

Revision of fiduciary regulatory legislation

Insights - 25/10/2021

The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 (as amended) (the **2000 Fiduciary Law**) will be repealed and replaced with the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 (the **New Fiduciary Law**) with effect from 1 November 2021.

| Summary

Although the revision of laws project has taken time to complete and has resulted in a number of new laws, rules and guidance, the intention has not been to fundamentally alter the regulatory regime in Guernsey but rather to modernise, future proof and consolidate legislation resulting in a position which should minimise the administrative burden on licensees, avoid duplication of efforts or unhelpful inconsistency and continue to provide an efficient and well-regulated fiduciary regime.

This briefing summarises some of the key changes introduced by the New Fiduciary Law (although it is not designed to be a fully comprehensive summary of changes).

The New Fiduciary Law will be complemented by revised rules, codes and guidance coming into force on the same day, some of which we will refer to below briefly, although it should be noted that these most recent revisions do not introduce material policy changes and the changes they do introduce are relatively minor.

The New Fiduciary Law will also be complemented by the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 which will apply across all regulatory sectors and does away with any existing inconsistency in enforcement and related provisions between regulatory laws.

Why the change?

Following consultation with industry and reviews over the last seven years, the 2000 Fiduciary Law is being replaced by new updated legislation, together with complementary secondary and tertiary legislation (regulations, orders, rules and guidance), for the purposes of consistency with other regulatory laws as well as modernising and future-proofing legislation in line with international and EU standards with the maintenance of Guernsey's reputation as a well regulated and efficient financial centre in mind.

What are the key changes?

New categorisation of licensees and definition of Bailiwick body

The New Fiduciary Law will continue to provide for the issuance of personal fiduciary licenses, however, two new categories of fiduciary licence will be introduced to replace the current licensing categories. Lead licensees will become "primary fiduciary licensees" whilst joint licensees will become "secondary fiduciary licensees".

This change will be automatic on 1 November 2021 for most licensees but if a joint licensee were to wish to become a primary fiduciary licensee, it would need to apply to the Guernsey Financial Services Commission (the **Commission**) with supporting evidence showing it has a business model and operations necessary to now justify a primary fiduciary licence.

Primary fiduciary licenses may only be granted to a Bailiwick body (being a Guernsey company or other legal person or unincorporated body, an Alderney company or unincorporated body or a Sark body) but may not be granted to a body with a corporate director or equivalent (for example, a corporate general partner of a limited partnership). Secondary fiduciary licences will only be granted to Bailiwick body which is a subsidiary of, or wholly beneficially owned by, a primary fiduciary licensee or its holding company. However, unlike primary fiduciary licenses, they may be granted to a body which has a corporate director (or equivalent).

Licensees should have by now received a notice from the Commission confirming the conversion of fiduciary licenses.

Regulated activity definition

The definition of what constitutes a "regulated activity" will remain almost identical under the New Fiduciary Law with minor updates for the purposes of clarification (for example, offering the service to act as a member of a limited liability partnership is a regulated activity, as it would be for a director to provide directorship services).

However, one change in this area is the introduction of a new statutory exemption in relation to

"ancillary vehicles", the definition of which is contained in section 20(3) of the Protection of Investors (Bailiwick of Guernsey) Law, 2020 (the **New POI Law**) which itself is subject to the publication of certain rules made pursuant to the New POI Law. It is not anticipated that these rules will be in force by 1 November 2021. When in force, the exemption will be subject to the prior notification of the Commission under rules made pursuant to the New POI Law. For further information on the New POI Law, read our article: [The restated Protection of Investors \(Bailiwick of Guernsey\) Law](#).

Over the years, ancillary vehicles carrying out such activities have typically sought and obtained a discretionary exemption from the Commission under the 2000 Fiduciary Law, however, the New Fiduciary Law recognises that reliance on such regime may not be the most appropriate route and the introduction of a new statutory exemption for such activities will likely be welcomed by industry.

Supervised roles

The New Fiduciary Law refers to new categories of key personnel of licensees that will hold "approved" or "notified" supervisory roles which are subject to notification to the Commission.

The categories of key personnel of licensees that will be "approved" supervisory roles cover (a) directors, (b) controllers, (c) partners of general partnerships, (d) general partners of limited partnerships, (e) members of limited liability partnerships, (f) MLROs, (g) MLCOs or (h) compliance officers.

