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The purpose of this Memo is to generally set out the requirements of Bermuda's ICO legislation as at the date hereof and does not speak to any future date. It has been drafted to cover the requirements applicable to companies in Bermuda, although there are similar provisions for limited liability companies (LLCs).

Relevant Legislation

Bermuda launched the world's most progressive ICO legislation in 2018 in the form of the *Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018* which revised the *Companies Act 1981* and the *Limited Liability Company Act, respectively, and came into effect on 9 July, 2018; as well as the *Companies (Initial Coin Offering) Regulations 2018* and *Limited Liability Company (Initial Coin Offering) Regulations 2018* which came into effect on 10 July, 2018 (together the '**ICO Legislation**')*

The ICO Legislation applies to companies issuing ICOs (as defined in the ICO Legislation) and imposes certain legal requirements which a company must comply with, including publishing an offer document or 'white paper' with certain disclosures.

The ICO Legislation aims to not only provide certainty for those wishing to issue an ICO but it also aims to provide protection for those looking to purchase tokens or coins via an ICO.

The ICO Legislation makes the issuance an ICO a restricted business activity, meaning that any company wishing to launch an ICO will require the consent of the Minister of Finance under the ICO Legislation. Whilst a company will not be prevented from being incorporated pursuant to the typical processes provided by the *Companies Act 1981* (as amended), ministerial consent is required prior to the launch of the ICO.

Any person who contravenes the ICO Legislation restriction on issuing an ICO, or makes (or authorises the making of) an untrue statement¹ in an ICO offer document commits an offence under the ICO Legislation².

Under the ICO Legislation, an ICO is defined as an offer by a company to the public to purchase or otherwise acquire digital assets. The reference to offering digital assets 'to the public' includes offering them to any section of the public. 'Digital assets' include anything that exists in binary format and comes with the right to use it and includes a digital representation of value that:

- a) is used as a medium of exchange, unit of account, or store of value and is not legal tender, whether or not denominated in legal tender;

¹ Unless he proves either that the statement was immaterial or that at the time he made the statement he had reasonable grounds to believe it was true.

² A person convicted of an offence as set out in this paragraph, shall be liable: on summary conviction, to a fine not exceeding \$50,000 or to imprisonment for a period of one year or to both such fine and imprisonment; on conviction on indictment, to a fine not exceeding \$250,000 or imprisonment for a period of five years or to or to both such fine and imprisonment.

- b) is intended to represent assets such as debt or equity in the issuing company;
- c) is otherwise intended to represent any assets or rights associated with such assets; or
- d) is intended to provide access to an application or service or product by means of blockchain.

It is worth noting that any affinity or rewards program which does not permit value to be taken from or exchanged for legal tender, bank credit or any digital asset, falls outside the scope of the ICO Legislation. Similarly, any digital representation of value issued by or on behalf of a publisher and used within an online game, game platform, or family of games sold by the same publisher or offered on the same game platform are excluded.

ICO Offer Document

The ICO Legislation provides that no company shall offer digital assets to the public unless it publishes in electronic form an ICO offer document prior to such offer. The company must file a copy of the offer document signed by or on behalf of all of the directors of the company prior to (or as soon as reasonably practicable after) publication of such ICO offer document.

Notwithstanding the above, an ICO offer document does not need to be filed with the Registrar, at any time or in any circumstances, where—

- e) the digital assets are listed on an appointed stock exchange or appointed digital asset exchange, or an application has been made for the digital assets to be so listed, and the rules of the appointed stock exchange or appointed digital asset exchange do not require the company to publish and file an ICO offer document at such time or in such circumstances;
- f) 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 and file an ICO offer document at such time or in such circumstances, except where exemption from publication and filing of an ICO offer document is given by reason of the offer being made only to persons who are resident outside the jurisdiction of the authority; or
- g) an appointed stock exchange, appointed digital asset exchange or any competent regulatory authority has received or otherwise accepted an ICO offer document or other document in connection with the Initial Coin Offering to the public.

It is important to note that the offer document must remain accurate and must be updated if any of the minimum required information changes. Pursuant to the ICO Legislation, a statement included in an ICO offer document shall be deemed to be untrue if it is misleading in the form and context in which it is included; and, a statement shall be deemed to be included in an ICO offer document if it is contained in the document or in any report or memorandum appearing on the face thereof or incorporated in the document by reference or issued along with it.

