Guernsey Financial Services Commission

Exemption of Directorships Connected to Authorised and Registered Collective Investment Schemes

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Feedback following the Commission's consultation on Exemption of Directorships Connected to Authorised and Registered Collective Investment Schemes

The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020

Background

On 8 December 2022 the Commission published a consultation paper that proposed making new regulations providing for the exemption from licensing under The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 (the "Fiduciaries Law") of the activity of acting as a director of certain companies connected to registered or authorised collective investment schemes. A copy of the consultation paper is available on the Consultation Hub. This consultation complemented proposals in a recent Policy & Resources Committee ("P&R") consultation paper on implementation of a directorship registration regime.[1]

In considering the comments received on our consultation paper, the Commission has liaised closely with P&R in respect of the comments received on its proposals. While separate feedback on those proposals will be provided to respondents, the final proposals explained in this feedback paper form part of a joined up and coherent overall approach to the setting of exemptions under the Fiduciaries Law and the scoping of the new director registration regime.

We reviewed 28 consultation responses, seven received directly and 21 as part of of composite responses to the P&R consultation. The Commission is grateful to everyone who responded to the consultation

Summary of Feedback

Respondents were generally supportive of the proposals in the Commission's consultation paper but also sought:

- further clarification of the proposals;
- further clarity or guidance on current Fiduciaries Law licensing exemptions; and
- the creation of new categories of licensing exemption under the Fiduciaries Law.

The Commission has carefully considered this feedback and has applied a risk-based approach in the development of licensing exemptions policy, taking particular account of the relative money laundering and terrorist financing risk profile presented by different types of directorship activity.

Following consultation with the Commission, the Policy and Resources Committee have made the Regulation of Fiduciaries etc. (Bailiwick of Guernsey) (Amendment) Regulations, 2023 (the "Regulations") which came into effect on 8 July 2023. The Regulations extend an existing exemption, introduce a revised version of the previously proposed exemption for Collective Investment Scheme-connected directorships, and also provide for three additional, new categories of director exemption. A copy of the Regulations is available on the Commission's website.

The Commission has published a revised version of its Frequently Asked Questions on acting as a director which reflects the revisions to the Fiduciaries

Law. This can be found on the Commission's website at the following link: Requirements for Individuals Acting as a Director.

New Categories of Licensing Exemption

Acting as Director of a Family Company

Comments received identified that while an exemption applied, under section 3(1)(d) of the Fiduciaries Law, to the activity of acting as a director of a company where either one of the director, a close relative of the director or a trustee of a family trust holds more than half the share capital of the company, such an exemption did not apply where such parties collectively held more than half of the companies share capital. The Regulations have widened the exemption to now apply where more than half of the share capital is collectively owned by the director's family or family trust.

Acting as Director of a Company Connected to Authorised or Registered Collective Investment Schemes

All respondents were in favour of a proposed exemption for directorships of companies connected to authorised or registered collective investment schemes. There were calls for greater clarity around the scope of the exemption and for some redrafting of the proposed wording to avoid potential ambiguity.

Some respondents also proposed that the exemption should be extended to apply to directorships of any company, not just authorised or registered collective investment schemes, administered by a licensed person.

Following consideration of the comments received a new exemption has been added to the Fiduciaries Law which is consistent with the consultation proposal. This exemption applies where the individual director is also a director of the connected collective investment scheme or the collective investment scheme's general partner, and the company is administered by the designated administrator of the connected collective investment scheme.

Respondents sought further clarity on the meaning of a company "connected to a collective investment scheme". Further guidance relating to specific scenarios has been added to the FAQs which can be found here.

Acting as Director of a States Owned Company

Further to feedback received a new category of licensing exemption has been created for the activity of acting as a director of a company wholly beneficially owned by the States of Guernsey, the States of Alderney or the Chief Pleas of Sark, or any committee thereof.

Acting as a Member of the Guernsey Banking Deposit Compensation Board

A further new category of licensing exemption has been created for the activity of acting as a member of the Guernsey Banking Deposit Compensation Board.

Acting as a Director of a Non-Bailiwick Supervised Financial Firm

A number of respondents proposed that directorships of foreign supervised companies should be exempted given that such activity also falls under the oversight of the home jurisdiction supervisor. This proposal has been taken up and the following additional exempt category has been added to the Fiduciaries Law:

"*(af) acting as director of a company which undertakes banking, insurance or investment activities where those activities are supervised by a supervisory authority which is a signatory to the International Organisation of Securities Commissions' Multilateral Memorandum of Understanding*"

It should be noted that a company undertaking investment activities includes a company which is a regulated collective investment scheme subject to supervision. A person wishing to rely on this exemption should establish that the company is supervised and does not fall outside supervision for example through exemption provisions applicable in the home jurisdiction.

FAQs

As previously stated the Commission's FAQs on Acting as a Director have been updated to reflect the new exemption categories described above. In response to comments received further guidance has also been added on exemption under section 3(1)(w) of the Fiduciaries Law for incidental activity. Specifically, the licensing status of remote working executive directors of non-Bailiwick operating companies was queried. (N.B. directorships of companies with an established place of business in the Bailiwick may already be exempt under section 3(1)(b) of the Fiduciaries Law.)

The Commission considers that the activity of an individual acting as a director of a trading company may be exempted under section 3(1)(w) of the Fiduciaries Law where the individual is also employed by the company in an executive role provided that:

- no separate or additional remuneration is taken for the directorship role and if the directorship role were to cease there would be no reduction in the individual's remuneration in respect of the executive role;
- the directorship is incidental to the carrying on of the individual's primary executive role and the significant part of the individual's day-to-day activities are given over to the conduct of the executive role;
- all provisions of section 3(1)(w) are otherwise met; and
- the activity is not exempted under any other provision of section 3 of the Fiduciaries Law.

