

Company formation by full fiduciary licensees

Introduction

This note provides guidance on the regulatory requirements applicable to full fiduciary licensees offering company formation services. The publication of this note coincides with the coming into force of The Companies (Guernsey) Law, 2008, but applies in relation to the formation of companies not only in Guernsey but in other jurisdictions.

The Companies (Guernsey) Law, 2008, effective from 1 July 2008, makes major changes to the procedure for forming Guernsey companies. In particular, it provides that Guernsey companies may only be formed by persons holding full fiduciary licences under the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc, (Bailiwick of Guernsey) Law, 2000 (“The Fiduciary Law”). The Guernsey Financial Services Commission, on behalf of the States of Guernsey Policy Council, will no longer receive details of proposed beneficial owners and undertake “pre-vetting” on each Guernsey company formation application, and therefore there will be increased focus on the role of fiduciary licensees as “gatekeepers” when applying for formation.

Licensees’ policies and procedures

Licensees must comply with the requirements of the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations, 2007 (“the Regulations”) and with the Rules contained in the Handbook for Financial Services Business on Countering Financial Crime and Terrorist Financing (“the Handbook”). The Handbook also contains guidance to assist licensees to meet the requirements of the Regulations and Rules.

The Regulations and Handbook apply to all services constituting regulated activities under the Fiduciary Law. Therefore licensees providing company formation services must include such services within their business risk and relationship risk assessments under Regulation 3 of the Regulations and Chapter 3 of the Handbook as they would any other services they provide.

Consideration should be given to the following areas **before** making applications to form Guernsey companies or **before** instructing a local agent to incorporate a company in another jurisdiction:

- Due diligence arrangements which have identified and verified the ultimate beneficial ownership of the proposed company in accordance with the requirements of the Regulations and the Handbook. This means that, where the proposed company is held within a complex corporate structure, a licensee understands and has verified the true/economic beneficial owner(s) in line with these requirements.

- The proposed name of the company. Licensees should be aware of legal restrictions (for example, those in sections 36 and 41 of the Fiduciary Law) and consider guidance issued by the Guernsey Registry and by the companies registry, or equivalent, of any other jurisdiction in which the licensee applies to form companies.
- The proposed activities of the company. Licensees should identify whether the activities would be legal in the country within which they will be carried out and whether these activities require any licensing or other authorisation (including, but not limited to, authorisation to conduct financial services activities).
- High risk relationships. Licensees should be alert to situations where the parties or the activities would be deemed to be high risk. This should include consideration of whether there are any high risk indicators as set out in paragraph 56 of the Handbook. Examples include where the beneficial owner would be considered to be politically exposed, where the company is part of a complex structure and where the proposed activities would be regarded as sensitive. The Regulations and Handbook require licensees to carry out enhanced levels of due diligence and ongoing monitoring in cases assessed as high risk.
- In the light of the above factors, the level of risk which the formation of the company would present to the reputation of the Bailiwick of Guernsey. The Fiduciary Law requires the Commission to be satisfied that a licensed fiduciary's business will be carried on in a manner which will not tend to bring the Bailiwick into disrepute as an international finance centre. The Commission therefore expects fiduciary licensees to use available information to identify cases which may damage the Bailiwick's reputation, and to handle such cases responsibly, and may take regulatory action if licensees fail to do this. Examples of cases which may present reputational risk include those involving companies:
 - trading in arms, supplying technology or parts connected with defence or providing military security services; and
 - carrying on financial services business in another jurisdiction, particularly one whose regulatory regime is not equivalent to that in the Bailiwick, or acting as a holding company of such a business.

Record-keeping

All licensees, including those licensees who retain no ongoing relationship with the companies they form, are expected to comply with Regulation 14 of the Regulations relating to record-keeping, and in particular to retain customer due diligence information for at least five years.

Competence

The effect of Schedule 1 to the Fiduciary Law is that the Commission must be satisfied, both when granting a licence and on a continuing basis, that licensees are fit and proper persons to hold a fiduciary licence. This encompasses a competence requirement in paragraph 3(2) which requires the Commission to have regard to the competence and knowledge and understanding of obligations undertaken, of both the licensee and its directors and managers as individuals. Compliance with the company law of any jurisdiction under whose legislation a fiduciary licensee forms or administers companies is therefore a regulatory issue and the Commission expects fiduciary licensees to understand the company law provisions which are relevant to their activities.

Specifically, licensees should be aware of the amendment which paragraph 3 of Schedule 5 to the Companies (Guernsey) Law, 2008 makes to Schedule 1 to the Fiduciary Law. This inserts an additional provision into Schedule 1 to the Fiduciary Law which sets out the minimum criteria for licensing. An additional sub-paragraph is to be added to paragraph 3(2) of the Schedule, requiring the Commission to have regard to:

“[a licensee’s/person’s] record of compliance with any provision contained in or made under the Companies (Guernsey) Law, 2008 in acting as a corporate services provider or a resident agent within the meaning of that Law.”

Supervision

The Fiduciary and Intelligence Services Division will review licensees’ policies and procedures in relation to the company formation process, and licensees’ activities as resident agent under Guernsey company law, during its routine cycle of on-site visits to full fiduciary licensees. This will include selecting cases for review to establish whether the licensee is applying these policies and procedures in practice. Licensees should note that this will include reviewing the due diligence undertaken by a licensee prior to making a company application.

The Commission will consider legal or regulatory action should the requirements of the Regulations or the Handbook be breached. The Commission will also consider regulatory action should a licensee fail to meet the minimum criteria for licensing set out in Schedule 1 to the Fiduciary Law, as amended by the new criterion set out above.

Guernsey Financial Services Commission
23 June 2008