more than 100 currently in force) and which include: rent-a-captives, life and annuity companies, so-called ‘transformer’ companies engaged in the transformation of insurance risk into capital markets products and vice versa, financial guarantee companies, securitisation and derivatives structures and special purpose vehicles.

Prospective non-insurance uses are expected to include ‘master-feeder’, umbrella or other mutual fund structures, providing for multiple classes of shares and multiple investment options, property development companies, ship and aircraft (or fleet) owning companies, non-insurance securitisation and derivatives transactions, replacement for operating subsidiaries or divisions of any company, facilitation of product line or geographic segmentation, temporal segregation (eg, ‘ring-fencing’ of old liabilities similar to Lloyd’s/Equitas), and a variety of trust company arrangements. The list could easily go on and is bounded only by the imagination and creativity of clients and their professional advisers.

In the context of mutual funds, the utility of the legal segregation of accounts is obvious, as different programmes can be offered to investors under the same corporate structure. For example, on 31 December 2002, Hartford Advantage Investment Limited (HAIL) successfully registered as a segregated accounts company, being Bermuda’s first closed-ended investment scheme registered under the SAC Act. HAIL is an indirect subsidiary of the Hartford Financial Services Group, Inc., a company listed on the New York Stock Exchange, being the fourth-largest life insurer in the United States and the number one provider of individual and variable annuities, and which is essentially a fund of funds with linked benefits offering up to one billion preferred shares to institutional investors. HAIL is a milestone for Bermuda’s segregated accounts legislation exemplifying the widening application of the segregated accounts product, the innovative use of segregated accounts under Bermuda’s comprehensive legislation, and illustrating confidence in Bermuda by one of United States’ largest companies.
While Bermuda was not the first jurisdiction to enact public legislation in relation to segregated accounts, it has always been at the forefront of the development of the concept of segregated accounts through the medium of Private Acts. We believe that the concept of segregated accounts is particularly well suited to a wide range of international business structures in Bermuda and that the responsible yet flexible nature of the SAC Act will assist in the continuing development of international business in Bermuda.
A. GENERAL

1. Introduction

The legal framework for insurance regulation in Bermuda is contained in the Insurance Act 1978 and related regulations (as amended, the 'Insurance Act'). The Insurance Act applies to all persons carrying on insurance business in or from within Bermuda and provides for the registration of all insurers and insurance managers, brokers, agents and salespersons. The regulations deal primarily with the financial reporting of registered insurers, the principal regulations being the Insurance Accounts Regulations 1980\(^1\) and the Insurance Returns and Solvency Regulations 1980\(^2\). In 2001, the Insurance Amendment Act 2001 amended the Act to, among other things, devolve responsibility over the insurance industry from the Minister of Finance to the Bermuda Monetary Authority (Authority). This transfer of authority was largely the result of recommendations from a report produced by KPMG on the financial regulation of Caribbean Overseas Territories and Bermuda (KPMG Report) which was presented to the United Kingdom Parliament in 2000. The KPMG Report criticised the insurance regulators for their lack of political independence as they were under the influence of the Ministry of Finance. This lack of independence has been obviated by the transfer of responsibility to the Authority, an independent body which has been in existence for more than 30 years as the equivalent of the central bank and the overseer of other financial services industries in Bermuda.

The Insurance Act was amended in the years 2002 and 2003 to, amongst other things, institute some of the changes that had to take place due to the move to the autonomous Authority. The most recent revisions to the Insurance Act which came into force on 10 December 2004, in addition to the introduction of guidance notes, principally relate to the continued improvement and
refinement of regulatory controls relating primarily to: (i) reporting timeframes; (ii) the manner of appointment of external specialists; (iii) reporting requirements of external specialists; and (iv) statutory financial returns/statements.

The Insurance Division of the Authority is headed by the Supervisor of Insurance (Supervisor) and oversees the licensing and regulation of insurers and insurance managers, the approval of company auditors and loss reserve specialists as well as various investigative functions.

The Insurance Act stipulates that no person may engage in insurance business in or from within Bermuda unless that person is registered as an insurer under the Act.

The Insurance Act distinguishes insurance companies along the lines of general business (products liability, property, casualty, etc.) and long-term business (life, annuity, health; where policies are in force for at least five years). General business is stratified into four classes:

- **Class 1:** which represents ‘pure’ captives (ie, where the insurer is writing the risks of its parent or a group owned by a single parent);
- **Class 2:** which includes association captives or single-parent captives writing not more than 20% third-party business;
- **Class 3:** which includes all insurers not falling into one of the other classes; and
- **Class 4:** which is for highly capitalised excess of loss or property catastrophe insurers or reinsurers whose capital is in excess of $100 million.

The Insurance Act does not distinguish between insurers and reinsurers for the purposes of registration or regulation, and references to ‘insurer’ and ‘insurance’ herein includes references to ‘reinsurer’ and ‘reinsurance’ (and vice versa).

2. **The Process of Incorporation/Registration**

The process of establishing a Bermuda insurance company involves both incorporation of the company and its registration as an insurer under the Insurance Act. The process is described in more detail in Chapter 7. Briefly, an insurance company is incorporated in the same manner as any other Bermuda company, ie, by registration or by Private Act of Parliament, the former being by far the most efficient and cost effective method. Incorporation of an insurance company by registration typically takes between two to three weeks to complete.

At the same time that the application for consent to incorporate the new company is made, it is necessary to approach the Insurers’ Admissions Committee (the ‘IAC’ as defined in Chapter 18)
for approval of the proposed business plan of the company. Attached to the business plan should be pro forma financial projections for at least five years of operation. Ideally, the business plan should discuss the pro forma statements in detail, providing explanations and justifications for projections where appropriate.

An insurance company will not be incorporated in Bermuda until and unless the IAC approves the business plan of the proposed insurer. After approval, and assuming that the Authority is satisfied with the technical merits of the proposed programme and the credentials of the sponsors/proposed owners of the company, the Authority will issue its consent for the company to be incorporated. The company may then proceed to incorporate by registration, however, the company cannot begin writing business until it is registered as an insurer under the Insurance Act.

Once incorporation has been achieved, registration of the company as an insurer can be effected in a relatively straightforward manner. The materials to be submitted on registration resemble, in content, the information submitted in respect of the application to the IAC. Upon registration, the company must demonstrate that it has been capitalised in the manner contemplated in the pre-incorporation materials, and that all service providers (auditors, principal representative and (where required) loss reserve specialist or approved actuary) have been approved by the Authority and accepted their appointments to serve the company in the required way. To the extent that there is any material change in the content of the insurance programme of the company, the materials must be reviewed by the IAC. Otherwise, registration will be granted upon confirmation by the Authority that the materials submitted are in order.

3. Services Available

The Bermuda insurance industry has developed a highly sophisticated and technically competent service infrastructure. This is an important advantage which Bermuda has over other offshore jurisdictions. Another key advantage is the large amount of reinsurance capital located on the Island, allowing insurers easy physical access to a major reinsurance marketplace in which to cede risk.

One will find offices of the major international brokers and managers in Bermuda, as well as independent offices, many of which offer ‘boutique’ or niche expertise in one specific market or area of risk. Some international service providers have established headquarters in Bermuda from which they manage their captive operations in other offshore jurisdictions.

In addition to the wealth of expertise and a highly capitalised reinsurance market, Bermuda offers a technically advanced telecommunications system, physical proximity to North America and Europe, a common law legal system, and modern and convenient hotel and guest accommodations.
The principal representative must be a ‘person’ (which in this context includes natural persons and bodies corporate) approved by the Authority as the insurer’s principal representative. The principal representative ensures the company’s compliance under the Insurance Act. The duties of the principal representative which are based on duties to report particular matters to the Authority are described in more detail in Chapter 17.

Insurance companies must also have approved auditors to carry out GAAP and statutory audit functions. Most insurance companies will also need to appoint a loss reserve specialist (for general business) and/or an approved actuary (for long-term business) to opine on the adequacy of reserves, both of whom must first be approved by the Authority.

Although not required under the Insurance Act, most insurers have an insurance manager appointed in Bermuda to oversee the day-to-day administration of the company’s insurance programme. The insurance management of a Bermuda insurer can be as simple or as complex as the client wishes. However, the principal representative must be satisfied that he or she has all the necessary information to enable him or her to fulfil his or her duties under the Insurance Act. Accordingly, all accounts and claims, if not processed in Bermuda, must be reported to the Bermuda principal representative.

Apart from the day-to-day management of the insurance business, it will also be necessary for the corporate administration of the company to be conducted on a day-to-day basis to ensure overall compliance with company law in Bermuda and that the required filings under the Companies Act and the Insurance Act are being made. Appleby Corporate Services (Bermuda) Limited (Appleby Corporate Services) is our affiliated services company, which provides corporate administrative services for clients of the firm. Services include: provision of the registered office; compiling the register of members; attending to share issues and transfers; provision of a corporate secretary, local directors or resident representative and the attendance of these appointed persons at meetings.

4. **Costs**

The incorporation costs depend largely upon the nature of the company and its corporate structure but the figure would include such disbursements as the annual government fee, which is levied on a sliding scale based on the assessable capital of the company (see overleaf for details) (if incorporation is after 31 August in any given year then the fee is reduced by 50%). The fee for registration as an insurer depends on the class of insurer and whether the insurer is writing general or long-term business. Further disbursements would include government application and filing fees, and corporate materials (minute book, common seal and share certificates). Legal fees for incorporating and licensing the company and for providing standard bye-laws will depend
largely on the nature of the application, so that a complex insurance programme will involve more professional time (and hence higher fees). There may be additional professional services rendered in connection with advising and drafting special documents such as bye-laws and shareholders’ agreements, etc. Such services would be charged in accordance with our terms of engagement.

The cost for corporate administrative services by Appleby Corporate Services depends on the number of shareholders and other matters (for example, whether there are special bye-laws, the frequency of meetings of the directors and shareholders, etc). In addition to the corporate administration costs, there will be insurance management costs, which vary greatly depending on the services rendered. There will also be fees for other service providers (auditor, loss reserve specialist, approved actuary), and the government fees described in the following tables.

5. Disclosure of Information

In 2001, significant changes were made to the Insurance Act relating to the protection of confidential information gathered by the Authority and the dissemination of same. Section 52 of the Insurance Act now provides that, unless stipulated within the Insurance Act, no person shall disclose any information obtained pursuant to the Insurance Act without the consent of the person to whom the information pertains and, if different, the person who provided the information. The prohibition is also supported by severe sanctions, varying from $50,000 to $100,000 and two to five years’ imprisonment.

There are circumstances, however, in which confidential information may be disclosed. These include:

1. where it is for the purpose of enabling the Authority to discharge its responsibilities under the Act;
2. where to do so would be in the interests of the policyholders involved;
3. to assist the Minister or other Bermudian authority to carry on their respective mandates; and
4. to assist foreign regulators in the discharge of their duties similar to those of the Authority under the Act.

In each instance the information disclosed is not be used otherwise than for the purpose provided. These rules apply equally to information obtained by the Authority from relevant supervisory authorities in other jurisdictions.
**Annual Government Fee:**

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</tr>
<tr>
<td>$500,000,001 or more</td>
<td>$27,825</td>
</tr>
</tbody>
</table>

**Annual Insurance Business Fee:**

- **Class 1** (general business only) — $925
- **Class 2** (general business) — $1,575
- **Class 1 or 2** (general and long-term business) — $7,500
- **Class 3** — $7,500
- **Class 4** — $55,000
- **Long-term** — $7,500

There are no Bermuda taxes on income or dividends for a Bermuda company which is owned by non-Bermudians (not resident in Bermuda) and which is conducting its business outside Bermuda from a principal place of business within Bermuda.
B. THE FOUR CLASSES OF GENERAL BUSINESS

1. Class 1

a. Statutory Capital Requirements and Ratios

Set out below are the statutory capital requirements and ratios for Class 1 insurers. Special insurance programmes such as, for instance, medical malpractice or professional liability, may be required by the Insurers’ Admissions Committee to be capitalised at greater levels.

1. Minimum Share Capital. The equivalent of $120,000 is required, which must be paid in cash. If the Class 1 insurer is to underwrite long-term business as well, then the minimum share capital is the equivalent of $370,000.

2. Minimum Solvency Margin. The statutory assets (ie, admissible assets under the Insurance Act) of the insurer must exceed the statutory liabilities (as determined pursuant to the Insurance Act) by the prescribed amount.

The prescribed amount for a Class 1 insurer is the greatest of: (a) $120,000; OR (b) 20% of net premium income up to the first $6 million of writings plus 10% of net premium income in excess of $6 million; OR (c) 10% of the aggregate of loss expense provisions and other general business insurance reserves.

Generally, net premium income equals gross premium income less any premium ceded by the insurer for reinsurance.

A Class 1 insurer must obtain the consent of the Authority before reducing its total statutory capital (including share capital, contributed surplus and other statutory fixed capital, eg, letters of credit which have been approved as such by the Authority) by 15% or more from the level set out in its previous year’s financial statements.

3. Minimum Liquidity Ratio. Bermuda’s insurance regulations require that, in general, each Bermuda insurer carrying on general business maintain a liquidity ratio whereby its ‘relevant assets’ equal at least 75% of its ‘relevant liabilities’. Both ‘relevant assets’ and ‘relevant liabilities’ are defined in the Insurance Returns and Solvency Regulations 1980. ‘Relevant assets’ is defined by reference to certain lines of the insurer’s statutory balance sheet for general business, including lines 1 (cash and time deposits), 2 (quoted investments), 3(a) (unquoted bonds and debentures), 5(a) (first liens on real estate), 9 (investment income due and accrued), 10 (accounts and premiums receivable), 11 (reinsurance balances receivable) and 12 (funds held by ceding reinsurers). Other assets, such as investments in and advances to affiliates, are not relevant for the purpose of determining an insurer’s liquidity ratio.
However, it is possible to have a particular asset, which would otherwise not fit into one of the enumerated categories, accepted as a ‘relevant asset’ for the purposes of the insurer’s liquidity ratio, by making application to the Authority. In order to be accepted, the applicant must demonstrate that the asset in question is sufficiently liquid. An asset such as an evergreen letter of credit from a financial institution is most commonly sought to be treated as a ‘relevant asset’ for this purpose.

‘Relevant liabilities’ include total general business insurance reserves and total other liabilities less deferred income tax, sundry liabilities (ie, those not specifically defined), letters of credit and guarantees.

b. Reporting Requirements
As would be expected, Class 1 general business insurers bear the lightest regulatory burden from a financial reporting perspective. Each Class 1 insurer is required to file, annually, a Statutory Financial Return (the Return) within six months from the insurer’s financial year-end. The Return must be filed simultaneously with the Statutory Financial Statements. This filing deadline may be extended to nine months on application to the Authority. The Authority is empowered to levy fines of up to a maximum of $500 per week for late filings. The Return includes the auditor’s report on the statutory financial statements, a solvency certificate, a declaration of statutory ratios and, in the event that there has been discounting of loss reserves, an opinion from a loss reserve specialist (eg, casualty actuary) where compliance is not possible on an undiscounted basis. Further, the insurer must have a copy of its statutory financial statements available at its principal office for a period of five years from the filing date, and shall produce them to the Authority if required.

c. Other Requirements
The Insurance Act requires that every Class 1 insurer appoint a principal representative, a principal office (usually the office of the principal representative) and an independent auditor located in Bermuda. In certain instances a loss reserve specialist will also be required. The principal representative has certain statutorily defined duties of management of the insurer’s affairs in Bermuda, and the responsibility of reporting to the Authority the particulars of any circumstances indicating the insurer’s inability to meet the requirements of the Insurance Act at any time. Most insurers also have an insurance manager appointed in Bermuda (often the same entity as the principal representative) charged with overseeing the day-to-day administration of the company’s insurance programme. All of these persons must be approved in advance by the Authority — this is done upon registration. Any changes to the company’s auditor, loss reserve specialist or principal representative must first be approved by the Authority.

Class 1 insurers may not declare dividends or make other distributions to shareholders unless they will comply with the ratios described above after the declaration and payment of the dividend or distribution.
Additionally, Class 1 insurers are subject to the general company law of Bermuda and must, for instance, maintain a registered office in Bermuda (this is usually the office of the company’s corporate administrative service providers and is, in most instances, different from the principal office under the Insurance Act), maintain the company’s share register in Bermuda, and provide for either two Bermuda resident directors OR one Bermuda resident director and a Bermuda resident secretary (both of whom must be natural persons) OR a resident representative and a Bermuda resident secretary (both of whom must be natural persons).

2. **Class 2**

a. **Statutory Capital Requirements and Ratios**

Set out below are the statutory capital requirements and ratios for Class 2 insurers. Special insurance programmes, such as, for instance, medical malpractice or professional liability, may be required by the Insurers’ Admissions Committee to be capitalised at greater levels.

1. **Minimum Share Capital.** The equivalent of $120,000 is required, which must be paid in cash. If the Class 2 insurer is to underwrite long-term business as well, then the share capital is the equivalent of $370,000.

2. **Minimum Solvency Margin.** The statutory assets (ie, admissible assets under the Insurance Act) of the insurer must exceed the statutory liabilities (as determined pursuant to the Insurance Act) by the prescribed amount.

   The prescribed amount for a Class 2 insurer is the greatest of: (a) $250,000; OR (b) 20% of net premium income up to the first $6 million of writings plus 10% of net premium income in excess of $6 million; OR (c) 10% of the aggregate of loss expense provisions and other general business insurance reserves.

   Generally, net premium income equals gross premium income less any premium ceded by the insurer for reinsurance.

   A Class 2 insurer must obtain the consent of the Authority before reducing its total statutory capital (including share capital, contributed surplus and other statutory fixed capital eg, letters of credit which have been approved as such by the Authority) by 15% or more from the level set out in its previous year’s financial statements.

3. **Minimum Liquidity Ratio.** Bermuda’s insurance regulations require that, in general, each Bermuda insurer carrying on general business maintain a liquidity ratio whereby its ‘relevant assets’ equal at least 75% of its ‘relevant liabilities’. Both ‘relevant assets’ and ‘relevant liabilities’ are defined in the Insurance Returns and Solvency Regulations 1980. ‘Relevant assets’ is defined by reference to certain lines of the insurer’s statutory balance sheet for
general business, including lines 1 (cash and time deposits), 2 (quoted investments), 3(a) (unquoted bonds and debentures), 5(a) (first liens on real estate), 9 (investment income due and accrued), 10 (accounts and premiums receivable), 11 (reinsurance balances receivable) and 12 (funds held by ceding reinsurers). Other assets, such as investments in and advances to affiliates, are not relevant for the purpose of determining an insurer’s liquidity ratio. However, it is possible to have a particular asset, which would otherwise not fit into one of the enumerated categories, accepted as a ‘relevant asset’ for the purposes of the insurer’s liquidity ratio, by making application to the Authority. In order to be accepted, the applicant must demonstrate that the asset in question is sufficiently liquid. An asset such as an evergreen letter of credit from a financial institution is most commonly sought to be treated as a ‘relevant asset’ for this purpose.

‘Relevant liabilities’ include total general business insurance reserves and total other liabilities less deferred income tax, sundry liabilities (ie, those not specifically defined), letters of credit and guarantees.

b. Reporting Requirements
Each Class 2 insurer is required to file, annually, a Statutory Financial Return (the Return) within six months from the insurer’s financial year-end. The Return must be filed simultaneously with the Financial Statutory Return. This filing deadline may be extended to nine months on application to the Authority. The Authority is empowered to levy fines of up to a maximum of $500 per week for late filings. The Return includes the auditor’s report on the statutory financial statements, the statutory financial statements themselves, a solvency certificate and a declaration of statutory ratios. A Class 2 insurer must also file, triennially, an opinion from a loss reserve specialist (eg, casualty actuary) on the adequacy of its loss reserves. In the event that there has been discounting of loss reserves in any given year, an opinion from a loss reserve specialist must be filed for that year if compliance is not possible on an undiscounted basis.

c. Other Requirements
The Insurance Act requires that every Class 2 insurer appoint a principal representative, a principal office (usually the office of the principal representative), a loss reserve specialist and an independent auditor located in Bermuda. The principal representative has certain statutorily defined duties of management and oversight of the insurer’s affairs in Bermuda, and the responsibility of reporting to the Authority the particulars of any circumstances indicating the insurer’s inability to meet the requirements of the Insurance Act at any time. Most insurers also have an insurance manager appointed in Bermuda (often the same entity as the principal representative) charged with overseeing the day-to-day administration of the company’s insurance programme. All of these persons must be approved in advance by the Authority — this is done upon registration. Any changes to the company’s auditor, loss reserve specialist or principal representative must first be approved by the Authority.
Class 2 insurers may not declare dividends or make other distributions to shareholders unless they will comply with the ratios described above after the declaration and payment of the dividend or distribution.

Additionally, Class 2 insurers are subject to the general company law of Bermuda and must, for instance, maintain a registered office in Bermuda (this is usually the office of the company’s corporate administrative service providers and is, in most instances, different from the principal office under the Insurance Act), maintain the company’s share register in Bermuda, and provide for either two Bermuda resident directors OR one Bermuda resident director and a Bermuda resident secretary (both of whom must be natural persons) OR a resident representative and a Bermuda resident secretary (both of whom must be natural persons).

3. **Class 3**

a. **Statutory Capital Requirements and Ratios**

Set out below are the statutory capital requirements and ratios for Class 3 insurers.

1. **Minimum Share Capital.** The equivalent of $120,000 is required, which must be paid in cash. If the Class 3 insurer is to underwrite long-term business as well, then the share capital is the equivalent of $370,000.

2. **Minimum Solvency Margin.** The statutory assets (ie, admissible assets under the Insurance Act) of the insurer must exceed the statutory liabilities (as determined pursuant to the Insurance Act) by the prescribed amount.

   The prescribed amount for a Class 3 insurer is the greatest of: (a) $1 million; OR (b) 20% of net premium income up to the first $6 million of writings plus 15% of net premium income in excess of $6 million; OR (c) 15% of the aggregate of loss expense provisions and other general business insurance reserves.

   Generally, net premium income equals gross premium income less any premium ceded by the insurer for reinsurance.

   A Class 3 insurer must obtain the consent of the Authority before reducing its total statutory capital (including share capital, contributed surplus and other statutory fixed capital eg, letters of credit which have been approved as such by the Authority) by 15% or more from the level set out in its previous year’s financial statements.

   If a Class 3 insurer, within 30 days of becoming aware of that failure, or having reason to believe that such failure has occurred, fails to meet its general business solvency margin at any time, it must file a written report with the Authority detailing the circumstances leading
to the failure and the manner and time in which the insurer intends to rectify the same. Until the failure is rectified, a Class 3 insurer may not declare or pay any dividends.

3. Minimum Liquidity Ratio. Bermuda’s insurance regulations require that, in general, each Bermuda insurer carrying on general business maintain a liquidity ratio whereby its ‘relevant assets’ equal at least 75% of its ‘relevant liabilities’. Both ‘relevant assets’ and ‘relevant liabilities’ are defined in the Insurance Returns and Solvency Regulations 1980. ‘Relevant assets’ is defined by reference to certain lines of the insurer’s statutory balance sheet for general business, including lines 1 (cash and time deposits), 2 (quoted investments), 3(a) (unquoted bonds and debentures), 5(a) (first liens on real estate), 9 (investment income due and accrued), 10 (accounts and premiums receivable), 11 (reinsurance balances receivable) and 12 (funds held by ceding reinsurers). Other assets, such as investments in and advances to affiliates, are not relevant for the purpose of determining an insurer’s liquidity ratio. However, it is possible to have a particular asset, which would otherwise not fit into one of the enumerated categories, accepted as a ‘relevant asset’ for the purposes of the insurer’s liquidity ratio, by making application to the Authority. In order to be accepted, the applicant must demonstrate that the asset in question is sufficiently liquid. An asset such as an evergreen letter of credit from a financial institution is most commonly sought to be treated as a “relevant asset” for this purpose.

‘Relevant liabilities’ include total general business insurance reserves and total other liabilities less deferred income tax, sundry liabilities (ie, those not specifically defined), letters of credit and guarantees.

b. Reporting Requirements
Each Class 3 insurer is required to file, annually, a Statutory Financial Return (the Return) within four months from the insurer’s financial year-end. This filing deadline may be extended to seven months on application to the Authority. The Authority is empowered to levy fines of up to a maximum of $1,000 per week for late filings. The Return includes the auditor’s report on the statutory financial statements, statutory financial statements themselves, a solvency certificate, a declaration of statutory ratios and an opinion from a loss reserve specialist (eg, casualty actuary) on the adequacy of its loss reserves.

c. Other Requirements
The Insurance Act requires that every Class 3 insurer appoint a principal representative, a principal office (usually the office of the principal representative), a loss reserve specialist and an independent auditor located in Bermuda. The principal representative has certain statutorily defined duties of management and oversight of the insurer’s affairs in Bermuda, and the responsibility of reporting to the Authority the particulars of any circumstances indicating the insurer’s inability to meet the requirements of the Insurance Act at any time. Most insurers also have an insurance manager appointed in Bermuda (often the same entity as the principal representative) charged with
overseeing the day-to-day administration of the company’s insurance programme. All of these persons must be approved in advance by the Authority — this is done upon registration. Any changes to the Company’s auditor, loss reserve specialist or principal representative must first be approved by the Authority.

