

Guernsey foundations update

Insights - 15/11/2023

Since the Foundations (Guernsey) Law, 2012 (the **Foundations Law**) came into force in 2013, 160 foundations have been registered in Guernsey and we are witnessing a steady increase in the demand for legal advice in relation to both the creation and ongoing administration of foundations.

This briefing note is intended both to provide examples of our involvement in Guernsey foundations and also to provide a general update on developments that have come in over recent years which affect foundations in Guernsey which practitioners should be aware of.

Our experience

Members of the Ogier Private Wealth team assisted in establishing the first foundations registered in Guernsey in 2013. Since then, the team has continued to grow its experience, assisting on:

- advising on the use, structuring and ongoing administrative matters relating to Guernsey foundations
- drafting bespoke charter and rules
- advising foundation officials on their duties and obligations
- advising on private trust foundations and regulatory requirements
- assisting with a number of migrations into the jurisdiction
- advising on the winding up and termination of foundations

In light of legislative changes over the years, it has been important to keep up to date with legal and regulatory requirements affecting foundations, some of which are summarised below.

Key updates since introduction of Foundations Law

1. A previous change to the Foundations Law has been the substitution of section 12 of the Foundations Law by the Beneficial Ownership of Legal Persons (Guernsey) Law, 2017 (as amended) (the **Beneficial Ownership Law**). This had the effect of requiring foundations to have a resident agent whereas previously the office was only required where none of the other officeholders (councillors and guardians) were Guernsey resident. The change was required in order to ensure that there was an officeholder obligated under the Beneficial Ownership Law to file information in respect of beneficial ownership of each foundation with the Guernsey Registrar.

Resident agents may now be subject to information notices under the Foundations Law to provide information and or documents to the Registrar or another competent authority. Failure to comply with resident agent obligations under the Beneficial Ownership Law and the Foundations Law can now result in civil penalties.

2. We have seen an increase in the use of foundations established specifically to act as trustee of one or more trusts. Similarly to private trust companies (**PTCs**), private trust foundations (**PTFs**) can offer bespoke solutions to individual private client needs. However, as with PTCs, PTFs acting as trustees in Guernsey will often be carrying out a regulated activity if they are acting "by way of business" in Guernsey. To avoid the need to apply for a full fiduciary licence with the GFSC in respect of such PTFs, it is therefore often necessary to apply for a discretionary exemption (an **exemption**) under section 3(1) of The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2020 (the **Fiduciaries Law**). There have been two key developments in the GFSC's approach to Exemptions that practitioners should be aware of:

a. In November 2021, the GFSC published updated guidance in respect of the exemption of PTCs. The revised guidance reaffirms existing guidance published in 2019 that an Exemption may be granted where the following criteria are met:

- i. the PTC will only act as trustee to a specific trust or a group of connected trusts with common interests (for example, those established for the interests of one family)
- ii. the PTC will not advertise or market its services to the public in any way
- iii. the name of the PTC is not misleading in giving cause to understand that the entity is licensed
- iv. the PTC is administered by a licensee under the Fiduciaries Law (a **Licensee**)
- v. the Licensee will retain sufficient knowledge and information about the PTC's ownership, control structure and activities to be satisfied that the PTC is effectively administered and governed and that the PTC complies with relevant laws and

regulatory requirements. The Licensee may do this by any of, or a combination of, provision of a director to the board of the PTC, provision of a company secretary, provision of an authorised signatory, and close monitoring and oversight of the PTC

Such guidance may be construed so as to apply *mutatis mutandis* to PTFs although the GFSC has confirmed that there are as yet no plans to introduce a PTF specific discretionary exemption form. Practitioners wishing to apply for an Exemption in respect of a PTF should continue using the PTC form for the time being

b. An update was published by the GFSC on 1 October 2019 to:

i. clarify that any exemption shall only extend to the subject matter of the original application and that where there is any material change to the activities or structure of the exempted entity, a new application will be required (along with the associated fee). The GFSC confirmed that a change of the administrator or the addition of a connected party will only require notification and will not therefore require a new application for Exemption; and

ii. introduce a three-year limit to an exemption such that exemptions will now require renewal at least one month prior to the expiration of the three-year period either by way of:

- confirming, by notification to the GFSC, that there has been no material change to the activities or structure of the exempted entity (in which case the GFSC may issue a renewal for a further three-year period)

- if renewal is used as an opportunity to make material changes to the activities or structure of the exempted entity, submission of a new Exemption application (together with the associated fee)

3. A suite of legislation has recently been introduced which updates the Foundations Law in relation to, amongst other changes, record keeping and administration obligations. Some of the key amendments include:

a. foundations must file particulars of governance in the form prescribed by the Registrar to effect registration on or before 15 December 2023 (the **Effective Date**). This filing must also be completed for existing foundations by the Effective Date. Changes to this filing must also be notified to the Registrar within 21 days of the relevant date of change. No personally identifiable information or commercially sensitive information should be included in this filing

b. from the Effective Date, Guernsey registered foundations are also required to maintain a record of certain relating to each beneficiary's interest in the foundation at their registered office. This includes whether each beneficiary is enfranchised or disenfranchised, any

relevant benefits received by each beneficiary and whether each beneficiary has disclaimed or has any restrictions attaching to their interest. This information is not publicly available

- c. civil penalties may be imposed on foundations and their officials in a wider range of circumstances, including for non-compliance with the various record keeping, information gathering, resident agent and other requirements
- d. the sanctions which may be placed upon foundations (and other entities) and their officials have been expanded to include private reprimands and public statements

If you would like more information in respect of Guernsey foundations, please contact one of our team using the contact details at the side of this briefing.

About Ogier

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