Where an ICO offer document invites persons to purchase digital assets of a company, the following persons will be liable³ to pay compensation to all persons who prove that they purchased any digital assets in reliance to his detriment on the ICO offer document for the loss or damage they may have sustained by reason of any untrue statement included therein which is relevant to the ICO that is to say—

- a) every person who is an officer of the company at the time of the issue of the ICO offer document;
- b) every person who has consented to be named and is named in the ICO offer document as an officer or as having agreed to become an officer either immediately or after an interval of time;
- c) a promoter⁴ of the ICO; and
- d) every person who has authorised the issue to the public of the ICO offer document.

The Registrar will not accept an ICO offer document for filing unless it is accompanied by a certificate signed by an officer or attorney of the company certifying that the ICO offer document contains the particulars required by section 34D (see below).

³ Unless a statutory defense applies.

⁴ The ICO Regulations provide that a person is not a promoter solely by virtue of his provision of professional services to the company in relation to the ICO.

The directors of any company and promoters of any Initial Coin Offering that fail to comply with the above requirements shall each be liable to a civil penalty.

Section 34D Requirements

Section 34D provides that every ICO offer document shall contain (or there shall be attached thereto documents showing):

- a) the name and the address of the registered office or principal office of the promoters;
- b) the name, description and titles of the officers of the promoter;
- c) the business or proposed business of the company;
- d) a description of the project, the proposed timeline for the project including any proposed project phases and milestones;
- e) the amount of money equivalent (in Bermuda dollars) that the Initial Coin Offering is intended to raise;
- f) the disclosure as to the allocation of the amounts intended to be raised amongst the classes of any issuance (pre-sale, post-Initial Coin Offering etc.);
- g) any rights or restrictions on the digital assets that are being offered;
- h) the date and time of the opening and closing of the offering of digital assets;
- i) the general Initial Coin Offering risk warning referred to in section 34G (see below);
- j) a statement as to how personal information will be used.

Section 34G requires the promoter to ensure that the general risk warning appears in the ICO offer document and prominently on the ICO platform at all times while the offer is open or suspended. The general Initial Coin Offering risk warning is a statement that includes the following:

- a) information regarding any substantial risks to the project which are known or reasonably foreseeable;
- b) information as to a person's rights or options if the project which is the subject of the Initial Coin Offering in question does not go forward;
- c) a description of the rights (if any) in relation to the digital assets that are being offered;
- d) information regarding any disclaimer in respect of guarantees or warranties in relation to the project to be developed or any other asset related to the Initial Coin Offering.

The ICO offer document shall also comply with any other requirements as may be prescribed by regulations or any Code of Conduct issued in relation to the ICO Legislation.

Nothing in the ICO Legislation prevents a promoter from including additional information as the promoter considers relevant with respect to the ICO.

Where any company offers digital assets to the public over a period and any of the particulars in an ICO offer document issued by that company ceases to be accurate in a material respect, the company, as soon as reasonably practicable after becoming aware of that fact, must:

- a) publish supplementary particulars disclosing the material changes; and
- b) file a copy of the supplementary particulars with the Registrar.

Each of the directors of any company that fails to comply with the above requirements will be liable to a civil penalty.

ICO Application

Any company submitting an application requesting ICO consent from the Minister must contain the following minimum information relating to the ICO:

- a) the name of the project and the names of the project managers;
- b) the name of the applicant, including addresses, email addresses and websites and any other jurisdiction in which the applicant is registered;

- c) the details of all persons involved with the ICO including the digital asset issuer, the owner of the platform, ICO organisers and other such information;
- d) confirmation as to whether any one or more of the persons referred to above have applied for or been granted a licence, permission or other authority under any law relating to the proposed ICO or otherwise relating to financial markets in any other country and, if so, the relevant details;
- e) information about the project organisation and project planning including the project phases and milestones and estimated time for delivery;
- f) key features of the product or service to be developed;
- g) the proposed market participants that the ICO seeks to target and the proposed jurisdiction or jurisdictions;
- h) whether there are any restrictions regarding participants;
- i) information regarding the technologies to be used and including whether distributed ledger technology or other new or existing technologies will be used (and whether this is an open source project);
- j) the means by which the ICO will be financed;
- k) the amount of money equivalent (in Bermuda dollars) that the ICO is intended to raise by reference to the number of digital assets; and
- l) whether such funds have already been allocated to a specific project and how any surplus funds would be handled.