Class 3 insurers may not declare dividends or make other distributions to shareholders unless they will comply with the ratios described above after the declaration and payment of the dividend or distribution.

Additionally, Class 3 insurers are subject to the general company law of Bermuda and must, for instance, maintain a registered office in Bermuda (this is usually the office of the company’s corporate administrative service providers and is, in most instances, different from the principal office under the Insurance Act), maintain the company’s share register in Bermuda, and provide for either two Bermuda resident directors OR one Bermuda resident director and a Bermuda resident secretary (both of whom must be natural persons) OR a resident representative and a Bermuda resident secretary (both of whom must be natural persons).

4. **Class 4**

   a. **Statutory Capital Requirements and Ratios**
   
   Set out below are the statutory capital requirements for Class 4 insurers.

   1. **Minimum Share Capital.** A Class 4 general business insurer is required to maintain issued and paid-up share capital of the equivalent of $1 million. The Insurance Act allows a company to register as a Class 4 general business insurer prior to having fully paid up capital of the equivalent of $1 million, provided that: (1) it has a paid-up capital of at least the equivalent of $120,000, and (2) it does not commence underwriting until it has paid-up capital of the equivalent of $1 million. This provision exists to allow start-up reinsurers to obtain a licence in advance of completing their capital raising exercise.

   2. **Statutory Capital and Surplus.** A Class 4 insurer must maintain total statutory capital and surplus of not less than $100 million. If the total statutory capital and surplus of a Class 4 insurer falls below $75 million, the insurer must file, within 45 days of its becoming aware of the situation, a report including unaudited interim statutory financial statements, the opinion of a loss reserve specialist regarding the adequacy of the insurer’s loss and loss expense provisions and other general insurance reserves, and a general business solvency certificate in respect of those unaudited statements. No dividends may be declared or paid until the statutory capital is restored to the required level.

   3. **Minimum Solvency Margin.** The minimum solvency margin for a Class 4 insurer is the greatest of: (a) $100 million; OR (b) 50% of net premiums written (for which the maximum...
A Class 4 insurer may not reduce its statutory capital by more than 15% of the amount reported for its prior fiscal year without the consent of the Authority. The application for consent for a Class 4 insurer must be accompanied by an affidavit signed by two directors of the insurer and the insurer’s principal representative, deposing that, in their opinion, the reduction will not cause the insurer to fail to meet its relevant margins and ratios (solvency and liquidity). The Authority keeps the affidavit described in the preceding sentence on the public file maintained at the Authority’s office in respect of the insurer.

4. **Minimum Liquidity Ratio.** Bermuda’s insurance regulations require that, in general, each Bermuda insurer carrying on general business maintain a liquidity ratio whereby its ‘relevant assets’ equal at least 75% of its ‘relevant liabilities’. Both ‘relevant assets’ and ‘relevant liabilities’ are defined in the Insurance Returns and Solvency Regulations 1980. ‘Relevant assets’ is defined by reference to certain lines of the insurer’s statutory balance sheet for general business, including lines 1 (cash and time deposits), 2 (quoted investments), 3(a) (unquoted bonds and debentures), 5(a) (first liens on real estate), 9 (investment income due and accrued), 10 (accounts and premiums receivable), 11 (reinsurance balances receivable) and 12 (funds held by ceding reinsurers). Other assets, such as investments in and advances to affiliates, are not relevant for the purpose of determining an insurer’s liquidity ratio. However, it is possible to have a particular asset, which would otherwise not fit into one of the enumerated categories, accepted as a ‘relevant asset’ for the purposes of the insurer’s liquidity ratio, by making an application to the Authority. In order to be accepted, the applicant must demonstrate that the asset in question is sufficiently liquid. An asset such as an evergreen letter of credit from a financial institution is most commonly sought to be treated as a ‘relevant asset’ for this purpose.

‘Relevant liabilities’ include total general business insurance reserves and total other liabilities less deferred income tax, sundry liabilities (i.e., those not specifically defined), letters of credit and guarantees.

**b. Statutory Statements and Returns**

Each Class 4 Insurer is required to file, annually, a Statutory Financial Return (the Return) within four months from the insurer’s financial year-end. This filing deadline may be extended to seven months on application to the Authority. The Authority is empowered to levy fines of up to a maximum of $5,000 per week for late filings.
The Return is intended, among other things, to provide the Authority with a checklist of key characteristics of the insurer and comprises an audited analysis of prescribed ratios and statistical data. Where the insurer has carried on general business in the relevant financial year, a general business solvency certificate will be filed with the Return.

Where the insurer has carried on long-term business during the relevant year, a long-term business solvency certificate will also be required, accompanied by the certificate of the insurer’s approved actuary.

The cover sheet for the Return must disclose the classes of business written, the amount of gross premium in respect of each class, whether there is any annual aggregate stop loss protection and the maximum amount for each class of business, plus any other information necessary to describe the nature of the insurer’s business.

The general business and long-term business solvency certificates must also include:

1. a statement as to whether the insurer has complied with all conditions attached to its Certificate of Registration; and

2. if the answer to 1. is negative, or the insurer has not met its minimum liquidity ratio (general business only) or solvency margin, then a statement has to be included as to whether any corrective action has been taken. Details of any corrective action are to be attached to the Certificate.

Statutory filings must also include an opinion from a loss reserve specialist as to the adequacy of the insurer’s loss reserves. Class 4 insurers must supply the opinion annually.

c. Other Requirements
The Insurance Act requires that every Class 4 insurer appoint a principal representative, a principal office (usually the office of the principal representative), a loss reserve specialist and an independent auditor located in Bermuda. The principal representative has certain statutorily defined duties of management and oversight of the insurer’s affairs in Bermuda, and the responsibility of reporting to the Authority the particulars of any circumstances indicating the insurer’s inability to meet the requirements of the Insurance Act at any time. In addition, the principal representative must countersign any affidavit of a Class 4 insurer relative to either the payment of a dividend in excess of 25% of its statutory capital, or a decrease of its capital of more than 15%. All these persons must be approved in advance by the Authority — this is done upon registration. Any changes to the company’s auditor, loss reserve specialist or principal representative must first be approved by the Authority.
In addition to the requirement to file an affidavit where a Class 4 insurer proposes to declare a dividend in an amount exceeding 25% of its statutory capital, Class 4 insurers generally may not declare dividends or make other distributions to shareholders unless they comply with the ratios described above after the declaration and payment of the dividend.

Additionally, Class 4 insurers are subject to the general company law of Bermuda and must, for instance, maintain a registered office in Bermuda (this is usually the office of the company’s corporate administrative service providers and is, in most instances, different from the principal office under the Insurance Act), maintain the company’s share register in Bermuda, and provide for either two Bermuda resident directors, OR one Bermuda resident director and a Bermuda resident secretary (both of whom must be natural persons) OR a resident representative and a Bermuda resident secretary (both of whom must be natural persons).

C. LONG-TERM INSURERS

1. Minimum Capital and Solvency Margin

A long-term insurer must have minimum paid-up share capital of the equivalent of $250,000. This amount will be in addition to any minimum required for any class of general business in which the insurer may also be registered. The minimum solvency margin for a long-term insurer is $250,000. There is no statutory liquidity ratio for long-term business. If a long-term insurer fails to meet its solvency margin the principal representative has a duty to report such failure forthwith of its becoming aware of such failure and must provide a report in writing within 14 days of such notification. A long-term insurer may not reduce its statutory capital by more than 15% of the amount reported for its prior fiscal year without obtaining the prior approval of the Authority.

2. Annual Statutory Financial Return

The deadline for filing the annual Statutory Financial Return (the Return) of a long-term insurer is four months from the end of the fiscal period to which the Return relates. This filing deadline may be extended to seven months on application to the Authority. The Authority is empowered to levy fines of up to a maximum of $1,000 per week for late filings. An insurer, which is registered as both a long-term insurer and in one of the classes of general business, must file separate Returns relating to the long-term and general business. The long-term business Return must contain, amongst other items, a report of the approved independent auditor on the annual statutory financial statements, a long-term business solvency certificate, a declaration of statutory ratios, the statutory financial statements themselves, and a certificate from the approved actuary of the long-term insurer certifying the amount of the insurer's liabilities outstanding on account of its long-term business.
3. **Statutory Financial Statements**

A long-term insurer must prepare financial statements for its long-term business in accordance with Forms 4 and 5 of the Insurance Accounts Regulations 1980. These are similar to the financial statements prepared by general business insurers. Some differences include: (1) a long-term insurer is entitled to record as statutory assets any policy loans; (2) the reserving sections of the long-term business statutory balance sheet relate specifically to reserving issues which pertain to long-term business; and (3) the statutory statement of income for a long-term insurer relates specifically to that type of business.

4. **Approved Actuary**

A long-term insurer is required to appoint an actuary, who must be approved by the Authority. The duties of the approved actuary include preparing the annual certificate relating to the amount of the long-term insurer’s liabilities outstanding on account of its long-term business.

5. **Other Service Providers**

The Insurance Act requires that every long-term insurer appoint a principal representative, a principal office (usually the office of the principal representative), and an independent auditor located in Bermuda. The principal representative has certain statutorily defined duties of management and oversight of the insurer’s affairs in Bermuda, and the responsibility of reporting to the Authority the particulars of any circumstances indicating the insurer’s inability to meet the requirements of the Insurance Act at any time. Most insurers also have an insurance manager appointed in Bermuda (often the same entity as the principal representative) charged with overseeing the day-to-day administration of the company’s insurance programme. All these persons must be approved in advance by the Authority — this is done upon registration.

6. **Separation of Accounts**

The Insurance Act requires that a long-term insurer keep its accounts in respect of its long-term business separate from any accounts kept in respect of any other business. It further requires that no payments be made from an insurer’s long-term business accounts for any purpose other than for the insurer’s long-term business, except in so far as such payment can be made out of any surplus certified by the insurer’s approved actuary to be available for distribution otherwise than to policyholders.

7. **Restrictions on Dividends**

A long-term insurer may not declare or pay a dividend to any person other than a policyholder unless the value of the assets in its long-term business accounts, as certified by the insurer’s approved
actuary, exceeds the extent of the liabilities of the insurer’s long-term business. The amount of any such dividend shall not exceed the aggregate of the excess referenced in the preceding sentence and other funds properly available for distribution in the general business accounts of the insurer.

8. **Transfer of Long-Term Business**

The Insurance Act prohibits the portfolio transfer of any long-term business (other than long-term business that is reinsurance business) otherwise than by a court-sanctioned scheme.

9. **Winding Up of Long-term Insurers**

Long-term insurers may not be wound up voluntarily. On the winding up of a long-term insurer, the assets in the long-term business accounts shall only be available to meet the long-term business liabilities of the insurer, and the general assets of the insurer shall be available only for meeting the liabilities of the insurer attributable to its general business. Any excess in either the long-term or general business accounts of the insurer may be used to meet other liabilities. The liquidator of a long-term insurer must, unless the court otherwise orders, carry on the long-term business of the insurer with a view to its being transferred as a going concern to another insurer. The liquidator may vary existing contracts of insurance, but may not effect any new contracts of insurance.

10. **Supervision, Investigation and Intervention**

The Authority may, in writing, at any time direct a long-term insurer to produce a valuation of the insurer’s liabilities outstanding on account of its long-term business, certified by the approved actuary of the insurer.

11. **The Life Insurance Act 1978**

Bermuda has a specific statute regulating certain aspects of life insurance, the Life Insurance Act 1978 (the Life Act). The Life Act applies to contracts of ‘life insurance’ (as defined in the Life Act) made after the commencement of the Act and to all such contracts made in Bermuda unless the parties agree that some other law shall apply. Many international businesses are using Bermuda companies and Bermuda contracts for life business, but it is important to note that any life contract made in Bermuda shall, unless there is express choice of some other law, be deemed to be governed by the Life Act.

D. **SECTION 56**

Under Section 56 of the Insurance Act, it is possible for an insurer to apply to the Authority for a direction relieving it from some or all of the reporting requirements referred to above. Such
directions are typically given in circumstances such as where the insurer is not a Bermuda-incorporated company (e.g., a permit company) and is also registered as an insurer in its home domicile. In that case, the Authority usually gives, on application, a direction exempting the insurer from the requirement to file Bermuda statutory statements, accepting in lieu thereof a copy of the insurance filing made in the insurer’s home jurisdiction together with a schedule outlining its Bermuda-based business.
## SUMMARY OF COMPLIANCE FOR ALL INSURERS
### COMPLIANCE CHART

<table>
<thead>
<tr>
<th>Category</th>
<th>Class 1</th>
<th>Class 2</th>
<th>Class 3</th>
<th>Class 4</th>
<th>Long Term Insurer</th>
</tr>
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<tbody>
<tr>
<td><strong>Minimum Share Capital</strong></td>
<td>$120,000 (General Business)</td>
<td>$120,000 (General Business)</td>
<td>$120,000 (General Business)</td>
<td>$1,000,000</td>
<td>$250,000</td>
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<tr>
<td></td>
<td>$370,000 (Composite)</td>
<td>$370,000 (Composite)</td>
<td>$370,000 (Composite)</td>
<td>$1,250,000 (Composite)</td>
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<td><strong>Minimum Capital and Surplus</strong></td>
<td>$120,000 (General Business)</td>
<td>$250,000 (General Business)</td>
<td>$1,000,000</td>
<td>$100,000,000 (Composite)</td>
<td>$250,000</td>
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<tr>
<td></td>
<td>$370,000 (Composite)</td>
<td>$370,000 (Composite)</td>
<td>$1,250,000 (Composite)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Minimum Solvency Margin</strong></td>
<td>Greater of:- (a) $120,000; (b) Premium Test – First $6 million net premium written (“npw”); 20% plus – Excess of $6 million npw: 10%; or (c) Loss Reserve Test: 10%</td>
<td>Greater of:- (a) $250,000; (b) Premium Test – First $6 million npw: 20% plus – Excess of $6 million npw: 15%; or (c) Loss Reserve Test: 15%</td>
<td>Greater of:- (a) $1,000,000; (b) Premium Test – First $6 million npw: 20% plus – Excess of $6 million npw: 15%; or (c) Loss Reserve Test: 15%</td>
<td>Greater of:- (a) $100,000,000; (b) Premium Test – 50% of npw (maximum deduction of reinsurance premium cessions is 25% of gross premiums written); or (c) Loss Reserve Test: 15%</td>
<td>$250,000</td>
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<tr>
<td><strong>Liquidity Ratio</strong></td>
<td>Relevant assets must equal 75% of relevant liabilities</td>
<td>Relevant assets must equal 75% of relevant liabilities</td>
<td>Relevant assets must equal 75% of relevant liabilities</td>
<td>Relevant assets must equal 75% of relevant liabilities</td>
<td>Does not apply</td>
</tr>
<tr>
<td><strong>Reduction of Statutory Capital</strong></td>
<td>Approval by the Authority required for any reduction in total capital of 15% or more below that included in previous year’s financial statements</td>
<td>Approval by the Authority required for any reduction in total capital of 15% or more below that included in previous year’s financial statements</td>
<td>Approval by the Authority required for any reduction in total capital of 15%; include affidavit signed by two directors and the principal representative stating that margins still met</td>
<td>Approval by the Authority required for any reduction in total capital of 15% or more below that included in previous year’s financial statements</td>
<td>Approval by the Authority required for any reduction in total capital of 15% or more below that included in previous year’s financial statements</td>
</tr>
<tr>
<td>Where Solvency Test is Failed</td>
<td>Class 1</td>
<td>Class 2</td>
<td>Class 3</td>
<td>Class 4</td>
<td>Long Term Insurer</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>---------</td>
<td>---------</td>
<td>---------</td>
<td>---------</td>
<td>------------------</td>
</tr>
<tr>
<td>Principal Representative to report to the Authority within 30 days</td>
<td>Principal Representative to report to the Authority within 30 days</td>
<td>Notify the Authority of position; file revised business plan within 30 days; pay no dividends until failure is rectified</td>
<td>Notify the Authority of position; file revised business plan within 30 days; pay no dividends until failure is rectified</td>
<td>Principal Representative to report to the Authority within 30 days</td>
<td></td>
</tr>
<tr>
<td>Restrictions on Dividends</td>
<td>Comply with solvency/liquidity requirement</td>
<td>Comply with solvency/liquidity requirement</td>
<td>Comply with solvency/liquidity requirement</td>
<td>If dividend is greater than 25% of statutory capital and surplus, 7 days before payment file affidavit signed by two directors and the principal representative stating that insurer will continue to meet required solvency margin and liquidity ratio after payment of dividend; Authority has power to prevent payment</td>
<td>Comply with solvency/liquidity requirement</td>
</tr>
<tr>
<td>Filing Deadline</td>
<td>6 months from financial year end (on application, 9 months)</td>
<td>6 months from financial year end (on application, 9 months)</td>
<td>4 months from financial year end (on application, 7 months)</td>
<td>4 months from financial year end (on application, 7 months)</td>
<td>4 months from financial year end (on application, 7 months)</td>
</tr>
<tr>
<td>Financial Penalties for Late Filing</td>
<td>Up to $500 per week</td>
<td>Up to $500 per week</td>
<td>Up to $1,000 per week</td>
<td>Up to $5,000 per week; if over three months delinquent, inspector shall be appointed to investigate affairs of insurer</td>
<td>Up to $1,000 per week</td>
</tr>
<tr>
<td>Loss Reserve Specialist Opinion</td>
<td>Not required (annually, if discounting to meet solvency margin or more than 30% professional liability business written)</td>
<td>Required tri-annually (annually, if discounting to meet solvency margin or more than 30% professional liability business written)</td>
<td>Annual</td>
<td>Annual</td>
<td>Annual (by a life actuary)</td>
</tr>
<tr>
<td>Failure to Meet Requirements of the Act</td>
<td>Principal Representative to report to the Authority within 30 days</td>
<td>Principal Representative to report to the Authority within 30 days</td>
<td>Principal Representative to report to the Authority within 30 days</td>
<td>Principal Representative to report to the Authority within 30 days</td>
<td>Principal Representative to report to the Authority within 30 days</td>
</tr>
<tr>
<td>Annual Insurance Business Fee</td>
<td>General Business - $925</td>
<td>General Business - $1,575</td>
<td>All types of business - $7,500</td>
<td>All types of business - $55,000</td>
<td>$7,500</td>
</tr>
</tbody>
</table>

1 N.B. If capital and surplus falls below $75,000,000, report to the Authority within 45 days submitting unaudited interim statutory financial statements, loss reserve specialist opinion and general business solvency certificate.
Endnotes:

1. These regulations mandated the form and manner of presentation of statutory financial statements.

2. These regulations, *inter alia*, define the liquidity ratio and solvency margins for general business and long-term insurers.

3. **N.B.** If capital and surplus falls below $75 million, report to the Authority within 45 days submitting unaudited interim statutory financial statements, loss reserve specialist opinion and general business solvency certificate.
A. INTRODUCTION

The Insurance Act 1978 (the Insurance Act) requires an insurer registered in Bermuda under the Insurance Act to prepare financial statements in respect of its insurance business for each financial year. These accounts must be in the format as prescribed in the Insurance Returns and Solvency Regulations (1980) (the Regulations).

Under the Insurance Act, every insurer must also send to the Bermuda Monetary Authority (the Authority) a statutory financial return (the Return), which must be in the format prescribed in the Regulations.

The Insurance Act distinguishes insurance companies into two main categories; general business (products liability, property, casualty, etc.) and long-term business (life, annuity, health, etc.). General business insurers are registered under one of four classes, as shown in Table 1:

<table>
<thead>
<tr>
<th>Class</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class 1</td>
<td>‘Pure captives’ — the insurance company writes the risks only of its parent or affiliates of its parent.</td>
</tr>
<tr>
<td>Class 2</td>
<td>Association captives or captives that write up to 20% of their business to unrelated parties.</td>
</tr>
<tr>
<td>Class 3</td>
<td>Any insurance company that does not fit into the other three classes.</td>
</tr>
<tr>
<td>Class 4</td>
<td>Capital in excess of $100 million and writing excess liability and/or property catastrophe reinsurance.</td>
</tr>
</tbody>
</table>
An insurer who writes both general business and long-term business will need to register in the appropriate class and as a long-term insurer.

The Insurance Act does not distinguish between insurers and reinsurers for the purposes of registration or regulation and so references to ‘insurer’ and ‘insurance’ include ‘reinsurer’ and ‘reinsurance’.

An insurer must also meet at any time during the year certain solvency requirements, which are in place primarily to protect the insured(s).

This chapter examines the solvency requirements, the Return (with particular focus on the prescribed formats) and the differences between Bermuda Statutory Accounting and Generally Accepted Accounting Principles of other countries (mainly the US, UK, Canada or International Accounting Standards).

B. SOLVENCY REQUIREMENTS

The general requirements under the Companies Act 1981 stipulate that in order for a company to be solvent the value of its assets will be greater than the value of its liabilities. However, insurers are subject to a more stringent set of rules under the Insurance Act.

1. Minimum Solvency Margin

The Minimum Solvency Margin (MSM) is a prescribed amount by which the value of the general business assets must exceed the value of the general business liabilities for a general business insurer and the value of the long-term business assets must exceed the value of the long-term business liabilities for a long-term insurer. The MSM is calculated as the greatest value from one of the three tests below (see Table 2):
Table 2

The MSM is the greater of:

<table>
<thead>
<tr>
<th>Class of Insurer</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>Long Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital and Surplus Test</td>
<td>$120,000</td>
<td>$250,000</td>
<td>$1 million</td>
<td>$100 million</td>
<td>$250,000</td>
</tr>
<tr>
<td>Premiums Test</td>
<td>20% of the first $6 million of NPW(^{(1)}) and 10% of the remainder</td>
<td>20% of the first $6 million of NPW(^{(1)}) and 10% of the remainder</td>
<td>20% of the first $6 million of NPW(^{(1)}) and 15% of the remainder</td>
<td>50% (^{(2)})</td>
<td>N/A</td>
</tr>
<tr>
<td>Loss Reserves Test</td>
<td>10% of net loss reserves</td>
<td>10% of net loss reserves</td>
<td>15% of net loss reserves</td>
<td>15% of net loss reserves</td>
<td>N/A</td>
</tr>
</tbody>
</table>

\(^{(1)}\) Net premiums written (NPW) is defined as premiums written during the period less any premiums ceded during the same period.

\(^{(2)}\) For a Class 4 insurer the deduction for ceded premiums is limited to 25% of gross premiums written during the period.
**Example**

A Class 2 insurer, ABC Insurance Limited had loss reserves of $5,000,000 and net premiums written of $7,000,000 during the financial year ending 31 December 2006.

Applying the above tests produces the following figures:

Test 1 — Capital and surplus: $250,000

Test 2 — Premiums (20% of $6,000,000+10% of $1,000,000): $1,300,000

Test 3 — Loss reserves (10% of $5,000,000): $500,000

The largest value is $1,300,000 from Test 2. Accordingly the insurer’s general business assets must exceed its general business liabilities by $1,300,000.

(Note for all examples in this chapter, the Return and financial statements for ABC Insurance Limited can be found in Appendix 1.)

If the insurer has insufficient statutory capital and surplus to meet the MSM then the principal representative (whose role is discussed in Chapter 17) must inform the Authority of the insurer’s non-compliance. Within 14 days, the principal representative must submit a written report setting out all the particulars of the non-compliance.

2. **Minimum Liquidity Ratio (applicable to General Business only)**

The minimum liquidity ratio is the proportion by which the relevant assets of an insurer carrying on general business exceed its relevant liabilities. For all classes of business this ratio must exceed 75%.

**Relevant Assets:**

Relevant assets are defined as cash, quoted investments, bonds, accrued investment income, insurance balances receivable and funds withheld. Intercompany balances, real estate and other sundry assets are excluded.

**Relevant Liabilities:**

Relevant liabilities are defined as the aggregate of the insurer’s liabilities less any liability for deferred taxes, sundry creditors and letter of credit.
It is worth noting that an application can be made to the Authority for a direction under Section 56 of the Insurance Act, to allow intercompany balances, or other assets, to be included as relevant assets. An insurer might consider making such an application to enable its parent to draw down funds in the form of an intercompany loan for consolidated investment purposes.

C. STATUTORY FINANCIAL RETURN

Every year, insurers must submit an audited Return to the Authority in a prescribed format. The Return is intended, among other things, to provide the Authority with a checklist of key characteristics of the insurer and includes an analysis of prescribed ratios and statistical data.

Along with the Return the insurer will also submit the following documents:

- General Business Solvency Certificate (where the insurer has been carrying out general business) or a Long-term Business Solvency Certificate (where the insurer has been carrying out long term business);
- loss reserve specialist opinion (where applicable);
- Actuarial Certificate (where applicable); and
- statutory financial statements (SFS).

An example of all the documents for submission to the Authority is included in Appendix 1.

