



Guernsey Financial
Services Commission

Industry Seminar – 20 October 2011

Foundations Presentation

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For those of you that don't know me, my name is David McCloskey – I am Assistant Director in the Fiduciary Services Division.

This afternoon, I would like to provide you with a summary of the Commission's focus in the lead up to the Foundations (Guernsey) Law coming into effect.

The Foundations (Guernsey) Law

As you maybe aware the drafting of the Foundations (Guernsey) Law is at an advanced stage and is anticipated to be Law - around December 2012;

Whilst some of you have been administering Non-Guernsey Foundations for some time, from a review of the Commission's recent statistics, **89%** of the industry has had no exposure to Foundation structures.

What is a Foundation?

The key characteristic of a Foundation is that it is a Civil Law concept - rooted in Civil Law. This is as opposed to the Trust - which is a Common Law concept.

The best way of describing a Foundation - is to look at a Foundation having features both of a Trust and of a Company.

It has legal personality like a Company and is also registered at a Companies registry – BUT it holds assets for beneficiaries and it has no shareholders.

A Foundation enables a Founder, (similar to a Settlor) to transfer assets. The assets cease to be comprised within the Founders estate or the estate of the Administrator.

Foundations have a concept called Disenfranchised Beneficiaries.

Disenfranchised Beneficiaries

Firstly what is a Disenfranchised Beneficiary?

Essentially it is a beneficiary that is not entitled to any information about the Foundation - so may not be aware they are to benefit – hence they are known as disenfranchised.

Licensees may not - at the outset - be able to obtain the CDD on these beneficiaries

But it is envisaged, that it will be the responsibility of Licensees, to document its rationale for not obtaining the CDD.

Consideration may be given to issuing some Guidance, perhaps in conjunction with GAT, similar to the “Likely to Benefit” Guidance they issued previously.

Crucially the expectation is to obtain CDD prior to any distribution being made.

The Foundations (Guernsey) Law - The Impact on Current Legislation

What will be the impact on current legislation?

The Foundation Law will likely bring in an amendment to the Fiduciary Law making specific provision for the FORMATION, MANAGEMENT and ADMINISTRATION of FOUNDATIONS as Regulated Activities.

The Foundations Law will also bring in amendments to the Fiduciary Law to include :

- the provision of corporate or individual foundation officials as REGULATED ACTIVITIES
- the provision of Registered Office Services
- and a Record of Compliance with the Foundations Law - as currently exists for the Companies Law.

Similarly whilst Foundations are currently caught within the AML framework there may need to be amendments to the AML Handbook once the Law has come into force. For example, to clarify the position of disenfranchised beneficiaries.

A Code of Practice or Rules for Foundation Service Providers

We are using the next year to prepare. To train our staff and develop provisions in anticipation of the Law coming into effect.

The Commission is considering whether to establish a Code of Practice for Foundation Service Providers OR Rules, and I have the task of taking this project forward.

Should we introduce a Code - as with current Codes we will be consulting with the Policy Council and Finance Committees, in Guernsey, Alderney and Sark and with you the Fiduciary sector.

It is envisaged that a Code OR Rules would be similar to the current Codes of Practice for Trust Service Providers or Corporate Service Providers - But there will be aspects coming out of the Foundations Law, which I foresee would be incorporated within a new Code or RULES:

- Firstly - the requirement for the Foundation to have at least TWO Councillors - One being a Guernsey Licensed Fiduciary;
- Secondly - that any Agent may only act on behalf of and exercise any Founder or Councillor duties, if they are a Guernsey Licensed Fiduciary.

What other provisions do I foresee a Code or Rules containing and how will it impact on you as Fiduciary Licensees?

Firstly - its envisaged that Licensees will have to demonstrate that :

- Its Directors
- Its Employees who are designated to administer Foundations
- its Compliance Officer(s)
- and MLRO and relevant deputies

have either prior relevant experience - OR - have undertaken APPROPRIATE training in the principles of Foundations.

The Commission wants to work in partnership with the industry in preparation for the Law. To assist in compliance with any training provision of a Code/Rules, the Commission is in early discussions with the Guernsey Training Agency, GAT and the Guernsey branch of STEP to ensure specific training programmes on Foundations will be available next year.

I suspect you will see some Commission staff at that training.

And Secondly - It may be necessary for any a Code or Rules to address the activities of Guardian', which is similar to a Protector, where the activities are undertaken by a Guernsey Licensee.

AML Implications for Licensees – Relating to Foundations

- The expectation will be for Licensees to ensure that its Business Risk Assessment documents its risks and its risk mitigation measures, based on the proposed services the Licensee will provide.
- The collation of adequate CDD is a key risk mitigation tool in assessing risk of a relationship - Fiduciary Licensees must be able to demonstrate that it has conducted adequate CDD on the key parties connected to the Foundation.

What changes will be made to the Commission's supervision

We will of course look at Foundations during onsite visits - in the similar areas that we do for Trust and Companies Structures.

- We will review staff training records

- We will be looking to see there is demonstrable audit trail AND understanding of the Foundation Structure
- AND a Business Risk Assessment that covers the relevant risks regarding the Foundation.

As part of our Desktop Monitoring

We have already requested information on existing Foundations as part of the ASSETS UNDER TRUSTEESHIP request - There may be other notification requirement in the next year - but we will engage with the industry as the process develops.

I hope you will see that this reflects our desire to work in PARTNERSHIP with the Sector towards the smooth introduction of GUERNSEY FOUNDATIONS

Conclusion

In conclusion, what are the key messages to take away from this presentation? -

Should you be proposing to provide services to a Foundations -

Firstly - Ensure that your staff have received relevant training or have DEMONSTRABLE experience of Foundation structures BEFORE providing services.

Secondly - We see the establishment of Foundations within the Bailiwick as an important development that we all want to get right from the start. Therefore use this time prior to the Law coming into effect to make the relevant preparations for your organisations.

Thank you very much for your time and for listening - we would be pleased to answer any questions - at the end of ALL the presentations.

On that note - I would like to pass over the my colleague Donal Kennedy