There are also minimum requirements⁵ in relation to information that must be submitted describing the digital asset issue as well as information regarding compliance features as set out in the ICO Legislation (discussed in more detail below). The information on compliance must include a description of the procedures or protocol that will be used to confirm the identities of the participants in the ICO as well as description of the technical standards or software, blockchain or distributed ledger technology that will be used to identify participants in the ICO.

Subject to receiving consent from the Minister of Finance, the company must publish an ICO offer document in electronic form and must also file a copy of the white paper with the Bermuda Registrar of Companies (subject to specific statutory exemptions) as set out above.

Providing a Communication Facility; Cooling-off Rights

The ICO Legislation states that the promoter of the ICO must provide an electronic facility that can be used for the following purposes at all times while the offer is open or suspended:

- a) for people who access the ICO offer document through the ICO platform:
 - (i) to make posts relating to the offer;
 - (ii) to see posts relating to the offer made by others; and
 - (iii) to ask the company making the offer, or other service provider,
 - (iv) questions relating to the offer; and
- b) for the company or other service provider, as the case may be, to make posts responding to questions and posts.

If a person in relation to an Initial Coin Offering makes an application pursuant to the ICO, the person must be allowed to withdraw the application within three business days after the application is made. The withdrawal of an application can only be made by a method specified on the ICO platform and the ICO platform must include specific instructions and a means to withdraw.

Compliance

Any company issuing an ICO must ensure it establishes a compliance framework meeting the ICO Legislation requirements⁶ including applying appropriate measures to identify and verify the participants in the ICO. Appropriate

⁵ See Schedule A.

⁶ See Schedule B.

measures include identifying relevant participants based on documentation and verifying natural persons carrying out transactions, as well as conducting enhanced due diligence whenever necessary (e.g. if a person or a transaction is from or in a country that has been identified as having a higher risk by the Financial Action Task Force).

The identification and verification of participants should occur prior to the issuance of any digital asset, subject to certain exemptions which include if the rights and functionalities are such that the digital asset can only be used for services and products provided by the ICO issuer.

The company must ensure that appropriate mechanisms are in place in respect of the security of digital assets issued to recipients, confidentiality, disclosure of information and connected matters and that applicable Bermuda laws are complied with in these respects.

The Registrar may at any time, for the purpose of ensuring compliance with certain provisions of the ICO Legislation and any conditions imposed require a company to provide the Registrar with such information as the Registrar may reasonably require in order to ensure such compliance; and, to provide the Registrar with a report, in such form as may be specified by the Registrar, of any matter about which the Registrar has required or could require that company to provide information pursuant to the ICO Legislation.

The compliance measures set out in the ICO Legislation also include a requirement for internal compliance audits with respect to the conduct of an ICO and financial operations (including financial expenditures, if any) connected to the ICO as well as the preparation of a compliance report which must be filed with the Registrar, within 90 days of completion of the ICO.

This document does not constitute legal advice. It is intended for general informational purposes to aid in the consideration of the matters set out above and therefore is not intended to be exhaustive or definitive and should not be interpreted as such. We are happy to provide additional details and attend to any queries which may arise upon reading this Memo.

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SCHEDULE A

The following additional minimum information must be submitted as a part of the ICO application—

