



TO APPLY OR NOT TO APPLY?

JUNE 2019

Private Trust Companies (PTC) are currently in vogue. So far in 2019 the Collas Crill International Private Client and Trust team have established more than six bespoke PTC structures for high net worth and ultra high net worth clients.

So why the PTC popularity? The simple answer to this question is control. Many high net worth and ultra high net worth clients from non-common law jurisdictions are unfamiliar with the common law concept of a trust. Therefore, entirely divesting him or herself of his/her assets and handing them over to the ownership and control of a trustee is an alien and uncomfortable prospect. A PTC can be a much more palatable structure, whereby an individual can retain a greater level of control over their hard earned 'cash', by way of appointment to a position on the PTC board for example.

Despite their wealth structuring benefits, PTCs can be more challenging to set-up than a simple discretionary trust structure. The licensing requirements, in particular whether a full fiduciary licence is or is not required, is perhaps the most challenging to any fiduciary that is looking to establish a new PTC.

To minimise complexity and cost, a corporate service provider (CSP) and its client may hope to fall outside the scope of licensing requirements. However, the structure and its activities must be carefully planned and considered to ensure this is the case.

The Guernsey Financial Services Commission (GFSC) has issued [guidance as to when a full fiduciary licence is required*](#). In Guernsey, acting as a trustee 'by way of business' is a regulated activity and therefore requires licensing. But what does 'by way of business' mean? Helpfully the Fiduciaries Law^[1] provides a definition:

'a person who carries on an activity shall be deemed to do so 'by way of business' if he receives any income, fee, emolument or other consideration in money or money's worth for doing so'.

A rough rule of thumb could be that if a PTC is not being paid a fee (or similar) then they will not be acting 'by way of business' and will therefore not require a fiduciary licence in order to operate. However, the GFSC's guidance extends this by adding:

'a PTC is acting by way of business even if it is merely acting as a conduit and paying fees onto a third party'.

From a practical perspective, our advice to clients has been that if the PTC does not receive a fee (etc.) and does not have a bank account in its own name and/or operating for its own account (e.g. it just holds accounts in its capacity as trustee of an underlying discretionary trust) then the PTC is not acting by way of business nor is it, itself, acting as a conduit of funds. However, clearly each PTC will differ in structure, operation and activities, so each case must be carefully considered on its own facts.

What is the middle ground between a PTC obtaining a full fiduciary licence vs operating entirely outside of the scope of the Fiduciaries

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Law? The GFSC has the ability under section 3(1)(y) of the Fiduciaries Law to grant a discretionary exemption from the requirement to obtain a fiduciary licence to PTC even if the PTC in question is 'acting by way of business'. The rationale for this exemption is that the GFSC recognises that it may be '*potentially disproportionate to require a full fiduciary licence for essentially one business relationship*'. It should be noted that the discretionary exemption is only awarded in situations where certain prescriptive criteria are met. The full list of criteria and consideration can be found [here](#).

In practice, what have we seen clients do in relation to the licensing (or otherwise) of a PTC? In each case the intended operation and activities within the PTC structure should be carefully considered, with particular regard to the definition of 'acting by way of business' and the conduit guidance referred to above.

Following that analysis:

1. If it decided that there is no possibility that the PTC could be 'acting by way of business' then a 'no action' stance can be adopted. The GFSC discretionary exemption would not be required and the directors of the PTC could simply document the decision in a simple minute/resolution of the PTC; **OR**
2. Before incorporation, and if it is considered that the PTC may be 'acting by way of business', an approval 'in principle' application can be made to the GFSC.

This can be made by way of a letter and a completed [PTC exemption application form](#). After consideration of the PTC particulars, the GFSC will then either be able to:

- a) Confirm that the discretionary exemption is not required and the directors of the PTC will then have a clear record of this to rely upon in the future should the licensing status of the PTC be questioned; **OR**
- b) Confirm that the PTC will be 'acting by way of business' and grant an exemption in principle which will be replaced with a full exemption pursuant to the Fiduciaries Law once the PTC has been incorporated (again, subject to its criteria being satisfied).

Don't let regulation slow you down. The popularity of the PTC is growing and with it brings great opportunities for Guernsey based CSPs. When considering the use of these structures we would recommend that you consult with your legal counsel and tax advisers from the outset so you can be clear as to what regulatory hurdles need to be complied with.

If you would like to discuss this article and the use of a PTC for wealth planning, please feel free to contact a member of the Collas Crill International Private Client and Trusts team.

[1] The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000, section 58(3).

**This article has been updated since the new PTC Guidance was released on 11 June 2019.*

FOR MORE INFORMATION PLEASE CONTACT:

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