1. Deadlines for Submission of the Return

The Return and other documents must be submitted to the Authority on or before the deadlines as defined in Section 17 of the Insurance Act and detailed in Table 3 below:

<table>
<thead>
<tr>
<th>Class of Insurer</th>
<th>1 and 2</th>
<th>3, 4 &amp; Long-term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deadline for submission of the Return</td>
<td>Six months after the relevant financial year end (not to exceed nine months on application).</td>
<td>Four months after the relevant financial year end (not to exceed seven months on application).</td>
</tr>
</tbody>
</table>

The insurer is allowed to make an application to the Authority for an extension of up to three months. This is granted at the discretion of the Authority, usually on a month-by-month basis. Extensions are not usually granted to Class 4 insurers.
An insurer who fails to submit the Return by the required deadline may be fined up to $500 per week for a Class 1 or 2, $1,000 per week for Class 3 or long-term and $5,000 per week for a Class 4.

2. Contents of the Return

The Return includes the following documentation (in the prescribed format):

a. Cover Sheet

This contains general information on the insurer, including:

- the name;
- the class of insurer;
- any restrictions imposed on the insurer’s registration under the Insurance Act;
- the particulars of any direction issued by the Authority under Section 56 of the Insurance Act;
- the period to which the Return relates;
- whether the Return contains general or long-term business (or both);
- the gross written premiums for all classes of general business; and
- the currency in which the return is prepared.

b. Declaration of Statutory Ratios (General Business Only)

The insurer must show three ratios on the declaration of statutory ratios:

- premiums to capital and surplus;
- five-year operating ratio; and
- change in statutory capital and surplus ratio.

i. Premiums to statutory capital and surplus:

This ratio describes the proportion of net premiums written during the relevant year in relation to the statutory capital and surplus at the end of the year and is calculated as follows:

\[
\frac{\text{Net premiums written}}{\text{Statutory capital and surplus at the end of the year}}
\]
This ratio enables the user to see at a glance whether the insurer has sufficient capital to support the level of premium written.

*ii. Five-year operating ratio*

The five-year operating ratio describes the proportion that the insurer’s losses and expenses as a percentage of premiums expressed cumulatively for the last five consecutive years (including the current year) bear to the insurer’s investment income also so expressed.

It is calculated as follows:

<table>
<thead>
<tr>
<th>Ratio</th>
<th>Calculation</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loss ratio</td>
<td>Total losses over the last five years / Total net premiums earned over the last five years</td>
<td>A</td>
</tr>
<tr>
<td>Expense ratio</td>
<td>Total expenses (excluding losses) over the last five years / Total net premiums written over the last five years</td>
<td>B</td>
</tr>
<tr>
<td>Investment ratio</td>
<td>Total investment income over the last five years / Total net premiums earned over the last five years</td>
<td>C</td>
</tr>
</tbody>
</table>

The five year operating ratio is $A + B - C$. 
Example

ABC Insurance Ltd has the following underwriting information from over the last five years (in $):

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Net premiums written</strong></td>
<td>7,000,000</td>
<td>6,725,000</td>
<td>6,250,000</td>
<td>6,000,000</td>
<td>6,250,000</td>
<td>32,225,000</td>
</tr>
<tr>
<td><strong>Net premiums earned</strong></td>
<td>6,900,000</td>
<td>6,550,000</td>
<td>6,000,000</td>
<td>5,750,000</td>
<td>5,900,000</td>
<td>31,000,000</td>
</tr>
<tr>
<td><strong>Losses and loss expenses</strong></td>
<td>6,000,000</td>
<td>5,750,000</td>
<td>5,500,000</td>
<td>6,000,000</td>
<td>5,250,000</td>
<td>28,500,000</td>
</tr>
<tr>
<td><strong>Investment income</strong></td>
<td>275,000</td>
<td>325,000</td>
<td>300,000</td>
<td>325,000</td>
<td>275,000</td>
<td>1,500,000</td>
</tr>
<tr>
<td><strong>Other underwriting expenses</strong></td>
<td>665,000</td>
<td>542,000</td>
<td>425,560</td>
<td>400,000</td>
<td>450,000</td>
<td>2,482,560</td>
</tr>
</tbody>
</table>

From the above information, the five-year operating ratio can be calculated as follows:

A: Loss ratio \( \frac{28,500,000}{31,000,000} = 91.93\% \)

B: Expense ratio \( \frac{2,482,560}{32,225,000} = 7.70\% \)

C: Investment ratio \( \frac{1,500,000}{31,000,000} = 4.84\% \)

Five-year operating ratio \( (A+B-C) = 94.79\% \)
iii.  Change in Statutory Capital and Surplus:

The change in statutory capital and surplus ratio describes the increase (or decrease) in statutory capital and surplus from the prior year to the current year, expressed as a % of the current year.

\[
\frac{\text{Increase / decrease in statutory capital and surplus}}{\text{Statutory capital and surplus at the end of the year}}
\]

This ratio (calculated as above) enables the Authority to see at a glance whether there has been a 15% or greater reduction in the statutory capital as detailed in the Regulations regarding distributions.

Finally, the Declaration must be signed by the principal representative and two directors confirming that the ratios were calculated in accordance with Schedule II of the Insurance Act.

3.  General Business Solvency Certificate

The general business solvency certificate relates to the general business of the insurer. It must be signed by both the principal representative and two directors (usually the same people that sign the declaration of statutory ratios), certifying the statements made on the certificate.

The general business solvency certificate will state the following information:

- Whether the insurer has prepared statutory financial statements for the relevant year and whether they are available at the insurer’s Principal Office in Bermuda.
- Whether the insurer has complied with every condition attached to its registration.
- Whether, in the opinion of those signing the certificate, the value of the insurer’s assets at the end of the year was in the aggregate at least equal to the value of the assets as shown in the statutory balance sheet.
- Whether, in the opinion of those signing the certificate, the aggregate amount of the insurer’s liabilities is not more than the value shown in the statutory balance sheet.
- The following amounts as noted in the insurer’s statutory financial statements:
  - gross premiums written;
  - reinsurance premiums ceded;
  - net premiums written;
  - total premiums and other considerations;
  - loss and loss expense provisions;
• Whether the accounts have been audited for any purpose other than as prescribed by the Regulations.
• Whether or not the minimum liquidity ratio has been met at all times during the year.
• Whether or not the MSM has been met at all times during the year.
• The aggregate amount of the statutory capital and surplus at the end of the year.
• The currency used to prepare the statutory financial statements and the exchange rate used (if not in Bermuda dollars) for conversion purposes.

If the insurer has a negative answer to the points about compliance with certificate of registration and meeting the solvency margins, then the insurer needs to state whether any corrective action has taken place and describe the action taken.

4. **Long-term Business Solvency Certificate**

The long-term business solvency certificate relates to the long-term business of the insurer. It must be signed by both the principal representative and two directors, certifying the statements on the certificate.

The contents of the long-term business solvency certificate are the same as for the general business solvency certificate, with one exception. As the minimum liquidity margin is not applicable for long-term insurers (as it relates to general business), the statement about whether or not this has been met is not applicable.

5. **Loss Reserve Specialist Opinion (General Business Only)**

The Insurance Act stipulates that in certain instances a loss reserve specialist (LRS) who is approved by the Authority, must opine on the insurer’s loss reserves. The LRS is usually an actuary and must be independent from the actuary that actually sets the reserve levels. This opinion gives the Authority additional assurance on the level of reserves carried by the insurer.

The opinion which relates only to the general business of the insurer, must be signed and dated by the LRS and states the LRS’s opinion as to whether the loss reserves, as stated in the statutory balance sheet reasonably provide for all the unpaid loss obligations of the insurer under the terms of the policies.

The LRS must be approved by the Authority. To obtain approval the insurer needs to submit the following information to the Authority:

• name and address of the actuary;
• details of qualifications held (typically in the form of a brief biography/résumé);
• a letter of acceptance of the position from the LRS; and
• a completed letter of undertaking signed by the LRS, which outlines the specific duties of the LRS.

Approval is usually granted until the LRS resigns (e.g., the insurer wishes to appoint a different LRS) or is revoked by the Authority, and so does not have to be applied for every year.

The LRS’s opinion is only needed in certain instances, dependent on the class of the insurer, as shown in Table 4. The opinion is submitted with the Return.

Table 4

<table>
<thead>
<tr>
<th>Class of Insurer</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>Long-term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loss reserve specialist opinion required.</td>
<td>If gross premiums from professional liability insurance exceed 30% of gross premiums written for the financial year.</td>
<td>Every third year and for each year when gross premiums from professional liability insurance exceed 30% of gross premiums written.</td>
<td>Annually</td>
<td>Annually</td>
<td>N/A</td>
</tr>
</tbody>
</table>


The Insurance Act states that an insurer writing long-term business must submit with the Return a certificate prepared by the approved actuary relating to the amount of the insurer’s liabilities outstanding on account of its long-term business. The actuary must be independent from the person setting the reserves, but may be an employee of the insurer. This provides the Authority additional assurance on the adequacy of reserves set by the insurer.

It is important to remember to submit an application for approval for a replacement actuary if the incumbent resigns during the year.

The actuary’s certificate states whether or not, in their opinion, the aggregate amount of the liabilities of the insurer in relation to long-term business as at the end of the year exceeded the aggregate
amount of those liabilities as shown in the statutory balance sheet. The certificate which should be prepared on the actuary’s letterhead must also be signed and dated by the actuary.

As with the loss reserve specialist, the actuary must be approved by the Authority and the same documentation is required.

D. THE STATUTORY FINANCIAL STATEMENTS

The Insurance Act details a prescribed format for the Statutory Financial Statements (SFS) and all insurers who submit SFS must follow this format which includes:

General business:

- statutory balance sheet (Form 1);
- statutory statement of income (Form 2);
- statutory statement of capital and surplus (Form 8); and
- notes.

Long-term business:

- statutory balance sheet (Form 4);
- statutory statement of income (Form 5);
- statutory statement of capital and surplus (Form 8); and
- notes.

On each form there are numbered lines relating to defined assets, liabilities, income or expenses (eg, cash and cash equivalents are stated on line 1, loss reserves on line 17). The figures to be inserted on these lines can usually be taken straight from the audited financial statements with a few exceptions.

Under Section 24 of the Insurance Act, an insurer must keep the accounts of its long-term business separate from the accounts of its general business. Accordingly an insurer registered as, for example, a Class 3 and long-term insurer will need to prepare forms 1, 2, 4, 5 and 8.

Appendix 1 shows the complete SFS for a Class 2 insurer carrying on general business.

E. HIGHLIGHTING DIFFERENCES BETWEEN GAAP AND STATUTORY (STAT) ACCOUNTING

Many insurers require audited accounts, which are prepared under the Generally Accepted Accounting Principles (GAAP) of the country to which they are being reported (typically in Bermuda’s case that of the US, UK or Canada or the IAS).
The SFS contain a few accounting principles that are unique to the Insurance Act, although in most cases accounting treatment is similar to GAAP. Common examples include:

1. **Non-admitted Assets**

Bermuda statutory accounting regulations do not ‘admit’ certain assets (that are common in GAAP based accounting) as assets on the SFS. These are assets that do not have a readily realisable value and include:

- prepaid expenses;
- deferred income;
- deferred acquisition costs; and
- goodwill and other intangibles.

For such assets (with the exception of deferred acquisition costs which are discussed below), the change in value of these assets flows through the statutory statement of capital and surplus (Line 2 (g)) and the asset is not included on the statutory balance sheet.

2. **Deferred Acquisition Costs**

Deferred acquisition costs are considered a non-admitted asset. Accordingly, they are not recognised as an asset on the balance sheet. However the accounting treatment is different than for other non-admitted assets. The change in deferred acquisition costs flows through Line 9 of the statutory statement of income (commissions and brokerage) rather than the statement of capital and surplus.

3. **Accounts Receivable**

Bermuda statutory accounting regulations require that the insurance and reinsurance balances receivable are shown separately on the statutory balance sheet — insurance balances on Line 10 and reinsurance balances on Line 11. Other receivables that have a readily realisable value would be included on Line 13. This is due to the fact that Section 19 of the Insurance Act states that the insurer must segregate the assets and liabilities of its insurance business from those of its other business.

4. **Loss Reserves**

Where an insurer has reinsurance coverage, they may have some loss reserves recoverable. Under GAAP accounting the loss reserves are shown gross — so the loss reserves recoverable would be shown as an asset and the gross loss reserves shown as a liability.
Bermuda statutory accounting allows the insurer to net the reinsurance reserves recoverable against the total loss reserves and show the balance on Line 17 of the statutory balance sheet.

5. **Unearned Premium and Deferred Ceded Premium**

Where an insurer has reinsurance coverage, there may be some deferred reinsurance premium. This is usually shown as an asset on the GAAP balance sheet and expensed over the reinsurance policy period.

Bermuda statutory accounting allows the insurer to net the deferred reinsurance premium against the unearned premium on the policies written and show the balance on Line 16 of the statutory balance sheet.

6. **Letters of Credit**

An insurer may have a letter of credit (LOC), or other guarantee in their favour (eg, from their reinsurer). Under GAAP accounting, a LOC does not appear in the balance sheet, but is disclosed in the notes to the accounts.

If the LOC relates to insurance operations then the insurer can obtain permission from the Authority for the LOC to be included as an asset on the statutory balance sheet (Line 14 — other assets) with the credit being an increase in statutory capital, which is included in Line 1 (c) in the statement of statutory capital and surplus. This applies only to a LOC that relates to insurance operations. No other LOC or guarantee can be included here.

7. **Segregated Accounts**

Where an insurer operates segregated accounts (either under the provisions of the Segregated Accounts Companies Act 2000 (the SAC Act) or under the provisions of a Private Act) the insurer has two reporting options:

- the insurer may apply for a direction under Section 56 of the Insurance Act and to show the balances relating to the segregated accounts as amounts due to the segregated accounts (Line 14) and amounts due from the segregated accounts (Line 36) on the statutory balance sheet; or
- separate out the assets, liabilities, income and expenses of the segregated accounts and combine them with those in the general account.
F. FREQUENTLY ASKED QUESTIONS

1. Are there any restrictions on paying a dividend and how does this affect our statutory ratios?

The Companies Act (S.54) provides that a company may not declare or pay a dividend if the directors have reasonable grounds for believing that the company is, or would after payment, be unable to pay its liabilities as they become due, or that the realisable value of the assets would thereby be less than the aggregate of its liabilities.

In addition to this requirement an insurer must also continue to meet the solvency and liquidity ratios (as noted in section B of this chapter).

It is usual for the directors to request a written confirmation from the insurance manager stating that:

- to the best of their belief the payment will not affect the insurer’s ability to pay its liabilities as they become due;
- the insurer will remain compliant with the Companies Act following payment; and
- the payment of the dividend will not cause the insurer to breach any provisions in the Insurance Act and Regulations.

Additionally, a Class 4 insurer may not pay out in any financial year dividends which would exceed 25% of its total statutory capital and surplus as shown on the statutory balance sheet at the end of the previous financial year unless they file at least seven days before payment an affidavit with the Authority (signed by two directors and the insurer’s principal representative) stating that the declaration of the dividends has not caused the insurer to fail to meet its relevant solvency and liquidity requirements.

2. We wish to reduce the capital of the insurer — what are the restrictions?

A reduction in statutory capital (defined as share capital plus contributed surplus plus any letters of credit in the insurer’s favour) may occur for example when a letter of credit in favour of the insurer is reduced. Table 5 on the next page shows the requirements and restrictions.
Table 5

<table>
<thead>
<tr>
<th>Reduction of less than 15%</th>
<th>Classes 1,2,3 &amp; Long Term</th>
<th>Class 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insurer must apply to the Authority for approval before the reduction occurs.</td>
<td>No restriction</td>
<td>Insurer must apply to the Authority for approval and also submit an affidavit (signed by two directors and the insurer’s principal representative) stating that the reduction in capital will not cause the insurer to fail to meet its relevant margins.</td>
</tr>
</tbody>
</table>

3. *We want to make a loan to an affiliated company – does this have any implications for statutory accounting?*

Amounts due from a related company are considered a non-relevant asset (they appear in Line 4 of the balance sheet). Accordingly, the insurer has to make sure that it will meet its minimum liquidity ratio (the MSM is unaffected) as relevant assets will be reduced by the amount loaned to the affiliated company.

An insurer can, if necessary, apply to the Authority for permission, under Section 56 of the Insurance Act, to allow the intercompany balance to be included as a relevant asset. However, the insurer would need to be able to demonstrate the ability of the parent/affiliate to repay the balance.

4. *We want to increase the amount of business we write – do we have enough capital?*

An increase in the business of the insurer usually means an increase in the premiums written. This will, in turn, increase the MSM of the insurer (unless the additional business is 100% reinsured) as part of the premiums test.

Therefore, in order to write more business, the insurer must be able to meet the higher MSM. If it appears likely that the insurer will not meet the increased MSM, then the parent company can inject more capital (e.g., via contributed surplus) in order to make sure that the insurer meets the required solvency margin.
5. **We are currently registered as a Class 1 and now wish to write some unrelated business, what do we do?**

In order to write business of unrelated parties the insurer will need to change its registration class from Class 1 to either Class 2 or Class 3 (depending on the expected amount of unrelated business).

To change registration, the insurer will need to submit an application to the Authority, along with a revised business plan. If approved, the Authority will issue a revised certificate of registration.

6. **Who is an unrelated party?**

An unrelated party is anyone who is not an affiliate of the insurer (not part of the same group of companies).

7. **What is the difference between premiums written and earned?**

Premiums written is the total gross amount of business written during the financial year. Premiums earned is the total premiums actually earned during the financial year. The difference usually arises when a policy period does not coincide with the insurer’s financial year. This is the matching concept where income should be earned over the period to which it relates.

**Example**

An insurer has a financial year from 1 January 2006 to 31 December 2006.

It writes one 12-month policy that runs from 1 July 2006 to 30 June 2007 with a premium of $10 million.

Premiums written for the insurer (in the financial year to 31 December 2006) is $10 million — the premium written on that policy.

Only half of that premium actually relates to the financial year 1 January 2006 to 31 December 2006 and so can be ‘earned’ during the year ending 31 December 2006. The other half relates to the financial year 1 January 2007 to 31 December 2007.

Accordingly, at 31 December 2006 there would be unearned premium of $5 million, which would be on the balance sheet.
8. **What is the difference between the terms ‘gross’ and ‘net’ (eg, net premiums written or net loss reserves) for the purposes of statutory reporting?**

Gross figures represent the value before taking into account any reinsurance that the insurer has in place. So gross losses are the insurer’s total liability prior to reinsurance and net losses are the insurers’ liability after accounting for any reinsurance.

Net premiums written is the premium written less any reinsurance premium ceded to a reinsurer.

9. **For the purposes of statutory reporting, what is the difference between reinsurance losses receivable and reinsurance losses recoverable?**

Reinsurance losses receivable are the reinsurance balances that are due on a loss that the insurer has already paid out. Once the insurer has paid out a loss, under the terms of the reinsurance contract the reinsurer will be contractually liable for their portion of the losses paid. The amount would be included in Line 11 of the Return.

Reinsurance losses recoverable are amounts that could be recovered under the reinsurance contract (ie, if there was a loss how much could we recover) and is usually related to the insurance loss reserves. The amount would be recorded in Line 17 of the Return as loss reserves are shown net of reinsurance recoverable.
STATUTORY FINANCIAL RETURN
of
ABC Insurance Ltd
for the period from: 1 January 20X1
to: 31 December 20X1

PART (A) DESCRIPTION OF THE NATURE OF THE COMPANY’S BUSINESS

(1) Information regarding insurance business carried on:

(i) GENERAL BUSINESS
(ii) LONG-TERM BUSINESS
(iii) IF COMPOSITE: IS THE COMPANY A “SECTION 24(6) COMPOSITE”? 
(iv) (a) IS THE COMPANY A WRITER OF UNRELATED RISKS?
(b) IF “YES” TO (a) ABOVE, IS IT AS A DIRECT WRITER OR A REINSURER
(v) THE CLASSES OF BUSINESS WRITTEN AND AMOUNT OF GROSS PREMIUM WRITTEN
WITHRESPECT TO EACH CLASS IS AS FOLLOWS:

<table>
<thead>
<tr>
<th>CLASS OF BUSINESS</th>
<th>GROSS PREMIUM WRITTEN</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>RELATED</td>
</tr>
<tr>
<td>General Business</td>
<td>9,000,000</td>
</tr>
</tbody>
</table>

(vi) IS THERE ANNUAL AGGREGATE STOP LOSS REINSURANCE IN PLACE?
(vii) THE COMPANY Has Not DISCOUNTED ITS LOSS PROVISIONS

PART (B) DESCRIPTION OF CURRENCY USED

(1) Indicate the currency in which the COMPANY’S STATUTORY FINANCIAL
STATEMENTS are shown: UNITED STATES DOLLARS

(2) Has such currency been expressed in accordance with Regulation 10 (2)
of the Insurance accounts Regulation, 1980: Yes

PART (C) OPEN YEAR BUSINESS REVENUE STATEMENT (O.Y.B.R.S.)

(i) (i) Has a Statutory O.Y.B.R.S. been annexed
to the Company’s Statutory Statement of Income
(ii) If “YES” to (i) above, indicate class or classes
of the Company’s business to which the O.Y.B.R.S. relates

N/A
DECLARATION OF STATUTORY RATIOS

year ended December 31, 20XY

2001

(A) THE PREMIUMS TO STATUTORY CAPITAL AND SURPLUS RATIO WAS 1.92 : 1

(B) THE FIVE YEAR OPERATING RATIO WAS 94.80%

(C) THE CHANGE IN STATUTORY CAPITAL & SURPLUS RATIO 84.82%

ABC Insurance Ltd

GENERAL BUSINESS SOLVENCY CERTIFICATE

WE THE PRINCIPAL REPRESENTATIVE AND DIRECTORS OF ABC Insurance Ltd HEREINAFTER REFERRED TO AS ‘THE COMPANY’ DO HEREBY CERTIFY THAT:-

(1) THE COMPANY HAS PREPARED STATUTORY FINANCIAL STATEMENTS IN ACCORDANCE WITH THE ACT, FOR THE year ended December 31, 20XY

AND THAT THEY ARE AVAILABLE AT XYZ LIMITED, 1 ABC STREET, HAMILTON, HM 11 WHICH IS THE COMPANY’S PRINCIPAL OFFICE IN BERMUDA.

(2) THE COMPANY HAS COMPLIED WITH EVERY CONDITION ATTACHED TO ITS CERTIFICATE OF REGISTRATION.


(4) IN OUR OPINION, THE AGGREGATE AMOUNT OF THE COMPANY’S LIABILITIES IS NOT MORE THAN THAT SHOWN IN THE STATUTORY BALANCE SHEET.

(5) THE FOLLOWING AMOUNTS APPEAR ON THE STATUTORY STATEMENT OF INCOME AND BALANCE SHEET FOR THE year ended December 31, 20XY

<table>
<thead>
<tr>
<th></th>
<th></th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A)</td>
<td>GROSS PREMIUMS WRITTEN (Form 2 Line1)</td>
<td>$10,000,000</td>
</tr>
<tr>
<td>(B)</td>
<td>REINSURANCE PREMIUMS CEDED (Form 2 Line 2)</td>
<td>$2,275,000</td>
</tr>
<tr>
<td>(C)</td>
<td>NET PREMIUMS WRITTEN (Fm 2 Line 3 + Fm 3 Line 3)</td>
<td>$7,000,000</td>
</tr>
<tr>
<td>(D)</td>
<td>TOTAL PREMIUMS &amp; OTHER CONSIDERATIONS (Fm 5 Line 19 (d))</td>
<td>$-</td>
</tr>
<tr>
<td>(E)</td>
<td>LOSS AND LOSS EXPENSE PROVISIONS (Fm 1 lines 17/18) (ref: s 8 (2) (e) and s 9 (2) (1))</td>
<td>$797,092</td>
</tr>
</tbody>
</table>

(6) NOT APPLICABLE (ref: s 8 (2) (f))
(7) EXCEPT FOR THE ANNUAL SHAREHOLDERS’ AUDIT, THE ACCOUNTS OF THE INSURER HAVE NOT BEEN
AUDITED FOR A PURPOSE OTHER THAN THAT REQUIRED BY THE REGULATION.

(8) THE APPLICABLE MINIMUM LIQUIDITY RATIO WAS MET DURING THE PERIOD

(9) THE MINIMUM SOLVENCY MARGIN WAS $1,300,000 AND IT WAS MET

(10) THE AGGREGATE AMOUNT OF CAPITAL AND SURPLUS SHOWN IN THE STATUTORY STATEMENT OF
CAPITAL AND SURPLUS WAS $3,652,000

(11) THE STATUTORY FINANCIAL STATEMENTS WERE PREPARED IN United States Dollars
AND THE FIGURES EXTRACTED WERE TRANSLATED INTO BERMUDA DOLLARS AT PAR
TO PREPARE THIS RETURN.