The categories of key personnel whose appointment requires notification to the Commission as a "notified" supervisory role covers:

- a. a significant shareholder
- b. an "other supervised manager", that is to say, a person appointed – "(i) otherwise than as a chief executive, to exercise, under the immediate authority of a director or partner (or general partner, in the case of a limited partnership, or member, in the case of a limited liability partnership), day-to-day managerial functions in relation to regulated activities in respect of which the body is or will be licensed, (ii) to any other role in order to enable the body to fulfil the requirements of paragraph 3 of Schedule 1 (business to be directed by at least two individuals)", but not including a person who falls into any other category of supervised role
- c. a company secretary

Annual returns

In line with changes to other regulatory laws, the New Fiduciary Law contains provisions regarding the submission by licensees of an annual return containing such information as may

be prescribed by the Commission, including:

- audited accounts and statements of income
- an up to date business plan
- a certificate signed by a prescribed person confirming:
 - compliance throughout the period covered by the annual return with the provisions of this Law, the appointed Laws and any other prescribed enactment
 - that accounts have been prepared and deposited in accordance with the provisions of the New Fiduciary Law
- the names of and other prescribed particulars in respect of the holders of supervised roles in respect of, or the officers or employees of, a licensee
- the number of staff employed

Information collection, retention and disclosure

The New Fiduciary Law expands provisions regarding:

- the scope of persons from whom the Commission may seek information and the retention of information
- the powers of the Commission relating to the inspection of information
- the disclosure of information

Other changes

Various other changes have been made in the New Fiduciary Law, including changes to key definitions or new definitions and to provisions regarding:

- the surrendering of licences and conditions which must be met or may prevent a surrender
- a statutory requirement to deal with the Commission in an open and cooperative manner
- direction powers of the Commission, which are very broad (although limited in how long they remain in force in certain circumstances set out), in relation to all persons who are, were or should be regulated under the New Fiduciary Law or who are exempt under the provisions of the New Fiduciary Law, persons who hold key roles in such businesses and any person suspected of having contravened any provision of the New Fiduciary Law
- decisions by the Commission relating to licensees and other relevant persons, notification and challenges to the same
- accounting and auditing requirements

- the scope of rules that may be created (see further below) and powers to make secondary and tertiary legislation, publicise the same and the effect of non-compliance
- provision of electronic documentation

The 2020 Rules

Fiduciary licensees will be aware of the requirements set out in the Fiduciary Rules and Guidance, 2020 (the **2020 Rules**) which have been in operation since 31 December 2020. This briefing does not propose to cover the provisions of the 2020 Rules in detail. However, by way of summary, it is noted that the 2020 Rules brought together the existing regulatory framework and replaced:

- previous Commission Codes of Practice specific to the fiduciary sector
- the Regulation of Fiduciaries (Accounts) Rules, 2001
- the Financial Resources Requirements Rules, 2018; and
- rules 1 to 9 of the Pension Licensees (Conduct of Business) & Domestic and International Pension Scheme and Gratuity Scheme Rules (No. 2) 2017

The 2020 Rules also brought in new or amended rules relating to banking, client money, outsourcing, record keeping and communications to clients, terms of business and complaints, employee screening and training. They also introduced additional rules applicable to fiduciaries acting as trustees, for corporate service providers and directors, and for foundation service providers.

The 2021 Rules

Following consultation with industry earlier this year, the 2020 Rules will be replaced on 1 November 2021 with the Fiduciary Rules and Guidance, 2021 (the **2021 Rules**) which contain certain amendments to reflect the provisions of the New Fiduciary Law. These include:

1. rules to account for the new categories of fiduciary licence under the New Fiduciary Law and how changes between categories can be effected
2. provisions for annual returns (which will result in the repealing of the Regulation of Fiduciaries (Annual Return) Regulation, 2017)
3. additional notification requirements relating to supervised roles
4. changes to reflect the repeal of the Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations 2012 and the restrictions on a personal fiduciary licensee advertising (with applicable provisions in the 2021 Rules); and

5. changes to ensure consistency of definitions with the New Fiduciary Law, particularly in relation to the meaning of "actively trading", noting that a primary fiduciary licensee can actively trade whilst a secondary fiduciary licensee cannot

Other changes

Other regulations and rules as well as codes and guidance relating to fiduciary regulation in Guernsey are also being amended in light of the revision of laws project and will come into force on 1 November 2021, but the changes are generally considered minor. In addition, some codes and guidance notes will no longer be used.

Note

Please be aware that the above is a summary only of certain selected changes for information and does not constitute legal advice. The full scope of the changes made by the New Fiduciary Law and related secondary and tertiary legislation are not covered in this briefing.

Businesses will need to consider the impact of the changes on their business, including their internal policies and procedures.

If you wish to discuss how the changes to the fiduciary regime may impact your business, please do not hesitate to get in contact with your usual Ogier contact or a member of the team.

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