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1. **Key legislation**

The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 ('the Fiduciaries Law') is the principal legislation that regulates the provision of trust and corporate services providers in Guernsey. Amongst other things, it requires a Guernsey company (or foundation) that carries on, by way of business, regulated activities, including acting as trustee, to be licensed by the Guernsey Financial Services Commission ('the Commission'). With the introduction of foundations as an alternative type of structure to companies, the trustee can be formed as a private trust foundation instead of a private trust company, offering increased choice and structural simplicity to the client. An exemption from licensing is available under the Fiduciaries Law for those private trust companies and private trust foundations (collectively 'private trust vehicles') that meet certain criteria.

2. **Private trust vehicles**

2.1 **Regulated activities**

The provision of corporate, trust and foundations services is regulated in Guernsey under the Fiduciaries Law. In the case of a Guernsey vehicle, it applies no matter where in the world the vehicle offers its services. In the case of a vehicle incorporated outside Guernsey, it applies if the vehicle carries on, offers to carry on or holds itself out as being willing to carry out those activities from or within Guernsey.

The regulated activities relevant to private trust vehicles are:

- the formation, management or administration of trusts, and the provision of advice in relation to the formation, management or administration of trusts, including (without limitation):
 - acting as corporate trustee; and
 - the provision to trusts of corporate trustees;
- company administration including (without limitation):
 - the formation, management or administration of companies and the provision of advice in relation to the formation, management or

administration of companies whether incorporated or established in or under the laws of Guernsey or elsewhere;

- the provision to any such companies of:
 - corporate or individual directors;
 - individuals or companies to act as company secretary or in any other capacity as officer of a company other than a director;
 - nominee services including (without limitation) acting as or providing nominee shareholders; and
 - registered offices or accommodation addresses (including postal, telecommunication or electronic (ie, email) addresses); and
- acting as director of any company whether incorporated, registered or established in or under the laws of the Bailiwick or elsewhere.

Activities exempted from licensing are:

- acting as a director of a company where more than half the nominal value of the equity share capital of that company is held by:
 - the director, as beneficial owner;
 - any close relative of the director, as beneficial owner; or
 - the trustees of a trust of which the director or a close relative of the director is a beneficiary; and
- any particular activity, transaction or appointment for which a specific exemption has been given by the Commission.

2.2 Exemption from licensing for a private trust vehicle

The Commission has issued guidance that a private trust company may be considered to be acting by way of business (and thus subject to the licensing regime) even if it is merely acting as a conduit and paying fees on to a third party.¹ Thus, unless all and any costs and expenses of a private trust vehicle are prefunded, it will be necessary to obtain an exemption from licensing from the Commission. The Commission's guidance on private trust vehicles sets out the general conditions for the grant of an exemption. For a private trust vehicle, these are as follows:

- It acts as trustee only in respect of a specific trust or connected trusts.
- It does not advertise or market its services to the public.
- It is administered by a company which is itself licensed under the Fiduciaries Law.
- The licensed administrator of the private trust vehicle confirms to the Commission that it will retain sufficient knowledge and information about the private trust vehicle's ownership and control structure and about its activities to be satisfied that:

¹ See: Guernsey Financial Services Commission, *Guidance on Private Trust Companies*. Available at: www.gfsc.gg/sites/default/files/June%202019%20-%20PTC%20Guidance%20-%20FINAL%202.pdf.

- the private trust vehicle is effectively administered and governed; and
- the private trust vehicle complies with relevant laws and regulatory requirements.

One way this last requirement can be achieved is for the licensed administrator to provide a director to sit on the board of the private trust company or councillor of the foundation (although this is not required). However, there should be close monitoring and oversight of the private trust vehicle by the licensed administrator.

A one-off fee of £1,270 is payable with the application for exemption by a private trust vehicle.

An exemption is granted for a period of three years and needs to be renewed thereafter.