- a) whether a digital asset has been created, or will be created in the course of the ICO; and if the latter, the steps for the creation of the digital asset by reference to the technical standards;
- b) the amount or proportion of the digital assets that will be retained by the project operator and project development team and whether there is a vesting period and, if so, details of the timeline;
- c) the point at which, by whom and the manner in which the digital asset will be transferred to the participants;
- d) a detailed description of the functionalities that are planned for the digital asset and a description of the point or points when the planned functionalities will apply or become active;
- e) the rights that the participant would acquire and any obligations to be imposed on the participant and how they will be documented (specifics regarding participation and issuing conditions are required);
- f) whether a financial institution that is subject to anti-money-laundering and anti-terrorist financing laws in Bermuda or any other jurisdiction will be engaged to meet due diligence requirements under Bermuda laws and, if so, detailed information about the relevant processes and the relevant financial institution must be provided;
- g) whether the applicant or any other persons involved in the ICO have previously completed or attempted to complete an ICO in Bermuda, or any other jurisdiction, and if so the status of the ICO and any other project funded thereby;
- h) whether the digital asset has been marketed by the applicant or any other party as an investment;
- i) whether the digital asset can be traded or transferred between persons with or without an intermediary or other third party custodian and information about compatible wallets and technical standards;
- j) whether the digital asset will already be functional at the time of transfer and, if so, to what extent;
- k) whether it is intended that the digital asset may be used in exchange for goods or services of the applicant or third parties;
- l) whether there are plans for the project operator or issuer to buy back the digital assets and the terms of the repurchase;
- m) a description of the technical standards or software, blockchain or other distributed ledger technology that will be used to identify participants in the ICO;
- n) a description of the procedures or protocol that will be used to confirm the identities of the participants in the ICO; and
- o) a description of the measures that will be established to enable an audit and production of a compliance statement at the close of the ICO confirming compliance with the relevant sections of the ICO Legislation.

SCHEDULE B

COMPLIANCE MEASURES Extract from Companies (Initial Coin Offering) Regulations 2018

Meaning of “appropriate measures”

9 For the purposes of these Regulations, appropriate measures include the following—

- (a) identifying any participant and verifying the participant’s identity on the basis of documents, data or information obtained from a reliable and independent source;
- (b) in the case of a legal entity or legal arrangement, identifying the participant and verifying the identity of the relevant natural person carrying out the transaction or proposed transaction;
- (c) in the case of a person purporting to act on behalf of a participant, verifying that the person is in fact so authorised and identifying and verifying the identity of that person; and
- (d) conducting enhanced due diligence whenever necessary in accordance with regulation 12.

Verification of identity and timing of verification

10 (1) A company shall, in relation to an Initial Coin Offering, ensure that it applies appropriate measures relating to identification and verification of the participants in the Initial Coin Offering.

(2) Subject to paragraph (3), a company must verify the identity of a participant before the issuance of a digital asset to the participant with respect to the ICO.

(3) Such verification may be completed after the issue of a digital asset if—

- (a) the rights and functionalities are such that the digital asset can only be used for services and products provided by the ICO issuer;
- (b) this is necessary not to interrupt the normal conduct of business;
- (c) there is little risk of money laundering or terrorist financing occurring, provided that the verification is completed as soon as practicable after the digital asset is issued;
- (d) any money laundering or terrorist financing risks that may arise are effectively managed; and
- (e) it appears that a participant, or any person purporting to act on behalf of the participant, is not or does not appear to be anonymous or fictitious.

Requirement to cease transactions, etc.

11 (1) Where in relation to any participant or proposed participant in an ICO, a company is unable to apply appropriate measures in accordance with the provisions of these Regulations, the company—

- (a) shall not open any account or carry out a transaction for the person;
- (b) shall not issue a digital asset to the person;
- (c) in the case of a participant in an ICO, shall not permit that participant to undertake any further transactions of any nature, until such time as the company has been able to apply the measures; and
- (d) shall terminate any existing business relationship with the person.

(2) In the event that an existing business relationship is terminated in accordance with paragraph (1)(d), details regarding the termination shall be included in any final audit or other compliance report required by the Registrar.

Enhanced due diligence

12 (1) A company must apply on a risk-sensitive basis enhanced due diligence to business relationships with existing participants or proposed participants in its ICO—

- (a) in accordance with paragraph (2);
- (b) in instances where a person or a transaction is from or in a country that has been identified as having a higher risk by the Financial Action Task Force;
- (c) in instances where a person or a transaction is from or in a country that represents a higher risk of money laundering, corruption, terrorist financing or being subject to international sanctions;
- (d) in any other situation which by its nature may present a higher risk of money laundering or terrorist financing;
- (e) in instances where the company suspects money laundering or terrorist financing; or

(f) in instances where the company doubts the veracity or adequacy of documents, data or information previously obtained for the purpose of identification or verification.