(12) NOT APPLICABLE

XYZ LIMITED
Principal Representative

A N Other
Director

A Director
Director

Solvency Certificate P2
BERMUDA
THE INSURANCE ACT 1978
(Act No: 39 of 1978)
STATUTORY BALANCE SHEET
(General Business)

ABC Insurance Ltd
name of company

for the year ended December 31, 20XY

expressed in United States Dollars
currency used (vide Reg.10(2))

<table>
<thead>
<tr>
<th>STMT. ASSETS</th>
<th>20X1</th>
<th>20X0</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. CASH AND TIME DEPOSITS</td>
<td>3,350,000</td>
<td>3,000,000</td>
</tr>
<tr>
<td>2. QUOTED INVESTMENTS:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Bonds and Debentures</td>
<td>2,200,000</td>
<td>2,350,000</td>
</tr>
<tr>
<td>(b) Equities (preferred and ordinary)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(c) Other quoted investments</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(d) Total quoted investments</td>
<td>2,200,000</td>
<td>2,350,000</td>
</tr>
<tr>
<td>3. UNQUOTED INVESTMENTS:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Bonds and Debentures</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(b) Equities (preferred and ordinary)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(c) Total unquoted investments</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>4. INVESTMENT IN AND ADVANCES TO AFFILIATES</td>
<td>3,000,000</td>
<td>2,500,000</td>
</tr>
<tr>
<td>5. INVESTMENTS IN MORTGAGE LOANS ON REAL ESTATE:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) First liens</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(b) Other than first liens</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(c) Total investment in mortgage loans on real estate</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>7. REAL ESTATE:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Occupied by the company (less encumbrances)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(b) Other properties (less encumbrances)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(c) Total real estate</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>8. COLLATERAL LOANS</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>9. INVESTMENT INCOME DUE AND ACCRUED</td>
<td>45,000</td>
<td>50,000</td>
</tr>
<tr>
<td>10. ACCOUNTS AND PREMIUMS RECEIVABLE</td>
<td>1,000,000</td>
<td>900,000</td>
</tr>
</tbody>
</table>
GUIDE TO THE BERMUDA INSURANCE MARKET

**ABC Insurance Ltd**  
name of company

for the **year ended December 31, 20XY**  
expressed in **United States Dollars**  
currency used (vide Reg.10(2))

<table>
<thead>
<tr>
<th>STMT. LINE NO.</th>
<th>20X1</th>
<th>20X0</th>
</tr>
</thead>
<tbody>
<tr>
<td>11. REINSURANCE BALANCES RECEIVABLE</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>12. FUNDS HELD BY CEDING REINSURERS</td>
<td>1,000,000</td>
<td>1,000,000</td>
</tr>
<tr>
<td>13. SUNDARY ASSETS:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(b)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(c)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>14. LETTERS OF CREDIT AND GUARANTEES:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Letter of Credit</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(b)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(c)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>15. TOTAL</td>
<td>10,595,000</td>
<td>9,800,000</td>
</tr>
</tbody>
</table>
# ABC Insurance Ltd

ame of company

for the year ended December 31, 20XY

expressed in United States Dollars

currency used (vide Reg.10(2))

<table>
<thead>
<tr>
<th>STMT. LINE NO.</th>
<th>20X1</th>
<th>20X0</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>GENERAL BUSINESS INSURANCE RESERVES, OTHER LIABILITIES AND STATUTORY CAPITAL AND SURPLUS</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>INSURANCE RESERVES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>16. UNEARNED PREMIUMS</td>
<td>1,200,000</td>
<td>1,000,000</td>
</tr>
<tr>
<td>17. LOSS AND LOSS EXPENSES PROVISIONS</td>
<td>5,000,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td>18. OTHER INSURANCE RESERVES - GENERAL BUSINESS</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>19. TOTAL GENERAL BUSINESS INSURANCE RESERVES</td>
<td>6,200,000</td>
<td>6,000,000</td>
</tr>
<tr>
<td>OTHER LIABILITIES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>28. INSURANCE AND REINSURANCE BALANCES PAYABLE</td>
<td>698,000</td>
<td>450,000</td>
</tr>
<tr>
<td>29. COMMISSIONS, EXPENSES, FEES AND TAXES PAYABLE</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>30. LOANS AND NOTES PAYABLE</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>31. (a) Income Taxes payable</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(b) Deferred Income Taxes</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>32. AMOUNTS DUE TO AFFILIATES</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>33. ACCOUNTS PAYABLE AND ACCRUED LIABILITIES</td>
<td>45,000</td>
<td>25,000</td>
</tr>
<tr>
<td>34. FUNDS HELD UNDER REINSURANCE CONTRACTS</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>35. DIVIDENDS PAYABLE</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>36. SUNDARY LIABILITIES:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Director's Bonus</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(b) Deferred Commissions Received</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>37. LETTERS OF CREDIT AND GUARANTEES</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>38. TOTAL OTHER LIABILITIES</td>
<td>743,000</td>
<td>475,000</td>
</tr>
<tr>
<td>39. TOTAL GENERAL BUSINESS INSURANCE RESERVES AND OTHER LIABILITIES</td>
<td>6,943,000</td>
<td>6,475,000</td>
</tr>
<tr>
<td><strong>STATUTORY CAPITAL AND SURPLUS</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>40. TOTAL STATUTORY CAPITAL AND SURPLUS</td>
<td>3,652,000</td>
<td>3,325,000</td>
</tr>
<tr>
<td>41. TOTAL</td>
<td>10,595,000</td>
<td>9,800,000</td>
</tr>
</tbody>
</table>
The image contains a statutory statement of income for ABC Insurance Ltd for the year ended December 31, 20XY, expressed in United States Dollars.

<table>
<thead>
<tr>
<th>STMT.</th>
<th>20X1</th>
<th>20X0</th>
</tr>
</thead>
<tbody>
<tr>
<td>LINE NO.</td>
<td>UNDERWRITING INCOME</td>
<td></td>
</tr>
<tr>
<td>1. GROSS PREMIUMS WRITTEN</td>
<td>10,000,000</td>
<td>9,000,000</td>
</tr>
<tr>
<td>2. REINSURANCE PREMIUMS CEDED</td>
<td>3,000,000</td>
<td>2,275,000</td>
</tr>
<tr>
<td>3. NET PREMIUMS WRITTEN</td>
<td>7,000,000</td>
<td>6,725,000</td>
</tr>
<tr>
<td>4. (INCREASE)/DECREASE IN UNEARNED PREMIUMS</td>
<td>(200,000)</td>
<td>(175,000)</td>
</tr>
<tr>
<td>5. NET PREMIUMS EARNED</td>
<td>6,800,000</td>
<td>6,550,000</td>
</tr>
<tr>
<td>6. OTHER INSURANCE INCOME</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>7. UNDERWRITING EXPENSES</td>
<td>6,800,000</td>
<td>6,550,000</td>
</tr>
<tr>
<td>8. NET LOSSES INCURRED AND NET LOSS EXPENSES INCURRED</td>
<td>6,000,000</td>
<td>5,750,000</td>
</tr>
<tr>
<td>9. COMMISSIONS AND BROKERAGE</td>
<td>600,000</td>
<td>485,000</td>
</tr>
<tr>
<td>OTHER UNDERWRITING EXPENSES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10. GENERAL AND ADMINISTRATIVE</td>
<td>65,000</td>
<td>57,000</td>
</tr>
<tr>
<td>11. PERSONNEL COSTS</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>12. OTHER</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>13.</td>
<td>6,665,000</td>
<td>6,292,000</td>
</tr>
<tr>
<td>14. UNDERWRITING PROFIT/(LOSS)</td>
<td>135,000</td>
<td>258,000</td>
</tr>
<tr>
<td>15. TRANSFERRED FROM/(TO) OPEN YEAR BUSINESS REVENUE STATEMENT</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>16. NET UNDERWRITING PROFIT/(LOSS)</td>
<td>135,000</td>
<td>258,000</td>
</tr>
<tr>
<td>17. GENERAL BUSINESS INVESTMENT INCOME - NET</td>
<td>275,000</td>
<td>325,000</td>
</tr>
<tr>
<td>18. INCOME BEFORE THE UNDERTONED ITEMS</td>
<td>410,000</td>
<td>583,000</td>
</tr>
<tr>
<td>37. OTHER INCOME/(DEDUCTIONS)</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>
**ABC Insurance Ltd**

name of company

for the **year ended December 31, 20XY**

expressed in **United States Dollars**

currency used (vide Reg.10(2))

<table>
<thead>
<tr>
<th>STMT. LINE NO.</th>
<th>20X1</th>
<th>20X0</th>
</tr>
</thead>
<tbody>
<tr>
<td>38. INCOME BEFORE TAXES</td>
<td>410,000</td>
<td>583,000</td>
</tr>
<tr>
<td>39. INCOME TAXES (IF APPLICABLE):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Current</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(b) Deferred</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(c) Total</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>40. INCOME BEFORE REALIZED GAINS (LOSSES)</td>
<td>410,000</td>
<td>583,000</td>
</tr>
<tr>
<td>41. REALIZED GAINS (LOSSES)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>42. NET INCOME</td>
<td>410,000</td>
<td>583,000</td>
</tr>
</tbody>
</table>
**BERMUDA**

**THE INSURANCE ACT 1978**  
(Act No: 39 of 1978)

**STATUTORY STATEMENT OF CAPITAL AND SURPLUS**  
(General Business)

**ABC Insurance Ltd**  
name of company

for the year ended December 31, 20XY

expressed in United States Dollars  
currency used (vide Reg.10(2))

<table>
<thead>
<tr>
<th>STMT. LINE NO.</th>
<th>20X1</th>
<th>20X0</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. STATUTORY CAPITAL:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Capital Stock - authorized and issued 120,000 shares of par value US$ 1.00 each</td>
<td>250,000</td>
<td>250,000</td>
</tr>
<tr>
<td>(b) Contributed surplus</td>
<td>500,000</td>
<td>500,000</td>
</tr>
<tr>
<td>(c) Any other fixed capital</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

| | | |
| Total statutory capital | 750,000 | 750,000 |

| 2. STATUTORY SURPLUS: | | |
| (a) Statutory Surplus - beginning of period | 2,575,000 | 1,941,000 |
| (b) Add: Income for the period | 410,000 | 583,000 |
| (c) Less: Dividends paid and payable | 0 | 0 |
| (d) Add/(Deduct) change in unrealized appreciation/(depreciation) of investments | (78,000) | 45,000 |
| (e) Add/(Deduct) change in non-admitted assets | (5,000) | 6,000 |
| (f) Add/(Deduct) change in appraisal of real estate | 0 | 0 |
| (g) Add/(Deduct) change in any other statutory surplus | 0 | 0 |
| (h) Statutory Surplus - end of period | 2,902,000 | 2,575,000 |

| 3. TOTAL STATUTORY CAPITAL AND SURPLUS | | |
| | 3,652,000 | 3,325,000 |
ABC Insurance Ltd

SCHEDULE II
NOTES TO STATUTORY FINANCIAL STATEMENTS

PART I  GENERAL NOTES

<table>
<thead>
<tr>
<th>Line No</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>ABC Insurance Ltd. (“ABC”) was incorporated on January 1, 19XY as a wholly owned captive insurance subsidiary of DEF Inc, a company incorporated in the United States of America.</td>
</tr>
<tr>
<td>2</td>
<td>The general nature of the risks underwritten by the insurer are worker’s compensation, employer’s liability and auto liability.</td>
</tr>
<tr>
<td>3</td>
<td>The insurer’s significant accounting policies, the nature of any change made during the relevant year in those policies and the effect, if determinable, of that change on the statutory financial statements: Basis of preparation The financial statements have been prepared in conformity with accounting principles generally accepted in the United States of America. The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amount of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amount of revenues and expenses during the reporting period. Actual results could differ from those estimates. Cash and cash equivalents Cash and cash equivalents represent cash in banks, time deposits and treasury bills with original maturities of three months or less.</td>
</tr>
<tr>
<td>4</td>
<td>Premiums are reported as earned on a pro-rata basis over the applicable policy period and the unexpired portion is deferred as unearned premiums. Investment income is recognised during the period in which it is earned</td>
</tr>
<tr>
<td>5 - 12</td>
<td>Not applicable</td>
</tr>
<tr>
<td>13</td>
<td>The Company has loaned $3,000,000 to its parent company, DEF Inc. This loan is interest free and repayable on demand</td>
</tr>
</tbody>
</table>

PART II  NOTES TO THE BALANCE SHEET

<table>
<thead>
<tr>
<th>Line No</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 - 14</td>
<td>Not applicable</td>
</tr>
<tr>
<td>16</td>
<td>Unearned premiums Premiums are reported as earned on a pro-rata basis over the applicable policy period and the unexpired portion is deferred as unearned premiums.</td>
</tr>
<tr>
<td>17 - 21</td>
<td>Loss and Loss expense provisions Losses and loss expenses are recorded at the estimated ultimate cost of the claim when reported. The company also provides for losses incurred but not reported based upon estimates of management. Adjustments are reflected in current operations as they become known. Losses have not been discounted.</td>
</tr>
<tr>
<td>22 - 37</td>
<td>Not Applicable</td>
</tr>
</tbody>
</table>

PART III  NOTES TO THE STATUTORY STATEMENT OF INCOME

<table>
<thead>
<tr>
<th>Line No</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>37 - 41</td>
<td>Not applicable</td>
</tr>
</tbody>
</table>

PART IV  NOTES TO THE STATUTORY STATEMENT OF CAPITAL & SURPLUS

1(a). Share Capital Authorized, Issued and Fully Paid: 250,000 Ordinary $1 shares
ABC Insurance Ltd

NOTES TO STATUTORY FINANCIAL STATEMENTS

for the year ended December 31, 20XY

expressed in UNITED STATES DOLLARS

Calculations of Margins and Ratios

Part A

MINIMUM GENERAL BUSINESS SOLVENCY MARGIN:
The greater of:

a) 10% of Loss Reserves 5,000,000 x 10% = 500,000
OR or
b) Premium based calculation:
   Premium
   First (up to $6m) 6,000,000 x 20% = 1,200,000
   Balance 1,000,000 x 10% = 100,000
   Total 9,000,000 = 1,300,000

General Business Assets 10,595,000
General Business Liabilities 6,943,000
3,652,000

PREMIUMS TO STATUTORY CAPITAL AND SURPLUS RATIO:

PREMIUMS 7,000,000
divided by STAT CAPITAL & SURPLUS 3,652,000 = 1.92 : 1.00

CHANGE IN STATUTORY CAPITAL and SURPLUS RATIO:

BALANCE- 20X0 3,325,000
BALANCE- 20X1 3,652,000 PERCENTAGE CHANGE = 9.83%
ABC Insurance Ltd

NOTES TO STATUTORY FINANCIAL STATEMENTS

for the ABC Insurance Ltd

expressed in UNITED STATES DOLLARS

FIVE YEAR OPERATING RATIO:

<table>
<thead>
<tr>
<th>Line on SSI</th>
<th>TOTAL</th>
<th>Year 1</th>
<th>Year 2</th>
<th>Year 3</th>
<th>Year 4</th>
<th>Year 5</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>2001</td>
<td>2000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LOSS RATIO</td>
<td>8</td>
<td>(6,000,000 + 5,750,000 + 5,500,000 + 6,000,000 + 5,250,000)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NLI/NPE</td>
<td>5</td>
<td>91.94% (6,800,000 + 6,550,000 + 6,000,000 + 5,750,000 + 5,900,000)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EXPENSE</td>
<td>13-8</td>
<td>(665,000 + 542,000 + 425,560 + 400,000 + 450,000)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RATIO (B)</td>
<td>3</td>
<td>7.70% (7,000,000 + 6,725,000 + 6,250,000 + 6,000,000 + 6,250,000)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>INVESTMENT</td>
<td>17</td>
<td>(275,000 + 325,000 + 300,000 + 325,000 + 275,000)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RATIO (C)</td>
<td>5</td>
<td>4.84% (6,800,000 + 6,550,000 + 6,000,000 + 5,750,000 + 5,900,000)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL (A+B-C)</td>
<td>94.80%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

LIQUIDITY RATIO

Relevant assets
Relevant liabilities
6,943,000 x 75% = 5,207,250

7,595,000

5,207,250

2,387,750
CHAPTER 15
COMPANY LAW IN BERMUDA

A. EXEMPTED COMPANIES

1. Introduction

Bermuda’s statute law on companies is contained in the Companies Act 1981 (Companies Act). Until 1970, it was only possible to incorporate a limited liability company in Bermuda pursuant to a Private Act of the Legislature. In 1970, the concept of incorporation by registration was introduced. Nearly all companies are now incorporated by registration, although incorporation pursuant to a Private Act is still available and must be used where the general statute law will not accommodate the proposed structure, internal organisation or method of operation of the entity. This ability, with necessary philosophical limitations, to design a Private Act to meet some or all of the special needs of a company is a feature not commonly found in other jurisdictions.

2. Classification

Bermuda companies fall into two principal categories: companies incorporated by Bermudians to trade primarily in Bermuda, and companies incorporated by non-Bermudians for the purpose of conducting business outside Bermuda. This Guide is concerned only with the latter kind of company. Companies falling into this category are known as ‘exempted companies’ and are so-called because they are exempted from those provisions of Bermuda law which stipulate that at least 60% of the equity must be beneficially owned by Bermudians. Permit companies (ie, overseas companies which have received a permit to carry on business in or from within Bermuda) are dealt with in Section B of this chapter.
In general terms, the Companies Act restricts an exempted company from carrying on business in Bermuda, except to the extent that it is so authorised by its constitutional documents and has been granted a licence by the Minister of Finance (the Minister) who will form a view as to whether or not the granting of such a licence is in the best interest of Bermuda. Having said that, there are certain activities which are expressly excluded from the requirement for a licence. Such activities include: doing business with other exempted undertakings (i.e., exempted companies, permit companies, exempted partnerships and exempted unit trust schemes) in furtherance of the business of the exempted company which is being conducted outside Bermuda; dealing in securities of exempted undertakings, local companies or partnerships; carrying on business as manager or agent for, or consultant or adviser to, any exempted company or permit company which is affiliated (whether or not incorporated in Bermuda) with the exempted company or an exempted partnership in which the exempted company is a partner or, in the case of mutual funds, selling or distributing their shares in Bermuda.

The Companies Act makes provision for, among other things, the incorporation of single shareholder companies. The reader should therefore be aware that, in this Guide, references to shareholders also embrace the sole shareholder of such a company.

3. Procedure for Incorporation

a. By Registration

The first step in the registration procedure is the reservation of a name with the Registrar of Companies (Registrar). The application to form a company is then submitted to the Bermuda Monetary Authority (Authority). The application will supply the name of the proposed company, the nature of its intended business and the proposed ownership of the company.

Concurrently, approval is sought from the Authority for the intended beneficial ownership, details of which are confidential. Personal declarations signed by the beneficial owners must be supplied, unless the owners are already sufficiently well known to the Authority or are public companies (in which case, a copy of the latest annual report will be required).

The memorandum of association of the company (Memorandum) is submitted to the Registrar. The Memorandum will state, amongst other things: the share capital of the company and its division into shares of a specified par value; whether the liability of the shareholders is limited or unlimited; the objects of the company (i.e., business purposes); and any powers additional to those conferred by law. The Memorandum can specify the period, if any, fixed for the duration of the company, or the event, if any, upon which the company is to be dissolved.

The consent of the Minister of Finance (the Minister) is required only in respect of companies which engage in so-called restricted activities, e.g., investment business, trust business, mutual fund business, deposit taking and money services. The Minister will require information that
demonstrates that the company has adequate knowledge and experience available to it. The Minister may, at his discretion, grant or refuse his consent and need not give any reason for his decision.

Ordinarily, incorporation, which requires only the approval of the Registrar, can be accomplished in 24 to 48 hours. Where the consent of the Minister is required, the time needed is usually three to five working days from the date that the Bermuda attorneys have received all necessary information relating to the proposed company, and all personal declarations from the proposed beneficial owners. However, in the event of a genuine emergency, in cases where the consent of the Minister is required, a procedure is available to permit incorporation within two to four days.

b. Pursuant to a Private Act of the Bermuda Parliament

This procedure is relatively straightforward and not as costly as might be expected. Corresponding to the registration procedure, it is necessary to reserve the proposed name with the Registrar and to advertise the proposed incorporation by means of a Private Bill Notice in a local newspaper. The principal hurdle to be surmounted, in practice, is the review of the Bill by the Joint Standing Committee on Private Bills, whose favourable report will invariably ensure a smooth passage for the Bill through the legislative process.

The Bill (which, when enacted, is known as the Incorporating Act) corresponds to the Memorandum of a registered company and will set out, among other things, the proposed objects and powers of the company. In addition, provisions will be embodied which address any special features of the proposed company. It should be noted that this ability to petition the Legislature (for a Private Act which modifies or waives the requirements of some public statute or creates provisions which have statutory force where they do not presently exist) is not restricted to applicants seeking incorporation, but is also available to registered companies. This may be important when incorporation must take place at a time when the Legislature is not in session.

After the Bill has been enacted (the process having taken six to eight weeks), the company is incorporated by the filing of a memorandum of association, signed by at least three persons who are normally nominees resident in Bermuda. Once incorporated, the company is subject to the provisions of its own Incorporating Act read together with the general company law of Bermuda.

4. Organisation

We have now reached the point where the company is in being. The company will, at this time, receive an exchange control designation from the Authority (see C.3. on page 257) and will ordinarily have made the first payment of the annual government fee (see A.5. on page 258), as this fee must be paid within 30 days of incorporation.
Whichever method of incorporation has been adopted, the signatories to the Memorandum are the provisional directors of the company who act as such until the first board of directors is elected. The provisional directors will have subscribed to the bye-laws of the company (which govern the company’s internal organisation, management and administration, see A.7.d. on page 252), will allot the minimum share capital and will convene the so-called 'statutory meeting’, which is deemed to be the first annual general meeting of the shareholders of the company.

At the statutory meeting, the shareholders will confirm the bye-laws, elect the first board of directors and appoint auditors. The first board of directors meets immediately following its election for the purposes of, among other things, electing the company’s officers for the ensuing year, fixing the company’s financial year-end, opening bank accounts, establishing the company’s registered office and dealing with other matters necessary to put the company in a position to commence business (for example, in the case of an insurance company, appointing insurance managers and taking steps to secure registration of the company under the Insurance Act 1978).

5. Taxation

In Bermuda there are no taxes on profits, income or dividends, nor is there any capital gains tax, estate duty or death duty. Profits can be accumulated and it is not obligatory to pay dividends.

The Bermuda Government has enacted legislation under which the Minister is authorised to give an assurance to an exempted company, permit company, exempted partnership or exempted unit trust scheme that ‘in the event of there being enacted in these Islands any legislation imposing tax computed on profits or income or computed on any capital asset, gain or appreciation, then the imposition of any such tax shall not be applicable to such entities or any of their operations’. In addition, there may be included an assurance that any such tax ‘and any tax in the nature of estate duty or inheritance tax, shall not be applicable to the shares, debentures or other obligations’ of such entities. This assurance may be for a period ending not later than 28 March 2016; the assurance is applied for as a matter of routine by this firm and is invariably granted for the full period. There is an application fee of $152.

The only ‘tax’ imposed on an exempted company (so long as it does not have an office with employees in Bermuda) is an annual government fee, the first payment of which is made immediately upon incorporation and subsequent payments of which are made in January of each year.

Annual government fees are payable as follows:

i) Where the ‘assessable capital’ (ie, in the case of a joint stock company, its authorised share capital and share premium account; in the case of a mutual company, its reserve fund; in the case of a mutual fund, its authorised capital) is:
1) $0 — $12,000 $1,780
2) $12,001 — $120,000 $3,635
3) $120,001 — $1,200,000 $5,610
4) $1,200,001 — $12,000,000 $7,475
5) $12,000,001 — $120,000,000 $9,345
6) $120,000,001 — $1,200,000,000 $16,695
7) $1,200,000,001 or more $27,825

ii) Where the company’s business includes the management of any unit trust scheme, $2,595 is payable in respect of each unit trust scheme managed as at the first day of each calendar year. Lower levels of fees apply for foreign sales corporations.

The fee for the year of incorporation is reduced by 50% if the company is incorporated after 31 August. The fee payable under i) is determined by reference to the company’s assessable capital on incorporation for the year of incorporation and the company’s assessable capital on 31 August in the preceding year for subsequent years. Provision is made for the conversion of the assessable capital into Bermuda dollars for the purpose of determining the applicable fee.

6. Change of Name, Alteration of Objects, Limited or Unlimited Liability

A change of name, a change of objects and a change from limited to unlimited liability require a resolution of the shareholders passed at a general meeting of the company. In the case of a change of name, the change is effective upon filing the prescribed documentary evidence with the Registrar. This is also true of an alteration of a company’s objects. However, unless an affidavit can be sworn and filed to the effect that the two directors swearing the affidavit do not know of any specified person who can make an application to the Court for an annulment, there is a 21-day waiting period following the passing of the shareholders’ resolution before the filing can be made.

It should be mentioned that no company may be registered with a name, or seek to change its name to a name which, in the opinion of the Registrar, is undesirable. There are certain specific restrictions on the choice of name for a company. For instance, the name may not be identical to, or closely resemble, that of another company incorporated in Bermuda; nor may it contain the words ‘Chamber of Commerce’, ‘Royal’, ‘Imperial’, ‘Municipal’, ‘Chartered’, ‘Co-operative’ or ‘Building Society’.