2.3 Record-keeping by the private trust vehicle's administrator

The Commission may request a licensed administrator of a private trust vehicle to provide certain information in respect of the private trust vehicle, including:

- beneficial ownership information in respect of the private trust vehicle itself, and its directors/councillors/controllers; and
- information on the settlor(s), beneficiaries and protector(s) (if any) of the trust of which the private trust vehicle is trustee.

If requested to do so, the licensed administrator must provide the information sought regardless of whether the private trust vehicle holds a licence or an exemption from licensing, and whether the private trust vehicle acts by way of business or not.

3. Private trust companies

3.1 Nature of a private trust company

A private trust company can be a company limited by shares or by guarantee, or an unlimited company. Membership interests in a company limited by guarantee may be held by the settlor or members of his or her family or others, as appropriate.

A private trust company is usually incorporated using standard private company memorandum and articles of incorporation (or the equivalent) with limited liability. Its name cannot include any references to trusts or trustees, although it may use the initials 'PTC' in its name.

3.2 Ownership of a private trust company

Where a private trust company is constituted as a company limited by shares, the shares may be owned in a number of different ways depending on tax

considerations and other relevant circumstances. The principal options are as follows:

Individual ownership: Whilst it is possible for an individual, such as the settlor or a member of the settlor's family (or his/her nominee), to be the shareholder of a private trust company, such an arrangement can give rise to concerns around the issue of the individual's death. The first is practical, and relates to probate requirements in respect of the individual ownership of the private trust company's shares; the second relates to succession and the suitability of the person(s) to whom the private trust company shares will devolve upon the individual's death.

Purpose trust: In view of the problems associated with ownership by an individual of the shares of a private trust company, a private trust company is usually an 'orphaned' structure so that its ownership is not attributable to any particular person. The shares of the private trust company are therefore often held under the terms of a non-charitable purpose trust (hereinafter, a 'purpose trust'). If a Guernsey purpose trust is used, an enforcer must be appointed to enforce its stated purpose. The enforcer must be a separate person from the trustee of the purpose trust. The enforcer does not need to be licensed by the Commission if it is not acting as an enforcer by way of business. For example, a family member could act as the enforcer, although thought should be given to succession if that is the case. The trustee of the purpose trust may be unconnected with, and located in a different jurisdiction from, the administrator of the private trust company. The division of roles in this way may assist with separating out the respective rights and responsibilities within the structure.

Instead of using a private trust company owned by a purpose trust, an alternative is to use a private trust foundation (see section 4 below).

3.3 **Composition of the board of a private trust company**

The choice of the board of directors of a private trust company is a key issue. The settlor may wish to control the composition of the board and/or may wish to be a member, so as to participate actively in the decisions made by the private trust company in relation to the underlying trust and its assets.

Control of the board of directors can be structured through the constitutional documents of the private trust company and/or through the terms of the purpose trust that holds the shares of the private trust company. It may be that the trustee is required under the terms of the purpose trust to seek the approval of the settlor or a nominated other, such as a protector or the enforcer, in relation to the appointment or removal of directors of the private trust company. Alternatively, the trustee of the purpose trust could be required

to follow the directions of the settlor, the protector or the enforcer in relation to the composition of the private trust company's board of directors.

Whatever structures and mechanisms are used in relation to the appointment or removal of directors (and indeed other aspects of the management of the affairs of the private trust company), a prevailing issue for advisers to the settlor, the trustee of the purpose trust and the private trust company is for the settlor to understand how the balance of power will work in practice so that there are no surprises for the settlor, or indeed other family members, once the structure has been established and is in operation.

The directors should be selected based on knowledge and experience, although selection is also likely to be influenced by tax considerations and the protection of privacy. Concern can arise if one or more of the directors of the private trust company is resident in an unfavourable tax jurisdiction, thus adversely affecting the location of the private trust company's management and control, or even the tax residence of the underlying trust or the tax situs of the assets in the underlying trust. Issues may also arise if a director is subject to domestic legislation that can be used to obtain detailed information about the private trust company, its underlying trust and the trust's assets.