(2) Where any of the circumstances in paragraph (1) exist, a company must take specific and adequate measures to compensate for the potential risk, for example by applying one or more of the following measures—

- (a) ensuring that the participant's identity is established by additional documents, data or information;
- (b) employing supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by an AML/ATF regulated financial institution (or equivalent institution) which is subject to equivalent regulations;
- (c) ensuring that the first payment is carried out through an account opened in the participant's name with a banking institution;
- (d) monitoring the participant's activity.

Reliance on third parties

13 (1) A company may rely on a person who falls within paragraph (2) to apply any measures required by these Regulations, provided that—

- (a) the other person consents to being relied on; and
- (b) notwithstanding the company's reliance on the other person, the company—
 - (i) must obtain information sufficient to identify participants;
 - (ii) must satisfy itself that reliance is appropriate given the level of risk for the jurisdiction in which the party to be relied upon is usually resident; and
 - (iii) will remain liable for any failure to apply such measures.

(2) The persons are—

- (a) an AML/ATF regulated financial institution;
- (b) an independent professional supervised for the purposes of these Regulations by a designated professional body in accordance with section 4 of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008;
- (c) a person who carries on business in a country or territory other than Bermuda who is—
 - (i) an institution that carries on business corresponding to the business of an AML/ATF regulated financial institution or independent professional;
 - (ii) in the case of an independent professional, subject to mandatory professional registration recognised by law;
 - (iii) subject to requirements equivalent to those laid down in these Regulations; and
 - (iv) supervised for compliance with requirements equivalent to supervision by his supervisory authority.

Record-keeping

14 (1) A company must keep the records specified in paragraph (2) for at least the period specified in paragraph (3).

(2) In respect of a business relationship or an occasional transaction, the records are—

- (a) a copy of, or the references to, the evidence of the person's identity obtained pursuant to these Regulations, together with the results of any analysis or enhanced due diligence undertaken in relation to that person; and
- (b) the records of transactions, provided that such records must be sufficient to permit the reconstruction of individual transactions.

(3) In this regulation, the period is—

- (a) in the case of records in paragraph 2(a), for the duration of the business relationship and five years beginning on the date on which the business relationship ends or five years beginning on the date the occasional transaction is completed;
- (b) in the case of records in paragraph 2(b), five years beginning on the date the transaction is completed.

(4) A company who is relied on by another person must keep the records specified in paragraph (2)(a) for five years beginning on the date on which he is relied on for the purposes of these Regulations in relation to any business relationship or occasional transaction.

(5) But in any case where a company has been notified in writing by a police officer that particular records are or may be relevant to an investigation which is being carried out, the company must keep the records pending the outcome of the investigation.

(6) For the avoidance of doubt, all documents and findings related to the investigations of—

- (a) complex transactions;
- (b) unusually large transactions; or
- (c) unusual patterns of transactions,

must be recorded and kept for a minimum period of five years and shall be made available to competent authorities upon request.

(7) A person referred to in regulation 13(2)(a) or (b) who is relied on must, if requested by the person relying on him within the period referred to in paragraph (4)—

(a) make available to the person who is relying on him as soon as reasonably practicable after the request but not later than five business days thereafter any information about the participant which he obtained when applying appropriate due diligence measures; and

(b) without delay forward to the person who is relying on him, copies of any identification and verification data and other relevant documents on the identity of the participant which he obtained when applying those measures.

(8) A company who relies on a person referred to in regulation 13(2)(c) (a “third party”) to apply appropriate measures must take steps to ensure that the third party will, if requested by the company, within the period referred to in paragraph (4)—

(a) as soon as reasonably practicable make available to him any information about the participant; and

(b) as soon as reasonably practicable forward to him copies of any identification and verification data and other relevant documents on the identity of the participant, which the third party obtained when applying those measures.

(9) For the purposes of this regulation, a person relies on another person where he does so in accordance with regulation 13(1).

Audit of ICO

15 A company must—

(a) carry out an internal compliance review with respect to the conduct of its ICO and financial operations (including financial expenditures, if any) connected therewith and prepare a compliance report; and

(b) file with the compliance report with the Registrar in such form as the Registrar may determine, within 90 days of completion of the ICO.