7. General

a. Share Capital

While the minimum share capital prescribed by a company’s Incorporating Act, or by its Memorandum as the case may be, must be subscribed and allotted, there is no legal requirement that it be fully paid up. The minimum share capital of an exempted company cannot be less than
the equivalent, in some currency other than Bermuda dollars, of $12,000 (except for a mutual fund, which may have a minimum share capital of $1.00). However, a company which writes insurance for its own account is required to have a minimum authorised and issued share capital of at least $120,000, all of which must, prior to the company’s registration as an insurer, be fully paid in cash or marketable securities (for more detailed information, see the AS&K Guide to the Insurance Act 1978).

On an insolvent winding-up, a shareholder of an exempted company (being a limited liability company) is liable for up to, but not exceeding, the amount then remaining unpaid on his shares. It is also possible to incorporate companies whose shareholders’ liability is unlimited.

The authorised capital of a company may be increased by resolution of the shareholders in general meeting if authorised by the company’s bye-laws. Subject to observing the prescribed procedures, a company may reduce its share capital to an amount not less than its prescribed minimum share capital. Any exempted company may, if so authorised by its bye-laws and the shareholders in general meeting, divide its shares into several classes and attach thereto any preferential, deferred, or special rights, privileges or conditions; consolidate and divide its share capital; subdivide its share capital; make provision for the issue and allotment of nonvoting shares; cancel authorised but unissued shares; and change its currency denomination. In addition, a company may issue preference shares which, if authorised by its bye-laws, are redeemable at the option of the company and which, if authorised by its Memorandum, are redeemable at the option of the holder. Further, the Companies Act confers on a company, if so authorised by its Memorandum or bye-laws, the power to purchase its own shares. It is also clear that a subsidiary has the power to purchase shares of its parent.

Ordinarily, where a person is acquiring or is proposing to acquire shares in a company, it is not lawful for the company or any of its subsidiaries to give financial assistance, directly or indirectly, to that person for the purpose of that acquisition before, or at the same time as, the acquisition takes place, or to offset his liabilities after the event. However, this rule is relaxed if there are reasonable grounds for believing that the company is, and would after the giving of such financial assistance, still be able to pay its liabilities as they become due. In addition, the rule may be relaxed in certain other situations, subject to meeting tests set out in the Companies Act.

Companies are prohibited from issuing bearer shares. It is not possible to have shares with no par value.

The Minister is empowered to make regulations enabling title to securities to be evidenced and transferred without a written instrument. Paperless trading is also permissible when transfers are effected through any mechanism required or permitted by a stock exchange which has been approved by the Minister.
b. Directors

The business of a company is managed by its board of directors and the first board of directors is elected at the statutory meeting of the shareholders. The term of office of a director generally runs from one annual general meeting to the next; however, the bye-laws may provide for longer terms and retirement by rotation.

Any individual may be appointed an alternate director by, or in accordance with, a resolution of the shareholders, or by a director in such manner as may be provided in the bye-laws. An alternate director has all the rights and powers of a director except that he cannot attend or vote at a meeting otherwise than in the absence of the director to whom he has been appointed an alternate. The shareholders may, at any general meeting, increase the maximum number of directors and, if provided for in the bye-laws, fill, or authorise the directors to fill, any vacancies created. Should a vacancy occur on the board, the remaining directors may fill such a vacancy. Directors, upon written request deposited at the registered office of the company, are entitled to receive notice of any general meeting of the company, and to attend and be heard at any such meeting.

Subject to contrary provisions in the company’s bye-laws, the shareholders of a company may, at a special general meeting convened for that purpose, remove a director and appoint another person in his place.

The Companies Act requires that an exempted company have two individuals, ordinarily resident in Bermuda, who serve either:

1) one as secretary and one as resident representative; or
2) one as secretary and one as director; or
3) both as directors,

of that company.

A company whose shares are listed on an ‘appointed stock exchange’ (e.g., New York, London or Toronto) may appoint a corporate resident representative instead of meeting the above requirements. The resident representative has prescribed duties and obligations under the Companies Act. Corporate directors are not permitted.

Board (and shareholder) meetings may be held by telephone. The Board may also act by unanimous written resolution.

The duties of a company’s officers (which term includes directors) have been codified in the Companies Act and are broadly reflective of the position at common law. Every officer, in exercising his powers and discharging his duties, must:
‘1) act honestly and in good faith with a view to the best interests of the company; and
2) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.’

A company is permitted, either by contract or in its bye-laws, to indemnify its officers against, or to exempt them from, any liability attaching to them by reason of their office, other than in respect of fraud or dishonesty. A company may purchase and maintain insurance for the benefit of its officers.

Our associated company, Appleby Corporate Services Ltd., offers corporate administrative and resident representative services.

c. Officers
Every company must have either a president and a vice-president, or a chairman and a deputy chairman. These officers are elected from the board of directors each year, as soon as practicable after the annual general meeting. In addition, a company must have a secretary (who in certain circumstances cannot also be a director) and may appoint a resident representative. Other officers, such as a treasurer and an assistant secretary are optional.

d. Bye-Laws
The bye-laws of a company govern its internal organisation, management and administration. They are a private document, subject neither to governmental review nor to public inspection. Their adoption and amendment is a two-stage process in the sense that the directors may adopt and amend bye-laws. However, such adopted or amended bye-laws must be submitted to a general meeting of the company and are operative only to the extent that they are approved at such meeting.

The bye-laws must provide for, amongst other things: the holding of an annual general meeting in each year, an audit of the accounts of the company once in every year, the transfer and transmission of shares, and the quorum for general meetings.

In addition, the bye-laws may regulate such matters as the allotment of shares, the payment for shares, the declaration and payment of dividends, the duties and responsibilities of the company’s officers, the calling of and voting at meetings, and the conduct of the affairs of the company generally.

e. Dividends
A company may not declare or pay a dividend if the directors have reasonable grounds for believing that the company is, or will after the payment, be unable to pay its liabilities as they fall due, or that
the realisable value of the company’s assets will fall below the aggregate of its liabilities, its issued share capital and share premium accounts. The Companies Act enables distributions to be made out of contributed surplus (in broad terms, donated cash or other assets).

f. Proxies; Written Resolutions
Shareholders may attend general meetings in person (or, if a company, through the medium of its duly authorised representative) or be represented by proxy. A proxy-holder may exercise multiple voting rights where he represents different shareholders, whether voting on a show of hands or on a poll. Only another director may act as a director’s proxy at board meetings.

The directors may act by unanimous written resolution in lieu of a meeting. Except where the Companies Act requires a meeting, the shareholders may act unanimously by written resolution to do anything which may be done by resolution in general meeting.

g. Records
Every company must have a registered office in Bermuda, which may not be a post office box. The register of shareholders, containing the prescribed particulars of the company’s shareholders, must be kept at the registered office of the company or (after giving notice to the Registrar) at some other convenient place in Bermuda, for inspection. Provision is made for the keeping of branch registers outside Bermuda by companies: (i) whose shares are traded on an ‘appointed stock exchange’; (ii) whose shares have been offered to the public pursuant to a prospectus filed with the Registrar; or (iii) which are subject to the rules or regulations of a competent regulatory authority. Except when the register is permitted to be closed (for up to 30 days in the aggregate in each year), the register must be open for inspection by any shareholder without charge and by any other person on payment of not more than $5 for each inspection. The Companies Act makes provision for mutual insurance companies and mutual fund companies to limit access to their shareholder registers.

Every company must maintain a register of directors and officers at its registered office, stating the name and address of each director and officer of the company. This register is open for inspection by members of the public without charge.

Every company is required to maintain proper records of account, which are usually kept at its registered or principal business office. If, however, such records are kept at some place outside Bermuda, there must be kept at an office of the company in Bermuda ‘such records as will enable the directors or a resident representative to ascertain with reasonable accuracy the financial position of the company at the end of each three month period’. Where the company is listed on an appointed stock exchange, the relevant period for such financial information is six months rather than three.
A company is free to select the generally accepted accounting principles and the generally accepted auditing standards of a country other than Bermuda for the preparation and audit of its accounts, but the principles and standards selected must be expressly identified in the financial statements and auditor’s report.

h. Auditors
The Companies Act contemplates that every exempted company will appoint an independent representative of the shareholders as its auditor, and that audited financial statements, prepared in accordance with generally accepted accounting principles, will be placed before the shareholders at each annual general meeting. Such presentation can, however, be deferred for up to 90 days or such longer period as the shareholders may agree upon.

i. Investments
Except for restrictions on its ability to invest and deal in Bermuda real property (ie, land in Bermuda), an exempted company is free to acquire, hold and deal in all types of investments.

j. Employment of Personnel
Although the majority of exempted companies have no employees in Bermuda, many do have their own offices and staff here. All persons other than Bermudians require the permission of the Minister of Labour and Home Affairs to seek or take up employment in Bermuda. This Minister will allow the employment of skilled and experienced non-Bermudian personnel (particularly at the senior executive level) where it can be demonstrated that there are no Bermudian resources available.

B. PERMIT COMPANIES
An overseas company, that is to say a company incorporated outside Bermuda, which seeks to ‘engage in or carry on any trade or business in Bermuda’ may only do so with a permit issued by the Minister. The overseas company may be looking to establish its principal business office in Bermuda or, more usually, a branch office.

Whether an overseas company requires a permit is frequently a question of fact to be determined in the light of those activities which are, or are intended to be, carried on, by or on behalf of the company, in or from Bermuda. An overseas company will be deemed to be engaging in, or carrying on, a trade or business in Bermuda if it occupies premises in Bermuda, or if it makes known by way of advertisement, or by an insertion in a directory, or by means of letterheads, that it may be contacted at a particular address in Bermuda, or if it is otherwise seen to be engaging in, or carrying on, a trade or business in or from Bermuda on a continuing basis. An overseas company will not be deemed to be carrying on business in Bermuda simply because meetings of its officers
or shareholders are held in Bermuda, or because the company acquires, holds and deals in all types of securities issued or created by a Bermuda entity.

An overseas company with a permit issued by the Minister is known as a ‘permit company’. The application procedure, which normally takes from three to five days to complete, corresponds to the procedure relating to the incorporation of an exempted company. The intention to apply must be advertised in a local newspaper, specifying the company’s name and the trade or business which it proposes to engage in or carry on in Bermuda. The application, with prescribed supporting documents (certified copies of the company’s constitutional documents, its latest audited financial statements and, where appropriate, personal and financial references for the directors and beneficial owners of the company), will provide the prescribed particulars of the company, including the name and address of its proposed principal representative in Bermuda and of its proposed local bankers. The application must also disclose the reason for requiring a permit as opposed to forming an exempted company; exchange control prohibition and tax disadvantage, amongst other reasons, have been accepted in this context.

Generally, a permit company will be carrying on its business, and will only be allowed to do so, in the same manner as an exempted company, (ie, outside Bermuda) from a place of business within Bermuda, or with other exempted undertakings. It is subject to many of the provisions of the Companies Act which govern companies incorporated in Bermuda; for example, those relating to prospectuses required in connection with public offerings.

A permit company must appoint and maintain a principal representative in Bermuda, and give notice to the Registrar of the prescribed particulars of its principal representative. If any of these particulars are altered, details must be given to the Registrar within 21 days. If it has not already done so on its application for a permit, a permit company is required, upon receipt of its permit, to provide certain information to the Registrar, including a list of persons resident in Bermuda who are authorised to accept, on its behalf, service of process and any notices required to be served on it. That list would ordinarily include the principal representative. The permit granted by the Minister is a public document open to inspection.

A permit company must keep, at the principal place in Bermuda from which it carries on business, ‘such records of its acts and financial affairs as will show adequately the trade or business it is engaging in or carrying on or has engaged in or carried on in Bermuda’. However, if the records of the company’s acts and financial affairs are kept at some place outside Bermuda, there must be kept at an office of the company in Bermuda such records as will enable the directors to ascertain, with reasonable accuracy, the financial position of the company at the end of each three month period. In neither case are these records required to be filed with any governmental or other authority in Bermuda (except in the case of a permit company which is registered as an insurer under the Insurance Act 1978).
A permit company may not commence its business in or from Bermuda until it has made the first payment of the annual government fee. The fee ($1,780 or, for insurers, open-ended mutual funds and companies engaged in ‘finance business’, $3,685) becomes payable annually thereafter, on or before 31 March. If the permit company is engaged in the business of managing unit trust schemes, there will be an additional fee of $2,595 in respect of each scheme managed. Where a permit is issued after 31 October in any year, the appropriate fee payable for that year is reduced by 50%.

A permit company, like an exempted company, may apply to the Minister for an assurance exempting it from future taxation, for a period ending not later than 28 March 2016 (see A.5. on page 248).

C. GENERAL INFORMATION

1. Continuance and Discontinuance

A company incorporated outside Bermuda may apply to the Authority to be continued in Bermuda as an exempted company, provided the applicant can demonstrate that it has obtained all necessary authorisations required under the laws of the country in which it was incorporated to enable it to effect the migration to Bermuda. The result of continuance in Bermuda is that the foreign company becomes a company to which the Companies Act and any other laws of Bermuda apply, as if it had been incorporated in Bermuda on the date of its registration. The foreign company must, within one month after the date of registration of the memorandum of continuance, pay the appropriate fee payable as an exempted company. Continuance of a foreign company as an exempted company means that, amongst other things: the property of the foreign company continues to be the property of the company; the company continues to be liable for the obligations of the foreign company; and any existing cause of action, claim or liability to prosecution in respect of the foreign company is unaffected.

A discontinuance procedure is available to any exempted company in Bermuda which may make application to the Minister for consent to be continued in another country or jurisdiction outside Bermuda, as if it had been incorporated under the laws of that other country or jurisdiction. This assumes, of course, that such other country or jurisdiction can and will accept the importation of the Bermuda company.

2. Registration of Charges

The Companies Act established a system of registration with respect to charges created by a Bermuda-incorporated company over its assets. The system also extends to charges on property in Bermuda, which are created or acquired by a company incorporated outside Bermuda, whether or not it is a permit company.
The Registrar maintains the Register of Charges. Registration is not compulsory; nor is it necessary in order to ensure the validity of a charge. Registration does, however, govern the relative priority of charges created on or after 1 July 1983 (the date upon which the Companies Act came into effect). A charge registered on or after this date will have priority over an unregistered charge in respect of the same subject matter.

There is a government fee for registering a charge: $294 where the charge secures a principal amount of $1 million or less, and $515 where the principal amount secured exceeds $1 million.

3. Exchange Control


Generally, exempted undertakings are designated by the Authority as ‘non-resident’ for exchange control purposes, which means that they are free to deal in any currency of their choosing, other than ‘resident’ Bermuda dollars.

The Authority has the responsibility for vetting, on a strictly confidential basis, the proposed beneficial ownership of business enterprises with a foreign ownership component, and any changes in such ownership. Thus, the consent of the Authority must be obtained before any shares or other securities of an exempted company can be issued or transferred. The information to be supplied will correspond to that given at the time of making application to incorporate a company (see A.3.a. on page 246). A general permission with respect to the issue and transfer of securities would ordinarily be given in the case of a public offering (on the basis of a prospectus supplied to the Authority for informational purposes, to be filed thereafter with the Registrar) or, subject to certain conditions, on a private offering made to institutional investors.

4. Prospectuses

Any permit or exempted company which offers shares to the public must first publish a prospectus, signed by or on behalf of all of the directors, and file a copy of it with the Registrar. The prospectus must be certified by an attorney, either as containing the particulars prescribed by the Companies Act or as having been received or otherwise accepted as a basis for offering shares to the public by an appointed stock exchange or ‘competent regulatory authority’ (for example, the Securities and Exchange Commission in the US), in which case, it is exempt from the Companies Act prospectus disclosure requirements. Offerings to sophisticated investors of listed securities, which, under the rules of the stock exchange on which the shares are listed do not require the preparation and filing of a prospectus, are also exempted. Further exemptions apply where a company is subject to the rules and regulations of a competent regulatory authority and those rules do not require the preparation and filing of a prospectus. For those companies which continuously offer their shares
to the public (such as mutual funds), there is a requirement for the issue of a new prospectus or supplementary particulars on the occasion of any material change in the prospectus particulars.

The Minister has the discretion to direct that some or all of the prospectus requirements of the Companies Act shall not apply to a proposed offering of shares.

5. **Listing on the BSX**

Any exempted company or foreign company can use the facility of the Bermuda Stock Exchange (BSX) for raising capital and trading securities. All listing applications for prospective issuers must be sponsored by one of the BSX’s trading members and specific listing regulations must be complied with. Trading memberships are available to international brokers who meet the BSX requirements, which include a minimum capital requirement and a requirement to incorporate a subsidiary in Bermuda as an exempted company. Our associated company, Reid Services Limited, can act as a listing sponsor for certain listing applications.

6. **Amalgamations**

Amalgamations (pursuant to which, by operation of law, two or more companies limited by shares amalgamate and continue as one company) are governed by specific provisions of the Companies Act. The companies to amalgamate may include foreign companies, provided the foreign law permits such cross-border amalgamations. The amalgamated (surviving) company may be an exempted company or a foreign company. Where the amalgamating companies are in a close relationship with one another (ie, as holding company and subsidiary or as subsidiaries of the same holding company), there is available a ‘short form amalgamation’ procedure. The Companies Act contains other provisions for facilitating the reconstruction of companies (pursuant to a scheme of arrangement between a company and its shareholders or creditors) with the sanction of an order of the Court.

7. **Winding-up**

The winding-up or liquidation of a company may be enforced by the Court or may happen voluntarily. Voluntary windings-up may be made by the shareholders, where a company is solvent, or by its creditors, where the company is insolvent. An automatic winding-up of a company may be provided for in its Memorandum, creating a company of limited duration. In the case of insolvency, a compulsory winding-up may be ordered by the Court upon a petition presented either by the company itself or by any creditor, including any contributory or contingent or prospective creditor, or by all those parties, together or separately. The compulsory winding-up provisions of the Companies Act have been extended to include permit companies and non-resident insurance undertakings. The Court may also order that the company be reinstated to a
position prior to its liquidation or returned to liquidation; in either case the company will be
deemed to have continued in existence as if it had not been dissolved. For more information on
insolvent liquidations, see the AS&K Guide to Insolvent Liquidations in Bermuda.

8.  Limited Duration and Unlimited Liability

A limited duration company may be constituted by providing in its Memorandum for a period to
lapse, or for an event to occur, upon which the winding-up of the company will be automatically
triggered. An unlimited liability company may be created by providing for the unlimited liability
of its shareholders in its Memorandum.

9.  Banking Facilities

There are three retail banks in Bermuda, namely, The Bank of N T Butterfield & Son Limited,
The Bank of Bermuda Limited and Capital G Bank Limited. Each of these banks has a network
of subsidiaries, affiliates and correspondent relationships throughout the world.

Under the Banks and Deposit Companies Act 1999 the incorporation of exempted companies
which propose to engage in 'banking business' is permitted.

10.  Accountants

There are many firms of accountants in Bermuda available to provide accounting and consultancy
services to exempted undertakings. All of the leading international firms have local affiliates.
Appleby can provide such services through its associated company, Reid Management Limited.
CHAPTER 16
THE SEGREGATED ACCOUNTS
COMPANIES ACT 2000

The Segregated Accounts Companies Act 2000 (SAC Act) provides for any company to which the Companies Act 1981 (Companies Act) applies, to apply to operate segregated accounts enjoying statutory divisions between accounts. The effect of such statutory division is to protect the assets of one account from the liabilities of other accounts with the result that only the assets of a particular account may be applied to the liabilities of that account. Previously, such a legal effect has only been obtained by means of a Private Act of the Bermuda Legislature.

The statutory divisions between accounts do not create separate bodies corporate, but rather achieve within a single company what could otherwise be achieved by incorporating subsidiaries, or by a company creating a floating charge over certain assets in favour of its obligations to particular clients.

The SAC Act has several advantages over traditional routes to creating legal divisions between accounts. It is cheaper and less unwieldy than forming numerous subsidiaries. It also avoids issues of time, solvency and perfection in relation to charges. Most importantly, the SAC Act establishes substantive law governing the application of particular assets in favour of particular accounts and their respective liabilities. Such substantive law represents a major advance over many of the private acts which have preceded this legislation, particularly as the SAC Act’s more comprehensive substantive provisions now reinforce the hitherto largely procedural law provisions on which reliance has traditionally been placed, such as provisions for a liquidator to observe in relation to the application of assets. In this regard, it is believed that the new substantive provisions will significantly enhance the prospects for enforceability of transactions in jurisdictions where the assets of a particular segregated account might be situated, and furthermore, the extent to which procedural as well as substantive law provisions may bind third parties.
The substance of the relationship between a company and its assets which the SAC Act imposes is in the nature of a trust, in that the SAC Act describes a segregated account as being a separate fund from the company’s own assets. Such a separate fund is created by way of a mandated agreement between a company and its client. Accordingly, it is already clear that this new Bermuda law will enjoy wider international recognition and enforceability in accordance with general principles of private international law.

The framework for the privilege of publicly available segregated accounts is intended to enhance Bermuda’s reputation as having proper governance but with a light and flexible legislative regime, one where there is transparent governance, public accountability and yet speed and efficiency. Accordingly, the SAC Act establishes a system of registration of segregated accounts companies with certain prescribed standards of accounting and documentation so that the world at large, and creditors in particular, can see that such segregated accounts companies, as well as their respective segregated accounts, are being properly established and regulated.

An ancillary purpose of the SAC Act is to help Bermuda maintain the competitive high ground in the area of segregated accounts which was established in 1991 when Bermuda enacted its first such private act.

**A. A MAJOR OPPORTUNITY FOR INTERNATIONAL BUSINESS**

We believe that the SAC Act represents a major opportunity for many international businesses. Previously, private acts for segregated accounts were typically sought by insurance companies, Bermuda being a thriving insurance centre. However, one of the principal benefits of the SAC Act is that its provisions are made available to the full range of non-insurance as well as insurance uses, but subject to appropriate regulatory safeguards designed to protect Bermuda’s reputation.

Existing insurance users that employ the concept pursuant to a private act (of which there are approximately 150 currently in force) and which are common include: rent-a-captives, life and annuity companies, so-called ‘transformer’ companies engaged in the transformation of insurance risk into capital markets products and vice-versa, financial guarantee companies, securitisation and derivatives structures and special purpose vehicles.

Non-insurance uses already include ‘master-feeder’, umbrella or other mutual fund structures (both open-ended and closed-ended), providing for multiple classes of shares and multiple investment options. Other prospective non-insurance uses include property development companies, e-commerce companies, ship and aircraft (or fleet) owning companies, non-insurance securitisation and derivatives transactions, replacement for operating subsidiaries or divisions of any company, facilitation of product line or geographic segmentation, temporal segregation (e.g., ‘ring-fencing’ of old liabilities similar to Lloyd’s/Equitas), and a variety of trust company arrangements. The list could easily go on and is bounded only by the imagination and creativity of clients and their professional advisers.
B. SUMMARY OF THE SAC ACT

The SAC Act enacts public legislation (ie, openly available) for the registration of segregated accounts companies and sets out rules governing the operation of segregated accounts by such registered companies. The most significant aspect of segregated accounts is that the company is enabled to contract with a creditor or a shareholder so that the assets transferred by that person are held by the company in a segregated account and are insulated from any claims of the general creditors of the company or the creditors of other segregated accounts. The SAC Act establishes a voluntary system of registration so that segregated accounts companies may be created speedily and with the flexibility necessary to respond to the needs of international business. As with all Bermuda companies, there is a review of the bona fides of the applicant.

The SAC Act creates a statutory regime governing record keeping, the manner in which shares are issued and dividends distributed, accounting standards, the appointment of a receiver and winding up of the company.

The SAC Act also incorporates principles of the business trust legislation adopted in some states of the United States, which create a legal relationship between the company and the account owner of a segregated account that is similar to that obtained under a constructive trust. A business trust is essentially a trust with corporate personality, and the SAC Act represents the first time such a hybrid concept has been used in Bermuda.

The SAC Act contains certain important definitions including ‘account owner’ and ‘counterparty’ which, taken together, enable any combination of client relationships with a segregated account by ownership of shares which track the account or as party to a participation agreement sharing in the proceeds of the account. The documents governing the relationship between the company and the segregated account client constitute the ‘governing instrument’. ‘Linked’ and ‘transaction’ tie the entries in the records of the company, applying generally accepted accounting principles, to the particular segregated account to which a particular substantive activity relates.

The SAC Act also makes two matters clear. Firstly, it states that registration is voluntary, so that companies may continue to establish segregated accounts by other means, eg, by private act, or by mere accounting entries or by the charging route. Secondly, a segregated accounts company registered under the SAC Act is not, by reason only of the operation of segregated accounts, to be taken as carrying on trust business for purposes of Bermuda statute law.

