

Trustee Licensing in Bermuda

Preface

This publication has been prepared following the Trust (Regulation of Trust Business) Exemption Order 2002 and the amendments to the Trusts (Regulation of Trust Business) Act 2001. It is for the assistance of present and future trustees of Bermuda trusts and for those considering appointing Bermuda trustees to new or existing trusts. It is not intended to be exhaustive nor a substitute for proper legal advice but provides a basic guide to the licensing and regulation of trustees in Bermuda for clients of Conyers Dill & Pearman.

We recommend that our clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

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1. TRUSTS (REGULATION OF TRUST BUSINESS) ACT 2001

The Trusts (Regulation of Trust Business) Act 2001 ("the Act") was passed as a direct result of recommendations of the KPMG Report on Bermuda and aims to regulate persons who are in the business of acting as a trustee in or from Bermuda. Exemptions to the licensing requirements under the Act have been made by the Trusts (Regulation of Trust Business) Exemption Order 2002 ("the Exemption Order").

In addition to redefining "trust business" and restricting who may or may not conduct "trust business" in Bermuda, the Act confers regulatory and information gathering powers on the Bermuda Monetary Authority (the "BMA") and establishes rules relating to licence applications and ongoing standards of trust administration.

2. WHO NEEDS TO BE LICENSED?

Section 9(1) of the Act provides that any person who carries on "trust business" in or from Bermuda must be licensed unless either he is covered by one of the general exemptions under the Exemption Order or he is the subject of a specific exemption granted by the Minister of Finance on the advice of the BMA. Prior to the Act coming into force, only trust companies were required to be licensed.

"Trust business" is defined at section 9(3) of the Act as: "the provision of the services of a trustee as a business, trade, profession or vocation".

It is understood that the BMA takes the position that a trustee who is not remunerated for his services as trustee will not be considered to be carrying on trust business.

A person carries on business in or from Bermuda if he has a physical presence in Bermuda from which he carries on business or is an entity registered in Bermuda. For individuals, it will be necessary to look at each trusteeship to see whether, in all the circumstances, they are required to be licensed or not.

3. WHAT LICENCES ARE AVAILABLE?

There are two types of licence available, unlimited and limited.

Unlimited licences are available only to trust companies; individuals (or partnerships) are restricted to holding limited licences. The underlying policy objective is that all

trust business of significant size and complexity should be conducted inside a trust company.

3.1 Unlimited trust licence

An unlimited trust licence authorises the licensee to carry on trust business and to solicit business from the public generally.

3.2 Limited trust licence

A limited trust licence authorises:

- (a) the licensee to hold trust assets to an aggregate value of 30 million dollars or such higher value as the BMA agrees; but
- (b) does not authorise the trustee to act as sole trustee to any trust administered by him.

A limited trust licensee may hold trust assets to an aggregate value in excess of 30 million dollars if authorised by the BMA or if an unlimited trust licensee is appointed to carry out managerial and administrative functions in relation to the assets in excess of 30 million dollars.

The BMA will authorise a ceiling higher than 30 million dollars on a case-by-case basis having regard to whether the applicant has sufficient knowledge, expertise, financial and other resources to safeguard the interests of his clients or potential clients.

Licensees may apply to the BMA for the ceiling to be varied.

In calculating the value of trust assets held by a limited licensee, no account is taken of:

- (a) real property situated in Bermuda;
- (b) securities denominated in Bermuda dollars;
- (c) insurance policies providing for the payment of benefits in Bermuda dollars; and
- (d) other personal property situated in Bermuda.

4. EXEMPTIONS

The restriction on carrying on trust business without a licence does not apply to any person exempted by or under an exemption order. The Exemption Order provides that:

Private trust companies are expressly exempt from the licensing requirements under paragraph 3 of the Exemption Order but they must provide the BMA with a letter, executed by the directors of the company, stating (a) that the company is providing the services of a trustee only to the trusts specified in its Memorandum of Association; or (b) in the case of an overseas company, in its permit; and to other such trusts as the Minister has approved. The letter should also confirm that the company will notify the BMA of any change in the nature and scope of the trust business.

An individual trustee shall be exempted from the requirement to be licensed:

- (a) if he is a member of a recognised professional body in Bermuda and he either:
 - a. holds a certificate issued for the purpose of the Act by that professional body; or
 - b. appoints a licensed trust company (with which he is connected as specified in the Act) to maintain trust records; or
- (b) if he is a co-trustee of a trust and at least one of the other co-trustees is a licensed trustee; or
- (c) if he is a bare trustee; or
- (d) where he is trustee of either:
 - a. a pension plan registered under the National Pension Scheme (Occupational Pensions) Act 1998;
 - b. a pension trust fund registered under the Pension Trust Fund Act 1966; or
 - c. an investment fund approved under the Investment Funds Act 2006.

5. COMPLIANCE AND REGULATION

5.1 Minimum criteria for licensing

The Act sets out minimum criteria for a licensed trustee, including:

- (a) the employment of fit and proper persons;
- (b) the business must be directed by at least two individuals, unless otherwise approved by the BMA;
- (c) the composition of the board of directors must be appropriate;
- (d) the conduct of business in a prudent manner through compliance with the Act and any code of practice issued under it;
- (e) maintaining minimum net assets of \$250,000 in the case of an undertaking that is a company; or \$25,000 in any other case; or such larger amount as the BMA may require; and
- (f) through the maintenance of adequate insurance, accounting and other records, and other systems of control.

5.2 Compliance

A licensed trustee must:

- (a) provide annually to the BMA a certificate of compliance certifying that he has complied with the minimum criteria, with the code of practice and, in the case of a limited licence holder, with the financial limitation imposed under s 11(3);
- (b) prepare and file annual accounts in the form prescribed; and
- (c) in the case of a company, appoint an auditor.

6. POWERS OF INVESTIGATION

The BMA is given powers to investigate licensed trustees and, in particular, may:

- (a) by notice in writing, require a licence holder to provide the BMA with such information and/or documents as the BMA may reasonably require for

ensuring that the licence holder is complying with the provisions of the Act and for protecting the interests of its clients;

- (b) enter the premises of a licence holder for the purpose of obtaining the information or documents required under such a notice; and
- (c) where it believes that it is required in the interest of the public or the licence holder's clients, appoint an inspector to investigate and report on the affairs of a licence holder.

7. DISCLOSURE OF INFORMATION

Unless the disclosure of information is for the purpose of enabling or assisting either the BMA or any other authority in Bermuda to discharge its statutory functions, section 48 of the Act requires that any person who receives information under the Act which relates to the business or other affairs of any person shall not disclose such information without the consent of the person to whom the information relates and (if different) the person from whom it was received.

Information supplied to the BMA may also be disclosed to foreign regulatory authorities exercising similar functions to those of the BMA provided that such foreign authority is subject to equivalent restrictions on further disclosure. Information related to settlors and beneficiaries of any trust administered by a licence holder may not, however, be disclosed to any foreign authority.

8. FURTHER INFORMATION

If you have any further questions regarding this publication, please contact any member of our Trust and Private Client Department.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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