Where family members participate as directors, potential conflicts of interest need to be managed. This can be addressed in the constitutional documents of the private trust company, for example by regulating voting rights on decisions that could raise concerns where the personal interests of a director could conflict with the interests of the private trust company during the course of its business.

3.4 Directors' liability

One reason for the increased use of private trust companies in Guernsey results directly from the abolition of the statutory guarantee historically imposed upon trust company directors under the Trusts (Guernsey) Law, 1989 (as amended). As a result of the abolition, the risk of personal liability under Guernsey law has been reduced significantly and therefore lay persons, such as family members, are more willing to act as directors.

Some judicial discussion has taken place about the liability of a director of a trust company and whether 'dog-leg' claims are sustainable under Guernsey law. Dog-leg claims are based on the notion that the duties owed by a director to a company may, in certain circumstances, be regarded in law as an 'asset' of the trust of which the company is trustee. Whilst such claims have not been ruled out as legally untenable, they are certainly very difficult claims to construct and pursue.

Insofar as there are concerns about possible personal liability on the part of directors of the private trust company, this can be addressed through the provision of appropriate director and officer insurance.

4. Private trust foundations

4.1 Nature of a private trust foundation

A Guernsey foundation has legal personality but does not have shareholders. It holds assets in its own name on behalf of beneficiaries or particular purposes, or both. A Guernsey foundation cannot carry out any commercial activities. These attributes make it an ideal alternative to act as a private trust vehicle/trustee. A private trust foundation that is established in Guernsey must have a guardian whose role is to ensure that the purpose of the foundation is carried out.

4.2 Establishing a private trust foundation

A Guernsey private trust foundation comes into being upon its constitutional documents (charter and rules) being registered on the Guernsey Register of Foundations. A Guernsey private trust foundation's name cannot include any reference to trusts or trustees but may contain the initials 'PTF'.

4.3 Composition of the council

A Guernsey private trust foundation is managed by a council comprising at least two councillors, unless the constitution allows a single councillor. The settlor may wish to control the composition of the council and/or may wish to be a member, so as to actively participate in decisions made by the private trust foundation in relation to the underlying trusts and their assets.

Control of the council can be structured through the constitutional documentation of the private trust foundation.

Whatever structure and mechanisms are used in relation to the appointment or removal of councillors (and indeed other aspects of the management of the affairs of the private trust foundation), as in the case of a private trust company a prevailing issue for advisers to the settlor and the private trust foundation is for the settlor to understand how the balance of power will work in practice so that there are no surprises for the settlor, or indeed other family members, once the structure is in operation.

The councillors should be selected on the basis of their knowledge and experience, although selection is also likely to be influenced by tax considerations and the protection of privacy. Concern may arise if one or more of the councillors of the private trust foundation is resident in an unfavourable tax jurisdiction, which residence adversely affects the location of the private trust foundation's management and control or even the tax residence of the underlying trusts or the situs of the assets in the underlying trusts. Issues may also arise if a councillor is subject to domestic legislation that can be used to obtain detailed information about the private trust foundation, its underlying trusts and their assets.

As is the case for private trust companies, where family members participate

as councillors, potential conflicts of interest need to be managed, and this can be addressed in the constitutional documentation of the private trust foundation, for example by regulating voting rights on decisions that could raise concerns where the personal interests of a councillor might conflict with the interests of the private trust foundation during the course of its business.

4.4 Councillors' liability

Insofar as there are concerns about possible personal liability on the part of councillors of the private trust foundation, this may be addressed through the provision of appropriate insurance.

This is an extract from the chapter 'Guernsey' by Joanna Caen and Natasha Kapp in Private Trust Companies: A Handbook for Advisers, Second Edition, published by Globe Law and Business.