The SAC Act states that any company to which the Companies Act applies may apply to be registered. A company doing insurance business may apply without any restriction but other companies must first obtain approval of the Minister of Finance (Minister). The SAC Act clearly states that the establishment of a segregated account does not create a legal person distinct from the segregated accounts company. Though separate from all other segregated accounts and other
activities of the company, it is not itself a person in the eyes of the law. The segregated accounts company under whose umbrella such segregated account operates remains the only legal person with the capacity to enter into transactions in respect of the account.

The SAC Act requires a company intending to register to give notice to the Registrar of Companies (Registrar). Detailed information must be provided on application, and the designation ‘SAC’ in a company’s name is only required if the Registrar directs that it should be included.

There is a requirement to provide for the maintenance of accounts in the manner set out in the SAC Act and, in the case of existing companies seeking registration, a requirement for a declaration of solvency and consent of 75% of the account owners, creditors and counterparties to existing transactions. The SAC Act enables a dissenting minority of the account owners or counterparties to existing transactions to apply to the Registrar to refuse the registration.

The SAC Act establishes a register to be maintained by the Registrar. The Registrar, if satisfied that the company will comply with the requirements of the SAC Act, will register the company subject, in the case of financial institutions, to any objection from the Bermuda Monetary Authority. The Registrar, however, has the power to impose conditions on the registration or require the company to restrict its activities in a particular way.

The SAC Act enables a company to be removed from the register with the consent of 75% of the account owners or counterparties subject to satisfying the Registrar that there will be no prejudice to the creditors by the removal. Again, an aggrieved minority has recourse to the Registrar.

Where a company is in breach of the provisions of the SAC Act, conditions of registration or directions of the Minister, the Registrar, after giving notice of his intention to do so and after giving the company an opportunity to make representations, may remove the company from the register.

The Act enables a company, which operates segregated accounts by virtue of authority of a private act to register under the SAC Act. In that event, the provisions of the SAC Act will prevail over inconsistent provisions of the private Act, but contracts entered into before the date of registration will continue to be construed in accordance with the private act. Specially-crafted features of a private act business that do not deal with the legal segregation of accounts will be unaffected.

The SAC Act requires each segregated accounts company to appoint a segregated account representative in Bermuda whose duties derive from and are similar to those of the principal representative of an exempted insurance company.

The SAC Act deals with the governing instrument and classifies the relevant transactions distinguishing those relationships which pertain to the account ownership and thereby confer an
account interest in the segregated account, and those relationships that are essentially contractual. The governing instrument must be in writing and set out sufficient particulars governing the business of the segregated account to enable the assets and liabilities of that account to be tracked for each transaction. In the absence of specific provision in the governing instrument, the segregated accounts company will manage the account and may appoint and supervise other managers. The governing instrument will identify the account owners, the manager of the account who has fiduciary responsibility, specify the rights of account owners, and provide for the creation of accounts. Bermuda law governs transactions pertaining to the account ownership of segregated accounts.

The SAC Act enables a company to attribute portions of an asset or liability among any number of segregated accounts or the general account.

The SAC Act enables a segregated accounts company to issue any type of securities which track the performance of a particular account, and to pay a dividend or distribution in respect of securities linked to a segregated account and sets up solvency and liquidity requirements that must be met before any dividend or distribution is effected.

The SAC Act sets out rules governing the keeping of records with respect to each segregated account. The records are to be kept and financial statements are to be prepared in accordance with the relevant provisions of the Companies Act. A register of account owners is required, but the register is not open to public inspection.

A particularly crucial provision of the SAC Act is the section that sets out the operative law that effects the segregation of accounts. The assets of a segregated account are held exclusively for the benefit of the account owner or relevant counterparty and can only be applied to the liabilities of that account, and a statutory ‘firewall’ insulates those assets from the claims of other creditors.

Another vital section articulates the ‘trust’ nature of a segregated account, providing that the assets of the segregated account are held by the company as a separate fund for the benefit of the persons described in the governing instrument. The same section provides for the management of the account and details the legal rights and responsibilities of the account owner and the company.

The SAC Act enables the court to make a receivership order in respect of a segregated account where it is satisfied that the assets are unlikely to be sufficient to discharge the claims of creditors. It also sets out who may apply for a receivership order and requires notice to be served on interested parties. The SAC Act sets out the powers of the receiver to manage a segregated account.

The SAC Act also deals with the winding up of a segregated accounts company, and the liquidator is specifically directed to observe the segregation of accounts and apply the assets as intended by the parties. Remuneration of the liquidator is to be apportioned among the segregated accounts.
The SAC Act empowers the Minister to waive or modify the application of certain provisions of the SAC Act by direction. This is a power that is similar to that which exists under the Insurance Act 1978 (the Insurance Act), and reflects the flexible yet responsible regulatory approach that has long been a hallmark of Bermuda. It is particularly useful as it permits the creative formulation of tailor-made client solutions.

The SAC Act creates offences with respect to false statements, breach of registration conditions or requirements and failure of a segregated account representative to perform his statutory duties.

The Fifth Schedule to the Companies Act provides for an annual fee for segregated accounts companies registered under the SAC Act, which is calculated on the basis of the number of segregated accounts it operates. The SAC Act specifically contemplates an annual fee of $250 per segregated account subject to a maximum annual fee in the aggregate of $1,000.

In June 2002, several amendments were made to the SAC Act. A summary of the more substantive revisions brought into effect by the passage of the Segregated Accounts Companies Amendment Act 2002 (Amendment Act) follows.

The Amendment Act introduced new default provisions which provide that, where there is uncertainty as to whether an interest is an interest in the general account or a segregated account, that doubt is resolved in favour of the interest being characterised as an interest in the general account. Similarly, uncertainty as to whether a given interest in a segregated account is an interest as account owner or counterparty is resolved in favour of the interest being characterised as an interest as a counterparty.

The Amendment Act expressly affirmed the validity of inter-account (referred to in the legislation as ‘internal’) transactions and provided a blueprint for the conduct of such transactions. Specific provisions were introduced to protect creditors in the event that preferential or other improper transactions are entered into between accounts and, within limits, there is protection for management (on a consensual basis) from exposure to liability consequent upon inevitable conflicts of interest which will arise in the context of inter-account transactions. Further, there is express provision for the resolution of disputes arising in relation to such transactions either by reference to court or arbitration. The ability of a segregated accounts company to engage in inter-account transactions is a unique feature of the SAC Act that, it is believed, sets Bermuda’s segregated accounts statute apart from the segregated accounts laws of other jurisdictions like Cayman Islands and Guernsey, which do not contain inter-account provisions. In this regard, these provisions of the SAC Act were specifically reviewed by London leading counsel who confirmed their effectiveness as a matter of law, thereby dispelling any concern as to possible doubtful validity of inter-account transactions conducted in the absence of an express statutory blueprint.
Special provisions are now included in the SAC Act to reduce the likelihood that creditors in respect of a particular segregated account will be in a position to enforce their claims against assets not linked to that account. First, the SAC Act implies a provision into every contract by which the parties agree that the liability will not be paid out of assets other than assets of the segregated account to which the transaction is linked and that any recoveries in breach of the provision are held in trust by the recipient. The legislation also enables the company to make appropriate adjustments between segregated accounts in case: (a) a creditor, in breach of the SAC Act, enforces its claims against assets not linked to the segregated account with which the creditor has dealings; and (b) the company is unable to recover the sum. The provision will be particularly useful in cases where assets linked to a segregated account are located outside of Bermuda.

In addition, provisions corresponding with relevant provisions of the Companies Act were introduced to ensure that segregated accounts are treated substantially in the same way as general companies in respect of reduction of share capital.

The Amendment Act simplified the accounting requirements in relation to segregated accounts companies. For example, it provides that account owners may waive for an indefinite period their right to have the financial statements or an auditor's report thereon laid before a general meeting provided that such waiver is revocable at the option of such account owners.

The Amendment Act introduced a new section designed to lend clarity to the status of transactions or interests in a segregated account by providing that, except where expressly provided to the contrary in the SAC Act, no transaction or interest in a segregated account shall be void or voidable by reason only that at the relevant time the segregated accounts company fails to comply with, or is in breach of, any provision of the SAC Act.

A new provision was introduced to ensure that segregated accounts will enjoy and be subject to the same rights of set-off as apply to legal persons.

The Amendment Act provided a default priorities regime ensuring that creditors and counterparties will be paid before account owners enjoy their residual interest unless the affected parties agree otherwise.

The Amendment Act fortified and clarified a number of provisions in relation to transactions prior to insolvency with a view to applying the standards which apply under the Companies Act, including stating expressly that the consequence of improperly transferring assets between accounts is that the transaction is voidable.
It is noted that further recent amendments to the SAC Act have included: (i) facilitating conversions of companies, including private act companies, to registered SAC Act status, and (ii) reconciling certain provisions of the SAC Act with those of the Insurance Act.

C. CONCLUSION

Bermuda has been at the forefront of the development of the concept of segregated accounts through the medium of private acts and the SAC Act. With the passage of the SAC Act in 2000, it is believed that the concept of segregated accounts is now well developed and particularly well-suited to a wide range of international business structures in Bermuda.
A. INTRODUCTION AND OVERVIEW

The role of the principal representative is an important one both for the insurance regulatory body, the Bermuda Monetary Authority (Authority) and indeed for an insurer itself. The roles and duties of a principal representative which can take the form of a natural person or body corporate, (but more often than not a body corporate), are laid down in the Insurance Act 1978 and its related regulations (Act) and in guidance Note #1 of the Guidance Notes published by the Authority in March 2005. Pursuant to the Act, a principal representative has the responsibility to report certain events concerning the insurer for whom it is appointed including: the insolvency or likely insolvency of the insurer, the breach of any law or the insurer’s licence, the breach of any condition or solvency margin of the insurer, or the failure by the insurer to obey certain other directions of the Authority.

The appointment of a principal representative, which is compulsory for every Bermuda-registered insurer, must be approved by the Authority. A principal representative cannot resign unless proper notice is given to the Authority and a replacement is found, such replacement being also approved by the Authority.

Commonly, the insurance manager of an insurer also acts as the insurer’s principal representative, but it is possible for the two roles to be fulfilled by two separate entities. Where the two roles are separated it will be essential for the principal representative to work closely and insist on open communications lines with the insurer’s insurance managers. It is also possible for a principal representative to be appointed from an independent third-party entity offering such services. Typically, captives with little or no physical presence in Bermuda outsource the role of principal representative in this way. Where insurers have a physical presence in Bermuda, it is probable and
indeed favourable, for a person or entity from the insurer itself, or within a group structure, to be appointed as principal representative for that insurer.

The principal representative must keep itself informed and establish an open exchange of information with the insurer which it represents.

B. PURPOSE OF THE PRINCIPAL REPRESENTATIVE

The principal representative exists in order that the Bermuda Government and in particular the Insurance Division of the Authority can have some identified individual or company present in Bermuda to whom it can look in respect of an insurer’s affairs. The principal representative therefore has specific statutory obligations and, in particular, the requirement to report certain events to the Authority, breach of which constitutes an offence under the Act.

C. REQUIREMENTS AND DUTIES OF THE PRINCIPAL REPRESENTATIVE

The duties of a principal representative are laid down in the Act and Guidance Note #1.

Section 8 of the Act requires that an insurer, registered under the Act, must have two points of contact in Bermuda: a ‘principal office’ and a ‘principal representative’.

Typically, the same entity provides both the principal office and the principal representative, but it is not necessary for the same entity to fulfil both functions. For instance, the ‘principal office’ of the insurer can also be the registered office required under the Companies Act 1981.

The main thrust of Section 8 of the Act relates to the principal representative, and requires every insurer to appoint and maintain a principal representative in Bermuda who is a person (which includes natural persons and bodies corporate) approved by the Authority as that insurer’s principal representative. Thus, it is important to note that the Authority must first approve the principal representative before the appointment takes effect.

A request for the approval of a principal representative is made in writing to the Authority, setting out the name, address and qualifications of the proposed principal representative. In addition to being resident in Bermuda, the principal representative must fulfil the fit and proper criteria as set out in Guidance Note # 7. The most important considerations will be the individual’s competence and capability and their honesty, integrity and reputation.

Even if the insurance company has a physical presence in Bermuda, it must appoint and maintain a principal representative. Indeed, even the highly capitalised property catastrophe/excess liability insurers must appoint a principal representative. Section 8(3A) of the Act provides that, without a reason acceptable to the Authority, an insurer shall not terminate the appointment of its principal representative.
representative, and a principal representative shall not cease to act as such, unless it or he gives 30 days’ notice in writing to the Authority of the intention to do so. As a practical matter, the Authority has advised that writing to the Authority is not sufficient and that the out-going principal representative remains responsible until the in-coming principal representative has been advised and approved and any questions concerning the status of the company concerned have been answered. It is important to note that if a principal representative willfully fails to give the Authority the notice which it is required by Section 8(3A) to give, it commits an offence.

Essentially, the principal representative is obliged to keep an eye on, and review the activities of, the insurer, and see that the obligations of the insurer are carried out. The 2002 amendments to the Act give the Authority wider powers of investigation and document production. These amendments, coupled with the intended prudential visits to insurers by the Authority once every two years, at a minimum, suggests a more active role for the principal representative in that they will have further obligations to fulfill both in relation to the prudential visits and also where the Authority has ordered an investigation into an insurer or the production of documents in relation to the insurer for whom the principal representative acts.

In addition to the requirements for producing financial returns and producing and filing financial statements in respect of the insurer, the Act also provides that an insurer, at the time of registration, shall give notice in writing to the Authority of: (a) the location of its principal office; and (b) the prescribed particulars of its principal representative, its insurance manager (if it has one), its approved auditor and any other prescribed person to be engaged or employed in, or in connection with, its business. Because it is part of the principal representative’s duties to ensure that the insurer is in compliance with the Act at all times, the principal representative should ensure that his identity has in fact been notified to and approved by the Authority, along with the other required information. If any of the information required to be notified to the Authority is altered, the insurer shall give particulars of the alteration to the Authority in writing within 14 days of the alteration being made. Again, because of the principal representative’s over-riding duty to report on compliance with the Act, it should keep itself informed of any changes concerning the insurer and see that they are, or have been, communicated to the Authority.

Likewise, if an insurer fails to comply with any of its statutory requirements or with a written requirement from the Authority to provide them with a copy of its list of insurance agents in Bermuda, it commits an offence.

D. REPORTING EVENTS

The most serious duties of the principal representative are set out in the reporting section; Section 8A of the Act. It is important to note that while these duties are expressed as ‘reports’ when matters come to a principal representative’s attention, the actual discharge of the duty calls for something more active than the rather passive sounding language of the Act. In order to protect
himself, it is best practice for the principal representative to actively seek out information from the insurer, rather than wait for matters to come to light.

It shall be the duty of the principal representative to forthwith notify the Authority on: (a) his reaching the view that there is a likelihood of the insurer for which he acts becoming insolvent; or (b) it coming to his attention, or his having reason to believe, that an event to which this section applies has occurred. Within 14 days of such notification the principal representative shall furnish the Authority with a report in writing setting out the particulars of the case that are available to him.

Typically, a principal representative who acquires information which alerts it to problems within an insurer will question the insurer's principals to get a better understanding of the problem and what the insurer proposes to do to solve the matter. Typically, the problem will have been revealed in the latest financial returns filed with the Authority, or from the continuing liaison between the Authority and the insurance managers so that the Authority will already be aware of the outstanding issue(s).

The following events are considered to be ‘reportable’ events under the Act:

a. i) Failure to comply substantially with a condition imposed upon the insurer by the Authority relating to a solvency margin or a liquidity ratio or other ratio.

The principal representative will need to keep abreast of the underwriting performance of the insurer to know whether the premium writings and loss development are affecting the required solvency margin and ratio.

This means that the principal representative must keep informed of the financial affairs of the insurer. This will not be difficult where the principal representative is also the manager, but where the insurer is self-managed or managed by affiliates overseas, it becomes much more difficult to stay informed, and the principal representative will need to establish at the outset a regular system of reporting from the insurer.

ii) Failure to comply in any respect with any other condition imposed by the Authority.

It is usual for the Authority to restrict the licence of an insurer to those activities envisaged in its business plan as detailed upon incorporation of an insurer. For example where the insurer intends to write reinsurance then generally that insurer’s licence will be restricted to writing reinsurance only, and not direct insurance. Thus, the principal representative should maintain a copy of the licence, and the conditions attached to the licence of each insurer for whom it acts as principal representative. It should therefore be aware when an insurer infringes the conditions of its licence.
b. The commission of an offence by the insurer under either Section 20(8), Section 21(5) or Section 22(5) of the Act.

Section 20 and in particular Section 20(8) of the Act relates to compliance with orders enforced thereunder which have been applied to the insurer concerned. Orders under Section 20 set the level of assets which an insurer must invest in Bermuda. An order under Section 20 and the level of assets required to be invested thereunder are determined on a case-by-case basis. Section 21 relates to the maintenance in Bermuda of approved assets of a value to the whole or a specified proportion of the insurer’s domestic (Bermuda) liabilities. Section 22 relates to the maintenance of assets by the insurer in the custody of a person approved by the Authority as trustee of the insurer. Thus, a principal representative will need to be kept informed by the insurer of any orders made against it by the Authority which require the maintenance of assets in Bermuda or with a particular bank or trustee. Thereafter, the principal representative will need to monitor compliance with the order and report any transgressions.

c. Failure by the insurer to comply with a modified provision, or with a condition, being a provisional condition specified in a direction given to the insurer by the Authority in the exercise of his powers under Section 56 of the Act (typically, these are accounting provisions or exceptions from filing requirements).

Special dispensations granted to, or additional conditions imposed on, an insurer will naturally be known to the principal representative and, thereafter, the principal representative will need to monitor the insurer’s compliance under such directions or provisions. A principal representative should establish with the insurer that he will be notified of any Section 56 directions in place or any additional conditions imposed by the Authority in relation to the insurer. Thereafter, the principal representative should ensure that there is compliance under such special regulations.

d. The involvement of the insurer in any criminal proceedings whether in Bermuda or abroad.

To discharge this duty, the principal representative should not only keep in frequent contact with the insurer, but also keep apprised of the current status of the insurer and its parent company, and relevant group companies, to ensure that there are no relevant or immediate issues or concerns which could potentially impact the insurer for whom they act.

e. The insurer ceasing to carry on insurance business in or from within Bermuda.

The principal representative must keep informed about the underwriting activity of the insurer, and in particular, ascertain who and where the insurer’s principals are and what they are doing.
E. ADDITIONAL MATTERS

The essence of the duty of the principal representative is to be the eyes and ears of the Authority. In practice, this means reporting more than the listed ‘events’. A principal representative should be aware of what is happening with the insurer’s parent company as well. Thus, an impending bankruptcy of the parent will obviously have implications for the insurer.

A typical scenario is a financially troubled parent seeking to extract cash from the insurer to try to stave off its own deficiencies. Unusual dividend instructions, or unusual or overly large loan requests should be viewed with concern. Likewise, the value of loan instruments from the parent, addressed to the insurer, should be monitored. A financially troubled parent may not be able to pay its obligations under a loan instrument addressed to the insurer, and this will impact the solvency of the insurer, which itself is a reportable event.

Significant changes in the business plan of an insurer need to be reported. Under the class system for general business insurers, and in an environment where the business plan is critical in determining the correct classification of an insurer, together with all of the solvency implications consequent on such classification, it is important to be aware of the business the insurer is underwriting. It is also important to determine whether such business deviates materially from the business plan provided to the Authority at the time of licensing the insurer, or in the last notification of changes to the business plan. Notably, it is only material deviations which are of consequence, and whether a change to the business plan is a material change or not is a judgment call for the principal representative.

Equally, the liquidity position of the insurer should be monitored so that the principal representative can understand the investment portfolio of the insurer and ensure that there is sufficient care given to cash flow.

The principal representative must respond to any queries from the Authority concerning statutory returns of an insurer. The principal representative is the first contact for the Authority, and it is usual that the Authority’s queries concerning the financial reports filed by an insurer will come to the principal representative. It will therefore be the responsibility of the principal representative to see that any queries are answered in a timely fashion.

The relationship with the Authority is key. Ongoing dialogue concerning applications between the Authority and the principal representative is common and indeed necessary to ensure fluidity of communication in respect of an insurer. The Authority will look to the principal representative to provide information to assist in the evaluation of any application which the insurer, for whom the principal representative is to act, may make; including the initial incorporation application.
F. REPORTING DIFFICULTIES

Where the principal representative is attempting to resolve issues concerning the statutory financial statements, or any other matter, but encounters hindrances such as the size of the parent company which impacts the transmission of information, the Authority will require the insurer’s principals, whether local or overseas, to report to the Authority. Given the enhanced powers of the Authority under the Act, it is envisaged that the Authority will exercise his powers in respect of investigation into the insurer and the production of documents in relation to the insurer where it has concerns regarding that insurer. The prudential visits to insurers on a minimal bi-yearly basis will likely eradicate the possibility for ‘surprise’ concerns regarding insurers when they are being monitored even more closely and frequently by the Authority.
CHAPTER 18
KEY REGULATORY BODIES IN BERMUDA

A. THE INSURERS’ ADMISSIONS COMMITTEE

The Insurers’ Admissions Committee (the IAC) is responsible for reviewing the soundness of the proposed insurance programmes of companies seeking registration under the Insurance Act 1978, as amended (the Insurance Act), and advising the Bermuda Monetary Authority (the Authority) on an applicant’s suitability for registration as a Bermuda insurance company. During the life of Bermuda insurers, the IAC will also be involved where there is any marked change to the business plan necessitating a revision to the terms or conditions of the registration granted to the insurer.

The legal basis for the IAC is as a subcommittee of the Insurance Advisory Committee provided for in Section 2 of the Insurance Act. Section 2 provides that the purpose of the Insurance Advisory Committee (as distinct from the IAC) shall be to advise the Authority on matters connected with the discharge of its functions under the Insurance Act.

The IAC was originally established to review applications of companies wishing to incorporate in Bermuda, and which intended to write hospital and medical malpractice insurance. In 1976, its terms of reference were extended to include applications from companies proposing to write products liability insurance.

Initially, the IAC reviewed only those professional and products liability companies specifically referred to it by the Registrar of Companies (Registrar). In 1982, for example, the IAC reviewed only 25% of the insurance companies formed in Bermuda. Since 1983, however, the IAC has been reviewing substantially all potential insurance company incorporations.
The IAC comprises independent professional insurance executives resident in Bermuda. Their duty is to review each application and to advise the Authority whether the proposed company would be sound, stable, have competent management and adequate financial guarantees and reinsurance arrangements.

Section 52 of the Insurance Act provides, subject to sections 51A, 51B and 51C of the Insurance Act which permits the Authority to assist foreign regulatory authorities with requests for information, that no person who under or for the purposes of the Insurance Act receives information relating to the business or other affairs of any person and no person who obtains such information directly or indirectly from a person who has received it, shall disclose the information without the consent of the person to whom it relates and (if different) the person from whom it was received. This specific statutory bar to the disclosure of confidential information is of particular comfort to applicants in light of the fact that a member or members of the IAC may, on a given application, be in a position to receive competitive or otherwise sensitive information. Where an applicant can demonstrate to the Authority that there is such a risk, his attorneys may request that a particular member or members of the IAC stand down in respect of that application. In rare cases, it may be possible for the entire application to be handled by the Authority without reference to the IAC.

The current members (as at January 2006) of the IAC are as follows:

Scott Bradley (Chairman)          Graham Pewter
Nicholas Wheeler                  Andre Perez
Keith White                       Mike Hamer
Peter Woolf                       Michael Smith
Stephen S. Outerbridge            Richard Lightowler
Robert Cooney                    Colm Homan
Bermuda Monetary Authority       Compliance & Insurance Division Representatives

B. THE BERMUDA MONETARY AUTHORITY

The Authority was established by the Bermuda Monetary Authority Act 1969, as amended (BMA Act), as a regulatory body which is responsible for different aspects of the regulation of Bermuda’s economy, including the regulation of Bermuda’s corporate financial sectors on behalf of the Ministry of Finance.

The Authority considers that its objectives and responsibilities can be best achieved by a strong and autonomous body which is both knowledgeable and sensitive to the government’s aims and objectives and yet able and willing to give independent advice.
The Authority has evolved as a supervisor, regulator and inspector of financial institutions in accordance with international standards. As part of this evolution, with effect from 1 January 2002, the insurance regulatory function was transferred out of the Ministry of Finance from the Registrar to the Authority. The Authority is now the sole regulatory body for the financial services sector in Bermuda. The Authority is responsible for licensing and supervising insurance companies and deposit taking institutions, issuing licences under the Investment Business Act 1998, licensing trust companies and classifying and regulating collective investment schemes.

Given the importance of the insurance industry in Bermuda, the Authority maintains a distinct Insurance Division comprised of a Supervisor of Insurance, technical analysts and other staff focusing solely on regulating Bermuda’s insurers. The Insurance Division co-ordinates the weekly IAC meetings and is the interface between the IAC and the insurer’s service providers.

In connection with the Authority’s assumption of responsibility for insurance regulatory functions, the Authority has also been given powers of supervision, investigation and inspection with respect to insurance companies.

