

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay that contains the title text. The foreground shows a paved plaza with geometric patterns and a few small trees.

Trustee Licensing in Bermuda

Preface

This publication has been prepared following the Trust (Regulation of Trust Business) Exemption Order 2002 (as amended by the Trusts (Regulation of Trust Business) Amendment Act 2019) 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.

Conyers Dill & Pearman

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1. TRUSTS (REGULATION OF TRUST BUSINESS) ACT 2001

The Trusts (Regulation of Trust Business) Act 2001, as amended (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, as amended (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. Under the Act the BMA has also published a Statement of Principles and a Code of Practice (as amended from time to time). The Statement of Principles sets out the criteria that will be taken into account by the BMA when deciding to grant, restrict or revoke a licence, and exercise of the BMA's powers of investigation. The Code of Practice provides guidance as to the duties, requirements, procedures and standards to be observed by those carrying on trust business.

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 *via* 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.

Licensees may apply to the BMA for the ceiling to be varied and 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. The BMA will also consider whether the nature and scale of the business held by the limited licensee indicates that a trust company should be established instead.

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.

Partnerships formed under the Partnership Act 1902 or the Exempted Partnerships Act 1992; and by overseas partnerships formed under the Overseas Partnerships Act 1995 permitted by the Minister of Finance to operate business in Bermuda may apply to the BMA for a limited trust licence.

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.

4.1. Private Trust Companies Exemption

The Exemption Order provides that private trust companies are expressly exempt from the licensing requirements under section 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.

Private trust companies who seek to be exempted from licensing under the Act pursuant to the above exemption will be required to file a declaration with the BMA, on or before 31 March, in every year that it continues to qualify for the exemption.

4.2. Individual Trustees Exemptions

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

- (a) is a professional person who either:
 - (i) holds a certificate issued for the purpose of the Act by a recognised professional body in Bermuda; or
 - (ii) appoints a licensed trust company (with which the trustee is connected as specified in the Exemption Order) to maintain trust records;
- (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:
 - (i) a pension plan registered under the National Pension Scheme (Occupational Pensions) Act 1998;
 - (ii) a pension trust fund registered under the Pension Trust Fund Act 1966;
 - (iii) an investment fund authorised under the Investment Funds Act 2006; or
 - (iv) an investment fund exempted under section 7 of the Investment Funds Act 2006.

Trustees who are seeking to be exempted from licensing pursuant to the Act are required to apply for an exemption.

5. COMPLIANCE AND REGULATION

5.1. Minimum criteria for licensing

The Act sets out, and the Statement of Principles provide further guidance on, the minimum criteria required before either a limited or an unlimited license will be issued by the BMA. Once a license has been granted the licensed trustee must comply with the minimum criteria. The minimum criteria required include:

- (a) every person who is or is to be a controller or officer of an undertaking is to be a fit and proper person to hold that position. The licensed undertaking must, within fourteen days of becoming aware, notify the BMA of the fact that any person has become or ceased to be a controller or officer of the undertaking. There are civil penalties payable in the event of failure to do so;

- (b) the implementation of corporate governance policies and processes which must be appropriate given the nature, size, complexity and risk profile of the undertaking, and further that:
 - (i) the business must be effectively directed by at least two individuals for a company or partnership, or in any other case by one person if so approved by the BMA having regard to the circumstances of the undertaking and the nature and scale of its operations; and
 - (ii) the directors should include such number of non-executive directors, as the BMA considers appropriate given the nature, size, complexity and risk profile of the undertaking;
- (c) the conduct of business in a prudent manner through:
 - (i) compliance with the Act, any other law, including the provisions of the law pertaining to anti-money laundering and anti-financing of terrorism, codes of practice issued by the BMA under the Act, and international sanctions in force in Bermuda;
 - (ii) 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 for any particular undertaking;
 - (iii) through the maintenance of adequate insurance cover, accounting and recordkeeping systems;
 - (iv) maintaining adequate liquidity by ensuring they are always able to meet actual and contingent obligations as they fall due
- (d) in the case of undertakings which are members of wider groups or have ownership links with other entities, that the structures and relationships are not such as to obstruct the conduct of effective consolidated supervision; and
- (e) the business is or will be conducted, as the case may be, with integrity and the professional skills appropriate to the nature and scale of its activities.

The BMA will not grant a license unless satisfied that the applicant has met and has the ability to continue to meet minimum licensing criteria. It must be noted that the BMA always holds discretion to refuse an application even when satisfied.

5.2. Compliance

A licensed trustee must:

- (a) at the end of each financial year provide to the Minister of Finance a report on its activities under the Act in that year;

- (b) provide annually to the BMA a certificate of compliance (within four months from the end of its financial year) certifying that he has complied with the minimum criteria, with the code of conduct and, in the case of an undertaking which is not a company, with the financial limitation imposed under section 11A of the Act. Failure to comply will trigger a civil penalty;
- (c) prepare and file, in the case of a company, audited financial statements together with the auditor's report thereon, and where the undertaking is not a company, annual accounts in the form prescribed;
- (d) where it holds client funds, segregate such funds from its own funds or funds held in respect of any other business, and maintain books of accounts and records in such form that such clients funds can be readily identified at any time; and
- (e) in the case of a company, appoint annually an 'approved auditor.'

For the purposes of this section "approved auditor" means a person who is a member of a professional body for the time being declared by the Minister of Finance by notice published in the Gazette to be approved for the purposes of the Act.

6. POWERS OF INVESTIGATION

The BMA is given powers to obtain information and 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;
- (c) where it believes that it is required in the interest of the licence holder's clients or potential clients, appoint an inspector to investigate and report on the nature, conduct and state of the business of a licence holder; and
- (d) commission reports on a licence holder's business from an accountant or other person with relevant professional skills. Use of this method can offer an alternative means of conducting part of the on-site element of regulation. However, this route is normally used only in exceptional circumstances.

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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