The Authority may appoint an inspector with extensive powers to investigate the affairs of an insurer if the Authority believes that such an investigation is in the best interests of its policyholders or persons who may become policyholders. In order to verify or supplement information otherwise provided to the Authority, the Authority may direct an insurer to produce documents or information relating to matters connected with its business. In addition, the Authority has the power to require the production of documents from any person who appears to be in possession of such documents.

Further, the Authority has the power to appoint a professional person to prepare a report on any aspect of any matter about which the Authority has required or could require information. If it appears to the Authority to be desirable in the interests of the clients of a person registered under the Insurance Act, the Authority may also exercise these powers in relation to any company which is or has at any relevant time been: (a) a parent company, subsidiary company or related company of that registered person; (b) a subsidiary company of a parent company of that registered person; (c) a parent company of a subsidiary company of that registered person; or (d) a company in the case of which a shareholder controller of that registered person, either alone or with any associate or associates, holds 50% or more of the shares or is entitled to exercise, or control the exercise of more than 50% of the voting power at a general meeting.

If it appears to the Authority that there is a risk of an insurer becoming insolvent, or that an insurer is in breach of the Insurance Act or any conditions imposed upon its registration, the Authority may, among other things, direct the insurer: (i) not to take on any new insurance business; (ii) not to vary any insurance contract if the effect would be to increase its liabilities; (iii) not to make certain investments; (iv) to liquidate certain investments; (v) to maintain in, or transfer to the
custody of a specified bank, certain assets; (vi) not to declare or pay any dividends or other distributions or to restrict the making of such payments; and/or (vii) to limit the insurer’s premium income. The Authority intends to implement a programme of on-site inspections of the operations of physically present commercial insurers and reinsurers. In addition to powers under the Insurance Act to investigate the affairs of an insurer, the Authority may require certain information from an insurer (or certain other persons) to be produced to it. Further, the Authority has been given powers to assist other regulatory authorities, including foreign insurance regulatory authorities, with their investigations involving companies (including insurance and reinsurance companies) in Bermuda but subject to restrictions. For example, the Authority must be satisfied that the assistance being requested is in connection with the discharge of regulatory responsibilities of the foreign regulatory authority. Further, the Authority must consider whether co-operation is in the public interest. The grounds for disclosure are limited and the Insurance Act provides sanctions for breach of the statutory duty of confidentiality.

The Authority is also charged with processing applications and making recommendations to the Minister of Finance (the Minister) in respect of:

- incorporation of companies with restricted business activities (the carrying on of insurance business is not a ‘restricted’ activity, and a company seeking to be formed with this object does not require ministerial consent; however, the application for registration under the Insurance Act must be reviewed by the IAC);
- formation of partnerships;
- establishment of investment funds;
- issue of permits to overseas companies;
- the vetting of all owners of companies/entities to be incorporated/formed; and
- issue or transfer of securities in Bermuda companies and overseas partnerships to non-residents of Bermuda for exchange control purposes, both of which require specific permission from the Authority.

The confidentiality of all such applications to the Authority is strictly protected in the BMA Act. Information can only be released in the discharge of the functions of the Authority by its officers and staff.

Whilst Government must by definition retain the right to make policy, the Authority has a valuable role to play in implementing such policy and, through its advisory role, in influencing the direction in which policies are enforced and/or changed.
1. **Administration**

The Authority’s board of directors is made up of 11 directors (including the chairman). The board is responsible for the policy of the Authority and the general administration of its affairs and business. No director may be a member of either the House of Assembly or the Senate.

The board, after consultation with the Minister, may establish such committees as it deems necessary for the purpose of advising the Authority.

The General Manager is the principal administrative officer of the Authority.

2. **Objects of the Authority**

i. To issue and redeem notes and coins.

ii. To supervise, regulate and inspect any financial institution which operates in and from within Bermuda.

iii. To promote the financial stability and soundness of financial institutions.

iv. To supervise, regulate or approve the issue of financial instruments by financial institutions or by residents.

v. To foster close relations between financial institutions themselves and between the financial institutions and the Government.

vi. To manage exchange control and regulate transactions in foreign currency or gold on behalf of the Government.

vii. To advise and assist the Government and public bodies on banking and other financial and monetary matters.

viii. To perform such functions as may be necessary to fulfil the above objects.

3. **Authorisation and Compliance**

The Authority has a Legal Authorisation and Compliance Division, which vets the ownership of all entities incorporating or forming in Bermuda and which liaises with the various divisions within the Authority to ensure compliance. The Authority carefully scrutinises the ownership of
these entities requiring information on the direct, intermediate and ultimate owners. The Authority must be satisfied that the persons who wish to own/control such entities are persons of integrity and good standing.

4. Exchange Control Regulations

a. History
Exchange control in Bermuda was initially embodied in the Defence (Finance) Regulations 1940 and is now administered under the Exchange Control Act 1972 (Exchange Control Act) and Regulations (Regulations) which were enacted when Bermuda ceased to be a member of the Sterling Area.

b. Objectives
The basic objective of exchange control is to control flows of currency, both from and into Bermuda, and thus conserve Bermuda’s gold and foreign currency reserves for utilisation within the framework of the government's economic policy. It is important to remember that the controls lay equal emphasis on controlling inflows in the form of, for example, foreign currency borrowing and the sale of foreign currency by residents for Bermuda dollars, as they do on controlling outflows, as without the former the latter is not possible.

The controls are based on the concept of differentiating between ‘resident’ and ‘non-resident’ status. In general, the Exchange Control Act does not impose restrictions on transactions between residents of Bermuda but applies mainly to financial transactions between residents and non-residents.

Exempted undertakings are normally designated non-resident of Bermuda for exchange control purposes and are able to conduct their day-to-day operations free of exchange control formalities. Such undertakings are able to pay dividends, distribute capital, open and maintain foreign currency bank accounts, acquire assets and meet all liabilities without reference to the Authority.

5. Existing Controls Over Bermuda Companies

a. General
From the standpoint of controlling Bermuda’s company business, an extremely important aspect of the powers derived from the Exchange Control Act is that permission is required for the issue or transfer of shares in local companies to non-residents, and for all issues and transfers of securities in exempted companies to which a non-resident is a party as buyer or seller. Thus, the Authority is able to control the ownership of exempted companies, both at the incorporation stage and during subsequent changes of ownership. These controls are fundamental to Bermuda’s reputation.
for ensuring that ownership of Bermuda companies, whether controlling or minority, is open only to those of the highest credentials.

The Authority will require information on the direct, intermediate and ultimate owners of Bermuda companies and will look through the corporate veil to the ultimate owners of such companies. This information is kept strictly confidential and is not revealed to any other body, subject to certain exceptions arising out of specific legislation.

Individuals who are intending to acquire 5% or more of the shares of a Bermuda company are required to complete and sign a Personal Declaration Form. Where an individual is intending to own shares in a Bermuda insurance company, the Authority will require a statement of net worth for that individual. Where a private company is to own shares in the Bermuda company, the Authority will require (along with the name of the private company and information on its place and date of incorporation) a complete list of the shareholders of that private company which includes their names, addresses, dates of birth, nationalities, occupations and the percentages of their shareholdings in the private company. In addition, each shareholder who owns 5% or more of that private company must complete a Personal Declaration Form. Where a listed public company is to own shares in a Bermuda company, all that is required to be submitted in respect of that public company are details of the exchange on which it is listed and a copy of the most recent annual report to shareholders. Certain other information will be required where the proposed shareholder is a private equity fund, foreign bank, partnership or trust. The Authority reserves the right to request further information.

b. Exempted Companies

In respect of exempted companies, an exchange control administrative policy exists whereby Bermudians are precluded from acquiring more than a 20% interest in an exempted company. This rule is designed to limit Bermudian involvement in the business of companies which, although incorporated in Bermuda, essentially operate offshore and are normally non-resident for exchange control purposes. It is also considered inappropriate to allow a large Bermudian shareholding in a company which may be in possession of a government tax exemption.

c. Exchange Control

From a purely exchange control point of view, subject to provision of appropriate details to the Authority, non-residents may purchase shares in local companies whose shares are dealt with on the local exchange. Purchases of shares in other local companies are also usually approved subject to satisfactory information on the prospective purchaser, the price representing a fair one, payment being in foreign currency, and to the purchase meeting other provisions of law.

There are no exchange control restrictions on transfers of shares in a local company between residents of Bermuda, even though one or both parties may be non-Bermudian.
Non-resident purchases of shares in new or existing companies are also allowed subject to acceptable information on the purchaser being supplied to the Authority.

C. THE REGISTRAR OF COMPANIES

The Registrar is a department of the Ministry of Finance, and its principal activity is to regulate the many international and local companies incorporated in Bermuda. The Registrar works with the Authority and other government agencies and the private sector in order to maintain the quality and stability of Bermuda as an international offshore financial centre.

Some of the activities of the Registrar are as follows:

a. The registration of all new companies in Bermuda, pursuant to the Companies Act 1981, as amended (Companies Act).

b. The maintenance of the Register of Companies and the exercising of all the powers and duties assigned under the Companies Act.

c. The maintenance of the Register of Charges prescribed by Part V of the Companies Act.


e. The granting of permits to overseas companies to carry on business outside Bermuda from within Bermuda, and, in certain cases, licences to carry on business in Bermuda.

f. The receiving of certain public documents of a company, including offering prospectuses.

Under the Companies Act, the Minister has been given powers to assist a foreign regulatory authority which has requested assistance in connection with enquiries being carried out by it in the performance of its regulatory functions. The Minister’s powers include requiring a person to furnish him with information, to produce documents to him, to attend and answer questions and to give assistance in connection with enquiries. The Minister must be satisfied that the assistance requested by the foreign regulatory authority is for the purpose of its regulatory functions. The Minister must consider, amongst other things, whether it is in the public interest to give the information sought.
CHAPTER 19

ALTERNATIVE DISPUTE RESOLUTION FOR INSURANCE COMPANIES IN BERMUDA

A. ARBITRATION

1. Bermuda as an Arbitration Centre for Insurers

Bermuda’s history of innovation and excellence has provided the island with a well-deserved reputation as one of the top jurisdictions in the world for the conduct of international business.

Now, the island that revolutionised the international insurance and reinsurance worlds with its innovative approach, and was among the first offshore jurisdictions to enact e-commerce legislation, is providing commercial resolutions of a different kind as a centre for the arbitration of international disputes.

For more than 10 years, Bermuda has been forging links with arbitrators from around the world and with international arbitration organisations. Today, having laid a solid foundation for growth, the island is ready to challenge the world’s leading arbitration jurisdictions as the ideal locale for the settlement of disagreements among warring international parties.

Bermudian legislators have aided those efforts by wisely taking a different tack than their English counterparts. While similar English legislation has amended the UNCITRAL Model Law, Bermuda’s lawmakers have instead embraced it with the result that it has been incorporated in the Bermuda International Conciliation and Arbitration Act. That legislation, enacted in 1993, complements the domestic Arbitration Act 1986. The 1993 legislation gives parties the freedom to rely upon institutional rules, appointing institutions or ad hoc agreements. Or, in their absence, the Model Law. Only in the event that the parties do not specify are they forced to rely upon the Court.
Crucially, an award by arbitrators in Bermuda is virtually always final and binding on the parties, recourse to the Court being available only in limited circumstances. They include incapacity, failure to give proper notice, procedural irregularity, or in circumstances where the dispute is not capable of settlement under the law of the state, is in conflict with the state's public policy, or where the award deals with a dispute not contemplated by the parties.

Importantly, Bermuda has ratified the Convention on the Recognition and Enforcement of Arbitral Awards 1958 (the New York Convention), and therefore any award made in Bermuda is capable of being enforced in other convention countries.

Procedurally, Bermuda recognises the rules of international arbitral associations, including the International Chamber of Commerce, the American Arbitration Association, the London Court of International Arbitration and the Chartered Institute of Arbitrators, among others. The island has a branch of the latter group that is concerned with the promotion of arbitration as a dispute resolution mechanism, as well as with the training and appointment of arbitrators.

In conjunction with the Bermuda International Business Association, the Bermuda branch of the Chartered Institute of Arbitrators holds a register of qualified arbitrators. However, arbitrating parties are not limited to choosing an arbitrator from the register, and can appoint whomever they wish. Parties are not required to retain local counsel although such an appointment may be of use in terms of local counsel’s practical experience and knowledge of the procedural law of Bermuda. Many local counsel also hold membership in international arbitration organisations, and are qualified arbitrators by examination. Counsel arriving in Bermuda to work on an arbitration proceeding will find that the island’s Immigration department does not require specific permission for them to do so.

Bermuda has a variety of suitable facilities for the conduct of arbitration proceedings, including an International Arbitration Centre set up in conjunction with Bermuda College. The centre boasts a tribunal room, breakout rooms and appropriate business facilities. A variety of top class hotels are also available for the hearing of disputes.

Aside from the island’s friendly legislative framework, familiar procedural rules, qualified local counsel and first class facilities, there is the added advantage that Bermuda’s laws are based on English common law. Bermuda also provides the parties with a neutral venue having no allegiance to the parties in dispute or to the jurisdictions where they regularly conduct business.

The island’s geographical location, some 600 miles off the North Carolina coast, is also beneficial. Bermuda has direct air links with the United States, United Kingdom and Canada, and easy connections may be made for onward travel to continental Europe, Latin America and elsewhere.
The aim of those most closely connected with arbitration in Bermuda is to complement Bermuda’s sophisticated insurance market with a world class arbitration centre. The necessary infrastructure is now firmly in place and the number of arbitrations taking place in Bermuda is steadily increasing.

Many of those involved in the insurance and reinsurance market are increasingly concerned at the potential delays of, and more importantly the cost of, litigation. The advantages of arbitration may overcome these concerns and although these advantages may be familiar to those seasoned arbitration practitioners, it is worth highlighting the advantages of arbitration over litigation:

- **Speed:** arbitration can be speedier than litigation, particularly if both parties have the will to settle the dispute quickly;

- **Enforceability:** an award in Bermuda is enforceable as of right in any New York Convention country throughout the world;

- **Privacy:** the proceedings are not ‘reported’. They are not in the public domain and those preserve trade secrets, reputation and commercially sensitive information;

- **Ability of parties to set their own procedures:** either in the arbitration agreement or at the time of dispute. Avoids complicated court rules and becoming involved in the ‘litigation process’. Procedures can be drafted with the parties or the specific dispute in mind;

- **Expertise in subject matter:** parties can choose their own tribunal and therefore have the ability to appoint arbitrators with ‘industry’ expertise;

- **Cost:** although parties to an arbitration will have to pay for the expense of the arbitral tribunal, the cost of the entire exercise is often less in terms of time, commercial impact and recovery/resolution.

Our arbitration attorneys are never far away when the insurance team are drafting new documentation, and our clients receive careful consideration of the Alternative Dispute Resolution (ADR) provision. The arbitration attorneys will dissect the clause and give advice on the type of procedure to be adopted in certain disputes scenarios; advice on the use and effectiveness of the complexion of the arbitral tribunal; and advice on the use or otherwise of appointing institutions. Of equal importance, our arbitration attorneys’ role does not end when they sign off on the arbitration clause. They will be available when a dispute arises; continuing to use their influence and expertise to ensure a cost effective arbitral proceeding.

An effective arbitration clause/agreement will have been drafted and by operating the clause/agreement sensibly and effectively, but taking charge of the situation so as to enforce that it does not become the mirror image of long running court proceedings, we seek to ensure that the arbitral proceeding is both effective and efficient.
2.  The Arbitration Process

Similar to other industries, the majority of insurance arbitrations are commenced by the service of a demand for arbitration and a notice of the appointment of the claimant’s arbitrator. The International Chamber of Commerce (ICC) and other arbitration institutions have standard rules and specific requirements as to the content of the demand for arbitration. They also have certain filing constraints.

A typical reinsurance agreement will provide for arbitration by a panel of three arbitrators. The appointment of the arbitrators follows an unremarkable procedure in which each party appoints its own arbitrator and then the two appointed arbitrators choose the third member of the panel. If the two appointed arbitrators cannot agree on the identity of the third arbitrator within a given period (usually 30 days), the third arbitrator can be appointed by an agreed appointing body or, if there is no appointing body, by the Supreme Court of Bermuda. The third arbitrator acts as chairman of the arbitral tribunal.

In reinsurance agreements, arbitration clauses often specify that the arbitrators be active or retired insurance executives. The arbitration clause recommended by ARIAS (UK) expands the class of potential arbitrators and suggests the inclusion of lawyers and other professional advisors with a practice in the insurance industry. In complex arbitrations with difficult legal issues, the ideal panel comprises two industry executives appointed by the parties, with a senior lawyer with extensive reinsurance experience as the third arbitrator.

The arbitrators, including the party-appointed arbitrators, must be “independent and impartial”. Parties to arbitration often mistakenly believe that their appointee is their advocate or will be biased in their favour. Nothing could be further from the truth. The appointed arbitrators are neutral. By the very nature of the appointment, there must be no private communication between the parties and the arbitrators once the tribunal has been constituted. Even prior to appointment, private communication should be limited to determining that there are no conflicts of interest in confirming the candidates’ qualifications and his willingness to act. There must be no canvassing of the potential arbitrator to determine if he/she would be sympathetic to the appointer.

The appointment of an arbitrator can be challenged on two grounds:

(i) that the arbitrator does not possess the qualifications agreed by the parties; and
(ii) that there are justifiable doubts as to his/her impartiality or independence.

The arbitral tribunal will hear such a challenge, even if the arbitral tribunal consists of a sole arbitrator. If the challenge is rejected, there is a right of appeal to the Supreme Court of Bermuda, but no further right of appeal. During the pendancy of any appeal, the arbitration can continue with the challenged arbitrator in place.
Prior to the enactment of the Act, there existed doubt as to whether an arbitral tribunal had jurisdiction to determine the issue of whether a contract containing an arbitration clause was void ab initio. The then prevailing legal theory was that if a contract was held to be void ab initio then an arbitration clause contained in that contract would similarly be void ab initio.

The provision of Article 16(1) of the Model Law provides that an arbitral tribunal may rule on its own jurisdiction and that a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Any application for lack of jurisdiction of the arbitral tribunal must be made not later than the submission of defence. The arbitral tribunal may then either determine the matter as a preliminary issue or as part of its substantive award. There is but one appeal on this subject to the Supreme Court of Bermuda. During the pendency of the appeal, the arbitration can continue.

An arbitration clause can set out procedural rules or it can adopt the rules of an established arbitration institution such as ICC, AAA, ARIAS or the LCIA. In reinsurance contracts, the arbitration procedures tend to be drafted on an ad hoc basis. In ad hoc reinsurance arbitrations, an organisational hearing is held early in the proceedings in order for the arbitral tribunal to rule and give directions on procedural issues that cannot be agreed between the parties. Subject to a mandatory provision of the Act, the tribunal, in the absence of agreement by the parties, may ‘conduct the arbitration in such manner as it considers appropriate’.

Conflict of laws issues can arise in reinsurance arbitrations, particularly where the contract fails to specify a governing law. The procedural law, or curial law, of all international commercial arbitrations held in Bermuda is the Model Law as adopted by the Act, unless the parties agree to the contrary. If the parties specify a governing law in their reinsurance contracts, the arbitral tribunal will follow that choice. The parties are free to choose a governing law which need not have any territorial connection with either parties’ residence, place of performance of the contract, or the seat of arbitration. This Act does, however, prevent a party from attempting to rewrite the parties’ express choice of law agreement by relying upon the conflict of law rules of the jurisdiction chosen by the parties. Only where the parties do not agree on the substantive law governing the dispute will the arbitral tribunal apply the law, determined by the conflict of law rules, which it considers applicable.

The Act also enables the arbitral tribunal to select conflict of law rules as opposed to the substantive legal system governing the dispute. In summary, the arbitral tribunal must first decide the applicable conflict of law system and, second, apply that conflict of law system to determine the substantive law of the dispute. In the absence of agreement by the parties, the arbitral tribunal has a very wide discretion in determining conflict of law issues.

An arbitral tribunal can determine the construction of a contract, not by strict rules of law but as an ‘honourable engagement’. Honourable engagement clauses have long been a feature of
reinsurance contracts, but prior to the enactment of the Act, such clauses received limited recognition in Bermuda. A clause which purported to totally free arbitrators from applying a recognised system of law would not be enforceable. An honourable engagement clause could, however, legitimately release an arbitrator from applying strict rules of interpretation in construing a contract, so as to enable him/her to arrive at a commercially purposive construction of the document.

In our opinion, honourable engagement clauses do not call for a total abrogation of law with each side contending that their case is more honourable than their opponent's. We are certain that basic principles of insurance contract law would be applied to a reinsurance arbitration held under an honourable arbitration clause. The application of certain strict legal principles, which are perceived to be unfair by the insurance industry, might not, however, be applied in such an arbitration. For example, under Bermuda law, a court will not award damages in lieu of rescission in respect of an insurance contract that was entered into as a result of misrepresentation, even if the misrepresentation was a negligent error. An arbitral tribunal operating under an honourable engagement clause might award damages in lieu of rescission in circumstances where rescission would be considered a harsh remedy.

3. Essentials for an Effective Arbitration Agreement

The world's arbitration institutions have reported a record number of arbitrations being held in recent years. The reasons for the increase are varied, but essentially arise from the efforts by draftsmen of the numerous contracts who have made provision for mandatory ADR. The draftsmen and clients are driven by a desire to find a private, cost effective, speedy and knowledgeable forum to resolve disputes.

Whether ADR in any form is cost effective is a subjective exercise. ADR certainly gives parties the ability for a speedy resolution and privacy with the knowledge that the arbitral tribunal has been chosen with industry wisdom and experience. This gives the parties confidence in the process. As to cost, the initial view is not one of immediate savings but, in the long-term, costs are saved; both in comparison with litigation of a full trial, and with the added cost of management time lost in dealing with a matter which may have occurred some years before, with the prospect that perhaps management has changed/moved on.

This section will concentrate on the construction of an effective arbitration agreement. Such an agreement can be as short as a clause or as long as a separate contract. The former tends to rely on the rules and procedures of arbitration institutions and the latter on the imagination and skill of the draftsman to craft ADR procedures relative to the parties' business.

Possible Clauses
One of the first matters to be considered is the type of dispute which may have to be resolved. Will only certain disputes be the subject of ADR, or all disputes?
Should any other forms of ADR be explored before arbitration is entered into? Parties may wish to include provision for negotiation. Should the parties submit the dispute to mediation, either before or during arbitration? What of the conciliation process? There is no hard and fast rule. The parties need to consider and understand the process of ADR at the time the draftsman puts his pen to paper.

The shortest clause may seek to commit the parties to arbitration and to proceed in accordance with the rules of an arbitration institution such as the American Arbitration Association. Those rules are extensive and all encompassing. However, the parties may feel that they can resolve their own procedures with little or no involvement from the arbitration institution. An arbitration institution may seek to impose conditions as to its own fees or the manner in which an award by the tribunal should be dealt with prior to publication to the parties. However, a benefit of an arbitration institution is the support that is available to arbitrators and the parties in the event of any further dispute or impasse in the arbitral process.

If the parties decide to create their own rules and procedures (ad hoc), the following issues should be considered. In fact, they should always be the concern of the parties even if the rules of an institution are preferred, as it may be possible to agree to the amendments to those rules in the initial agreement.

Identify time limits for the:

- delivery of the notice of arbitration to the other party;
- process after notice has been served;
- appointment of the arbitral tribunal;
- hearing (if oral hearing preferred);
- award; and
- compliance with the award.

Select arbitrators:

- The parties can agree to the number of arbitrators (in the absence of agreement, the Act provides for the appointment of three arbitrators).

The manner of appointment:

- By each party appointing one arbitrator and then those two (assuming a two-party dispute) appointing the third; or by the parties putting forward a list of potential arbitrators and the parties then choosing from the list (ballot type); or by selecting from a register or pool of arbitrators or industry-experienced persons; or by having the appointments made by an arbitration institution ie, LCIA, ICC, AAA, etc.
Identify the qualifications of the arbitrators:

- Should the arbitrator be an industry-experienced person? If so, identify the industry, the seniority, experience and whether retired persons can be appointed. Should the arbitrators be attorneys, or should at least one attorney be included in the arbitral tribunal?

Where should the arbitration take place?

- Often referred to as the situs or site of the arbitration. The parties may wish to have an independent/neutral venue, or have a site which enables the arbitration to proceed with every convenience of an ideal infrastructure.

What language should be used?

Select the governing law and procedural law of the arbitration:

- Usually the law of the situs or the law of the contract. Certainty is essential. Remember that there are at least two systems of law; civil law and common law; and the manner in which evidence is given is different in each system.

- Allow the arbitral tribunal to award any relief or remedy it considers just and equitable without reference to the governing law of the contract. Many reinsurance contracts relieve the arbitral tribunal of the obligation to apply ‘strict rules of law’.

Procedures:

- Should the hearing be an oral hearing? Should it be a hearing where the arbitral tribunal should consider the documents only?

- ‘Discovery’ in Bermuda relates to the production of documents relevant to the issues in question. ‘Discovery’ in other jurisdictions may relate to the giving of oral evidence in a deposition hearing. Should the parties consider a hybrid of these processes or provide for specifics?

- Consider how the evidence should be given: orally before the arbitral tribunal; by witness statement/affidavit; or as a mix of the two.

- Consider how submissions should be made: as a written skeleton; with oral submission; or as a mix of the two, and whether the submission should be exchanged with the other party and, if so, in what time frame.
• Consider whether the arbitral tribunal should have the power to sit with an expert or appoint its own expert.

• Consider whether the arbitral tribunal should have the power to consolidate related disputes.

Costs and Interest:

• Should the arbitral tribunal be given the authority to apportion the costs between the parties, or have the losing party held responsible for the winner’s costs?

• The manner in which the parties should pay for the arbitrators will be another issue. Usually the parties will share the cost of the arbitrators. If an award of costs is made against the losing party, it may also include the winner’s share of the arbitrators’ costs.

• Interest may be appropriate. Should this be at the rate expressed in the contract (if any), or at the statutory rate of the state of the governing law of the arbitration, or at some other rate?

Whatever type of agreement to arbitrate is eventually drafted, the major consideration must be to have the arbitration dealt with quickly and at a reasonable cost. If the arbitration mirrors litigation, then perhaps the only benefit that has been achieved is privacy - speed will have been sacrificed for a dogged adherence to court rules and no saving of costs will have been attained.

B. MEDIATION FOR INSURERS, REINSURERS AND COMMERCIAL ORGANISATIONS AND COMMERCIAL DISPUTES

Mediation as a form of effective ADR has often been ridiculed and in some commercial circles overlooked. Although the reinsurance industry prefers mediation to resolve misrepresentation or non-disclosure issues, other forms of dispute in the reinsurance industry tend to be settled outside of mediation in the more common arenas of arbitration or litigation.

Mediation users are looking for client-based solutions, something which is consumer friendly, and a process which is relatively quick and, in real terms, inexpensive. Against this is the often held view that mediation is for wimps! How can this be? In England (at least) the courts are encouraging ADR and also imposing ADR as a prerequisite to the court’s consideration of whether a case should advance to trial.

The key to the success of mediation is the provision of skilled mediators. Mediation is an art form; mediators have to be non-judgemental and work to a resolution of the dispute.

There are real opportunities for the mediation process to be used, not only in particular industries, but also in certain disputes - particularly where the parties wish to preserve a continuing relationship.
An essential element is for the parties to find the right time for settlement of their dispute. Sometimes this is on the steps of the court or during the trial itself. This suggests that there may have been missed opportunities for ADR. If settlement negotiation or a mediation process is being carried out just before or during the trial, why not much earlier? There are several answers:

- Mediation takes place on a voluntary basis.
- Mediation can run with litigation.
- Genuine differences in the litigation — what is the other side thinking?
- Parties and their lawyers decide when it is appropriate for mediation.

All competent litigation lawyers will explore the benefits of ADR and litigation in developing the strategy of any case, including negotiation, but few may consider mediation. This is perhaps because they believe the process may lose tactical advantage or, worse, reveal the much worked upon strategy. These are valid reasons but, if nothing else, mediation may narrow or identify the precise issues between the parties and, if mediation fails, the ensuing arbitration or litigation will concentrate on the ‘real’ issues in dispute (and may even be dealt with as a preliminary issue).

All mediations are held on the basis of confidentiality and entirely without prejudice, until the parties decide to settle the dispute, at which time a formal settlement agreement is entered into which will be binding on the parties.

Mediation represents a speedy possibility of settlement, compared with litigation or arbitration. While the cost and delays in litigation are well known, arbitration is sometimes seen as a slow, expensive process, which is inevitably confrontational. Mediation brings the parties together across a table at a critical stage in the dispute. The cost is essentially that of the management time of those attending, the cost of lawyers (if present or representing a party), and the cost of the mediator and the hire of facilities. If the dispute settles as a result of the mediation, this is surely a worthwhile expense compared to the many thousands of dollars that can be spent on arbitration and litigation.

It is wisest to have a mediation clause as a separate clause in a contract, rather than try to incorporate mediation with arbitration. If one makes a mediation step compulsory in an arbitration clause, valuable time may be lost if one or both of the parties wish to go straight to arbitration. If the clause is part of a provision within the ADR clause, complications in law can arise if the mediation step has not been followed. Hence, a successful party may find that it is not possible to enforce its award.
Once parties have committed to the mediation process, it is then up to the mediator, who will have been selected and appointed by agreement, to bring the parties together at a meeting. The meeting could last for a full day or longer, depending on the progress being made. At this preliminary meeting the mediator will explain that:

- The reference to mediation is “in the contract” or ‘ad hoc’.
- The parties will attend and proceed in good faith.
- The process is consensual not adversarial.
- The mediator is not a judge or arbitrator and will not pass judgment.
- The mediation is absolutely confidential - and nothing from the mediation can be used in any subsequent dispute, litigation or arbitration.
- Anything disclosed to the mediator is done so in confidence.
- Confidence will be respected.
- There must be a high level of trust in the mediator and the parties must be candid with the mediator.

The mediator will also confirm that he will not propose a settlement; the mediator’s job is to facilitate agreement. The mediation will proceed with opening statements from the parties and then move to various plenary and caucus meetings, until either the process has run its course or the mediator recognises that there is no prospect of consensus, concession or settlement.

It is not necessarily the case that a mediator need be an industry specialist, although undoubtedly this helps. It is possible that some mediations will follow a team mediation approach where a lawyer will be appointed together with an industry specialist.

The timing of the mediation is a further key. If there is no timetable for mediation in the contract, the parties are left to consider (a) whether mediation is for them, and (b) when it should happen. Perhaps it should occur as soon as the notice to arbitrate has been served, or when the writ has been served or after ‘discovery’ has taken place. These are strategic and tactical decisions.

Insurers and reinsurers are turning to the mediation process in greater numbers and one of those factors is the continuing relationships between the parties which need to be preserved for the future smooth running of the business relationship. There is also a recognition in the industry that
long running disputes involving costly and lengthy litigation and adversarial arbitration get in the way of commercial enterprise.

Alternative Dispute Resolution in whatever form is a product of the 21st Century and will continue to be refined as businesses become even more sophisticated and management time more precious.


GLOSSARY

OF INSURANCE AND RISK MANAGEMENT TERMS

**Admitted Insurer** — Insurer licensed to do business in the state or country in which the insured exposure is located.

**Admitted Reinsurer** — Reinsurer licensed to do business in the state or country in which the admitted insurer is located. An important consideration for taking tax or accounting credit for reinsurance.

**Approved Auditor** — An auditor approved by the Bermuda Monetary Authority as the independent auditor of an insurer. Insurers must have their statutory financial returns audited annually by an approved auditor. Under prevailing policy the Bermuda Monetary Authority will only appoint individuals or firms resident in Bermuda as approved auditors.

**Arbitration Clause** — Language providing a means of resolving differences between the reinsurer and the reinsured without litigation in the first instance, or at all. Usually, each party appoints an arbitrator. The two arbitrators select a third, or an umpire, and a majority decision of the three becomes binding on the parties in the arbitration proceedings.

**Association Captive** — A captive insurer having two or more owners, typically members of an industry trade association. Sometimes the association itself is the owner of the captive. Generically-used term for all types of group-owned captives.

**Audit** — A survey of the financial records of a person or organisation conducted annually (in most cases) to determine exposures, limits, premiums, etc. Bermuda insurance companies are required to have an annual audit, which is carried out by chartered accountants at the behest of shareholders.
Beneficiary — a person named by the insured, usually under a life insurance policy, to receive the proceeds or benefits accruing under an insurance policy.

Bermuda Monetary Authority (the Authority) — The regulatory body responsible for, amongst other things, the supervision of Bermuda’s financial institutions, reporting to the Government on financial and regulatory matters, the vetting of all individuals and entities which are to be established in Bermuda and enforcing exchange control regulations. The Insurance Division of the Authority is responsible for the licensing and regulation of all Bermuda insurance and reinsurance companies.

Best’s Rating — The rating system developed and published annually by A. M. Best Company that indicates the financial condition of insurance companies.

Binder — A legal agreement issued either by an agent or an insurer to provide temporary evidence of insurance until a policy can be issued. It should contain a definite time limit, be in writing, and clearly designate the company in which the risk is bound, as well as indicating the amount, the perils insured against and the type of insurance.

Bond — A policy that guarantees the performance of a contract, as in surety bonding, or protects against the dishonesty of employees, as in fidelity bonding.

Bordereau — (pl. Bordereaux) — A report providing premium or loss data with respect to identified specific risks. The ceding insurers periodically furnish this report to a reinsurer.

Broker — A solicitor of insurance who does not represent insurance companies, as does an agent, instead representing the insured. Brokers place orders for coverage with companies designated by the insured or with companies of their own choosing.

Capacity — The largest amount of insurance or reinsurance available from a company or from the market in general.

Captive Insurance Company (or Captive) — A closely-held insurance company whose insurance business is primarily supplied and controlled by its owners and in which the original insureds are the principal beneficiaries.

Captive Management Company — A firm in a captive domicile that has as one of its principal activities managing the day-to-day operations of captives. Services provided include record-keeping, filings, serving as the captive’s principal representative in the domicile, and handling relations with other service providers such as auditors, attorneys, actuaries, investment advisers and visiting insureds, to name a few.
**Casualty Insurance** — Insurance that is primarily concerned with the losses caused by injuries to persons, and legal liability imposed on the insured for such injury or for damage to property of others.

**Catastrophe** — A severe loss characterised by extreme force and/or sizeable financial loss — eg, storm or earthquake.

**Catastrophe Reinsurance** — A form of reinsurance that indemnifies the ceding company for the accumulation of losses in excess of a stipulated sum arising from a single catastrophic event or series of events.

**Catastrophic Loss** — Loss in excess of the working layer.

**Cede** — When a company reinsures its liability with another. The original or primary insurer, ie, the insurance company that purchases reinsurance, is the ‘ceding company’ that ‘cedes’ business to the reinsurer. When a reinsurer cedes risk to another reinsurer, this is called a ‘retrocession’ to a ‘retrocessionaire’.

**Ceding Commission** — A percentage of the reinsurance premium retained by a ceding company to cover its acquisition costs and, sometimes, provides a profit.

**Ceding Company** — The insurer that cedes all or part of the insurance or reinsurance it has written to a reinsurer.

**Cession** — The portion of insurance transferred to a reinsurer by the ceding company.

**Claims-Made** — A term describing an insurance policy that covers claims made (reported or filed) during the year the policy is in force for any incidents that occur that year or during any previous period during which the insured was covered under a ‘claims-made’ contract. This form of coverage is in contrast to the occurrence policy, which covers an incident occurring while the policy is in force regardless of when the claim arising out of that incident is filed — one or more years later.

**Claims Reserve** — An amount of money set aside to meet claims incurred but not paid as of the time of the statement.

**Commercial Insurer (or Reinsurer)** — Any insurer whose principal business is selling insurance to anyone who requests a quotation, not just shareholders of the insurer. The shareholders, not necessarily the insured, benefit from the insurance profit.
Commutation — The exchange of one thing for another, as in the exchange of installment payments for a lump sum. Also, may provide estimated payment and discharge of future obligations for reinsurance loss or losses regardless of the continuing nature of certain losses. This is frequently found in Lloyd’s treaties. Commutation agreements are often used by an insurer to terminate a policy by paying the insured a lump sum estimate of future payouts.

Composite Company — An insurance company that transacts insurance, including both life and non-life business.

Credit Life Insurance — Insurance issued to a lender to cover payment of a loan, installment purchase, or other obligation if the debtor dies prior to repayment. Coverage offered is term insurance for less than five years and is generally decreasing as the loan is repaid.

Credit Default Swap — A bilateral contract in which the seller agrees to make a payment to the buyer in the event of a specified credit event in exchange for a fixed payment or series of fixed payments.

Deductible — An amount being the first part of the cost of a claim, which the insured has to bear in accordance with the terms of the insurance.

Directors and Officers Liability — Insures corporate directors and officers against claims, usually by shareholders or employees, alleging loss arising from mismanagement.

Disability — A condition that incapacitates a person in some way so that he cannot carry on his normal pursuits. The definition of ‘disability’ in disability income policies varies substantially and should be carefully examined. Disability may be total, partial, permanent or temporary, or a combination of these.

Excess Insurance — (1) A policy or bond covering the insured against certain hazards, and applying only to loss or damage in excess of a stated amount, or specified primary or self-insurance. (2) That portion of the amount insured that exceeds the amount retained by an entity for its own account.

Facultative Reinsurance — Reinsurance of individual risks by offer and acceptance wherein the reinsurer retains the ‘faculty’ to accept or reject each risk offered.

Feasibility Study — A study undertaken to determine whether a contemplated risk financing programme is feasible for an organisation or group of organisations. An actuarial analysis is often done in conjunction with a feasibility study.
**Financial Guarantee Insurance** — Insurance that covers financial loss resulting from default or insolvency, interest rate level change, currency exchange rate changes, restrictions imposed by foreign governments, or changes in the value of specific goods or products.

**Financial Reinsurance** — A form of reinsurance in which the time value of money is considered in developing the premium and which has loss containment provisions. One of the primary objectives of this type of reinsurance is to enhance the cedant’s financial statements or operating results. Examples of financial reinsurance include loss portfolio transfers and retrospective aggregates. A common feature of these transactions is that the reinsurer assumes the risk that claims will be paid more quickly than projected.

**Fronting (Front)** — An onshore carrier serving as the front for an offshore captive will issue a policy written on its paper to cover a risk, sometimes only insuring a small percentage of it and reinsuring the majority of all of the risk to the captive. Used, for example, where captive insureds need evidence of insurance from an admitted insurer. The front usually provides insurance services on behalf of the captive for a fee.

**Generally Accepted Accounting Principles (GAAP)** — Uniform method of procedures and concepts that have been developed, by general consensus of the accounting profession, to assist in the preparation of various financial statements. This method of accounting is intended to recognise income as it is earned. Each major jurisdiction has its own GAAP.

**General Exclusions** — In workers’ compensation insurance, operations that are specifically excluded from the basic classifications and are always separately classified.

**General Inclusions** — In workers’ compensation insurance, operations that are to be included in all the basic classifications, even though they may appear to be separate operations.

**General Liability Insurance** — Insurance protecting commercial insureds from liability exposures they face — eg, public liability.

**Governing Instrument** — One or more written agreements, instruments, bye-laws, prospectuses, resolutions of directors, registers or other documents (including electronic records), setting out the rights, obligations and interests of account owners in respect of a segregated account.

**Gross Premium** — The total amount receivable by an insurer from the insured under a policy, including a factor for interest or the time value of money.

**Gross Written Premiums** — Premiums received by or due to an insurer without deduction of the cost of any reinsurance or any adjustment for the fact that some of the income has to be reserved for unexpired risks.
**Group Insurance** — Insurance provided to groups of people. Group insurance involves the substitution of group selection, the use of experience rating, and the use of a master insurance contract. These aspects of group insurance yield lower administrative costs than would individual policies written for members of the group. Group insurance is commonly used to provide employees and members of associations with life, health, disability, dental and similar types of coverage.

**Incurred Losses** — Losses that occur during a given time period, whether or not adjusted or paid during that period. Reported incurred losses exclude IBNR, while ultimate incurred losses include IBNR.

**Incurred But Not Reported (IBNR)** — At the end of a period of account a reserve in respect of property, liability and pecuniary insurances to cover the expected cost of losses that have occurred but have not yet been reported to the insurer or reinsurer.

**Insurability** — Acceptability to the insurer of an applicant for insurance at a given rate.

**Insurable Interest** — An interest by the insured person in the value of the subject of the insurance, including any legal or financial relationship. Insurable interest usually results from property rights, contract rights and potential legal liability.

**Insurance** — A contractual relationship that exists when one party (the insurer) for a consideration (the premium) agrees to reimburse another party (the insured) for loss to a specified subject (the risk) caused by designated contingencies (hazards or perils).

**Insurance Policy** — In broad terms, the entire written contract of insurance. More specifically, it is the basic written or printed document, as well as the coverage forms and endorsements (including binders and slips) added to it.

**Insured** — The person(s) or entity(ies) protected under an insurance contract.

**Insurer** — The insurance company that undertakes to indemnify an insured for losses.

**Insurers’ Admissions Committee (IAC)** — The IAC, a committee comprised of industry executives who review and consider all insurance licence applications for insurance and reinsurance companies, brokers and other insurance intermediaries. The IAC considers each submission based upon the applicant’s business plan, five-year financial projections and supporting documentation and make their non-binding recommendation on the application to the Authority.

**Investment Income** — The income of a company derived from its investments as opposed to its insurance operations.
Letter of Credit (LoC) — A financial guarantee issued by a bank that ensures that funds will be available if requested. For captives, LoCs serve two possible purposes: (1) they may be used in lieu of or in addition to cash or other securities as capital; and/or (2) to secure the fronting insurer’s reinsurance receivable created by a non-admitted reinsurer (ie, the captive).

Liability Insurance — Insurance for loss arising out of legal liability to others.

Lloyd’s (of London) — A society of members which underwrite in syndicates via professional underwriters and which writes primarily specialty lines of insurance.

Lloyd’s Syndicate — A group of individuals or bodies corporate at Lloyd’s of London who have entrusted their capital to a team of underwriters who underwrite on behalf of the group.

Lloyd’s Underwriter — A person who writes insurance business for Lloyd’s syndicates through a Lloyd’s association or facility of Lloyd’s.

Loss Portfolio — An amount payable by a reinsurer to a cedent in consideration of the release of the reinsurer from liability arising under a contract of reinsurance in respect of claims arising prior to a fixed date. Hence, the term ‘loss portfolio transfer’ refers to the transfer of such an amount.

Loss Reserve — An estimation of the liability for unpaid claims that have occurred as of a given date, including IBNR, losses due but not yet paid, and amounts not yet due.

Loss Reserve Specialist — An actuary approved by the Authority who determines the levels and sufficiency of insurance loss reserves for an insurer.

Management Company — A firm in the captive domicile specialising in accounting and other services for captive insurance companies, usually serving as the captive’s principal representative in the domicile, and usually making all necessary filings and handling relations with other service providers such as auditors, attorneys, actuaries, investment advisers, and visiting insureds.

Member — A shareholder of a company.

Mutual Insurance Company — A company owned and operated by and for its insureds. Every owner of the company is an insured; every insured is an owner, and they mutually undertake to contribute to each other’s losses. Refer also to Chapter 4.

Named Insured — Any person, firm, or company, or any of its members specifically designated by name as an insured in an insurance policy, as distinguished from others who, although unnamed, fall within the policy definition of an ‘insured’.
**Net Premium** — The premium after discounts have been taken off. Also, a term variously used to describe gross premiums (less return premiums) net of: (a) reinsurance premiums payable; or (b) commission; or both (a) and (b).

**Net Written Premiums** — The premiums received or due to an insurer less the cost of reinsurance but without allowance being made for the cost of any unexpired risk.

**Premium** — The amount of money an insurance company charges to provide the coverage described in the policy or bond.

**Premium Reserve** — Insurers earn the premium paid for an insurance policy over the life of the policy. In other words, one-twelfth of an annual premium is earned each month. An unearned premium reserve is maintained on an insurer’s balance sheet to reflect the unearned premiums that would be returned to policyholders if all policies were cancelled on the date the balance sheet was prepared.

**Primary Beneficiary** — The beneficiary named as being first to receive proceeds or benefits when they come due or are payable, usually under a policy of life insurance. If the primary beneficiary is not living at the time the proceeds are payable, the benefits are paid to the secondary beneficiary.

**Principal Representative** — An individual or entity which is appointed by an insurer to ensure that the insurer is at all times in full compliance with its statutory requirements under the Insurance Act 1978 and related regulations. The principal representative has a statutory duty to report certain events or issues in relation to the insurer for which it acts, to the Authority.

**Private Act** — Private act of the legislature used to incorporate companies or provide companies with characteristics or qualities which are not permitted by statute but are permissible once approved by Parliament.

**Professional Liability** — Coverage designed to protect the professional person against liability for damages (and the cost of defence) based on alleged or real professional errors and omissions or mistakes.

**Quota Share Reinsurance** — Treaty reinsurance providing that the reinsurer shall accept a specified percentage share of each risk or of a book of risks.

**Registrar of Companies (RoC)** — The governmental regulatory authority responsible for the regulation of all non-insurance Bermuda companies and which also regulates insurance companies in relation to its non-insurance compliance requirements.
**Reinsurance** — The practice whereby one insurance company, the ‘reinsurer’, in consideration of a premium paid to it by another insurance company, agrees to indemnify that other insurance company, the ‘reinsured’, for part or all of the liability assumed by the reinsured under a policy or policies of insurance that it has issued. The reinsured may also be referred to as the ‘original’ or ‘primary’ insurer, or the ‘ceding company’.

**Reinsurance Intermediaries** — Brokers who act as intermediaries between reinsurers and the reinsureds.

**Reinsurance Premium** — The premium paid by the ceding company to the reinsurer in consideration of the liability assumed by the reinsurer. *Pro rata:* such premium is a pro rata share of the ceding company’s gross premium less a ceding commission. *Excess of loss:* premium may be a percentage of the ceding company’s gross premium income for the class of business being reinsured or may be the actual premium charged the insured for the reinsurance liability assumed.

**Reinsured** — An insurer whose risks are reinsured by a reinsurer. Also called the ‘ceding company’.

**Reserve** — An amount of money earmarked for a specific purpose. Insurers establish unearned premium reserves that are depicted on their balance sheets. Unearned premium reserves in essence show the aggregate amount of premiums that would be returned to policyholders if all policies were cancelled on the date the balance sheet was prepared. Loss reserves are estimates of outstanding losses, loss adjustment expenses and other related items.

**Retrocession** — A reinsurance of reinsurance.

**Retrocessionaire** — A reinsurer who accepts reinsurance (as distinct from direct insurance) from another reinsurer.

**Retrospective** — With effect from an earlier date; looking backward.

**Retrospective Rating** — The system for basing the premium for an insurance or reinsurance contract on the actual loss experience, with retrospective effect.

**Segregated Account** — A separate and distinct account (comprising or including entries recording data, assets, rights, contributions, liabilities and obligations linked to such account) of a segregated accounts company pertaining to an identified or identifiable pool of assets and liabilities of such segregated accounts company which are segregated or distinguished from other assets and liabilities of the segregated accounts company for the purposes of the Segregated Accounts Companies Act 2000, as amended.
**Segregated Accounts Company** — A company which is registered under Section 6 of the Segregated Accounts Companies Act 2000, as amended, or a company which is entitled to operate segregated accounts pursuant to a private act.

**Separate Account** — A fund usually held by a long-term insurance company or rent-a-captive which is maintained separately from the insurer’s general assets. Separate Accounts can now be used by general insurers also pursuant to the Segregated Accounts Companies Act 2000, as amended. In the case of a long-term insurer, a separate account is generally used for investing pension assets or variable annuity holdings in common stocks. In the event of insolvency of the insurer, separate accounts may be protected from claims by creditors and other insureds.

**Severity** — Estimation of the amount of financial resources required to recover from a potential loss occurrence; the impact of losses. A potential loss with catastrophic possibilities, although infrequent, is far more serious than events expected to produce frequent small losses and no large losses.

**Shareholder** — A person, company or other entity owning shares in a company.

**Special Purpose Vehicle** — An entity established for the purpose of engaging in insurance derivative transactions, whereby the special purpose vehicle issues capital market instruments in respect of a particular risk which the vehicle is itself insuring.

**Stop Loss** — A guarantee from one insurance company (the reinsurer) to another insurance company (the reinsured) that losses over and above an agreed upon amount will be paid by the reinsuring company.

**Syndicate** — A group of companies or underwriters who join together to insure very high valued property or high hazard liability exposures. Insurance exchanges, such as Lloyd’s of London, use syndicates to write insurance. At Lloyd’s a syndicate is made up of individual or corporate ‘names’ who collectively bear the economic risk of insurance policies underwritten by their manager.

**Transformer Company** — Equivalent to or synonymous with the special purpose vehicle in that the company ‘transforms’ the risk which they write into financial instruments which they then issue. Typically, incorporated as a Class 4 insurer.

**Treaty** — A general reinsurance agreement that is obligatory between the ceding company and the reinsurer, containing the contractual terms applying to the reinsurance of some class or classes of business. This contrasts with a reinsurance agreement covering an individual risk.
**Underwriting** — The process of determining whether to accept a risk and, if so, what amount of insurance the company will write on the acceptable risk, and at what rate.

**Underwriting Profit** — The profit derived from the transaction of insurance or reinsurance, ie, gross premiums minus premiums ceded to reinsurers, losses and loss expenses, exclusive of income derived from investments.

**Unearned Premium** — That portion of the original premium that has not yet been ‘earned’ by the insurance company because the policy still has some time to run before expiration. A property or casualty insurer must carry all unearned premiums as a liability in its financial statements since, if the policy should be cancelled, the insurer would have to pay back a certain part of the original premium.

**Working Layer** — The layer of risk in which frequent claims are likely to arise.

**Sources:**

3. The Segregated Accounts Companies Act 2000, as amended — Section 2.