For the purposes of this guidance a trading company is a company primarily engaged in commercial activity as opposed to investment or asset holding activity and which is not a regulated financial services firm. This exemption may, for example, apply to an individual who is an executive director of a UK advertising company whose principal role is head of communication, or head of HR and is a salaried employee.

It is the Commission's view that an employee or officer of a family office who acts as a director of companies within the family office structure, where the family office entity is not a licensee and the directorship activity is not conducted under the authorisation of a licensed person, may not use the exemption under section 3(1)(w) of the Law. Such activity is intrinsic to the overall family office management function and cannot be regarded as incidental.

Interaction with Director Registration Regime

While this feedback statement addresses only the licensing exemption regime under the Fiduciaries Law it is important to understand how this relates to and impacts the new Director Registration Regime. The Director Registration Regime applies only to directorship activity using the exemption for individuals acting as director of not more than six companies (the "up to six" exemption under section 3(1)(g) of the Fiduciaries Law). With the broadening of available exemptions under the Fiduciaries Law, the extent of directorship activity using the "up to six" exemption, and hence registrable, may be reduced.

It should be noted that there are further exemptions from the requirement to register under the Director Registration Regime and these should not be confused with licensing exemption under the Fiduciaries Law. For example, directorships of Bailiwick companies administered by licensed fiduciaries are exempt from registration but the decision has been taken not to expressly exempt such activity from the licensing requirements of the Fiduciaries Law.

Exemptions under the Director Registration Regime and the Fiduciaries Law have both different purposes and effects. The registration exemption applies to individuals using the "up to six" licensing exemption under section 3 of the Fiduciaries Law, taking into account the mitigating impact of the licensed administrator, which also acts as resident agent for the company, on their ML/TF risk profile, but the exemption does not remove the obligations on the individual under Schedule 3 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (the "PoC Law"). A general exemption from licensing for directorships of companies administered by licensed fiduciaries would have much further reaching and potentially undesirable consequences, entirely removing all directors (even where the number of directorships greatly exceeded six) from any obligation to comply with Schedule 3 of the PoC Law and, moreover, from the broader scope of licensing as a Personal Fiduciary Licensee.

Further information on the Director Registration Regime is available on the Commission's website (www.gfsc.gg).

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[1]Policy & Resources Committee, CONSULTATION PAPER ON REVISIONS TO THE SUPERVISORY FRAMEWORK SURROUNDING THE SIX DIRECTORSHIP EXEMPTION, 23 November 2022, https://www.gfsc.gg/sites/default/files/inline-files/Six%20directorship%20consultation%20Consultation%20Paper%20FINAL.pdf

Files:

- Feedback Statement, 292.6 KB (PDF document)

Overview

Introduction

This consultation paper proposes the making of new regulations providing for the exemption from licensing under The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 (the "Fiduciaries Law") of the activity of acting as a director of certain companies connected to registered or authorised collective investment schemes. This consultation complements a recent Policy & Resources Committee consultation on revisions to the supervisory framework surrounding the six directorship exemption[1].

It should be noted that the proposals in this consultation paper are not intended to affect the scope of any current exemption under section 3 of the Fiduciaries Law.

The Commission welcomes feedback and comments on the proposals set out in this Consultation Paper.

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Related

Consultation Paper - Director Exemption

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Guernsey Financial Services Commission

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The Regulations of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020

Issued 8 December 2022

Contents

Responses to this Consultation Paper are sought by 23 January 2023.

We welcome and encourage respondents to provide feedback or comment on any section and question. Feedback may be provided via the Consultation Hub section of the Commission's website (www.gfsc.gg).

Introduction

This consultation paper proposes the making of new regulations providing for the exemption from licensing under The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 (the "Fiduciaries Law") of the activity of acting as a director of certain companies connected to registered or authorised collective investment schemes. This consultation complements a recent Policy & Resources Committee consultation on revisions to the supervisory framework surrounding the six directorship exemption.[1]

It should be noted that the proposals in this consultation paper are not intended to affect the scope of any current exemption under section 3 of the Fiduciaries Law.

The Commission welcomes feedback and comments on the proposals set out in this Consultation Paper.

Background

The Fiduciaries Law and Licensing Exemption

The Fiduciaries Law prohibits the carrying out of certain regulated activities, by way of business, unless such activities are carried out by a licensed person or such activities are exempted activities as described under section 3 of the Fiduciaries Law. Acting as a director of a company is a regulated activity under the Fiduciaries Law but in certain circumstances this activity may be exempt. One such circumstance, for example, is provided for under section 3(1)(e) of the Fiduciaries Law, which exempts the activity of acting as a director of a "supervised body". This exemption applies to directorships of licensed companies and collective investment schemes registered or authorised under the Protection of Investors (Bailiwick of Guernsey) Law, 2020. Another example of exemption is the provision under section 3(1)(g) of the Fiduciaries Law which exempts the activity of acting, where the person is an individual, as a director of not more than six companies, (the "six directorship exemption"). In both examples director activity remains within the scope of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (the "Proceeds of Crime Law").

Director Registration Proposals

The Policy & Resources Committee has recently published a consultation paper (the "P&R Consultation Paper") proposing that directors using the six directorship exemption should be required to register with the Commission, coming within the ambit of the registration

[1] Policy & Resources Committee, CONSULTATION PAPER ON REVISIONS TO THE SUPERVISORY FRAMEWORK SURROUNDING THE SIX DIRECTORSHIP EXEMPTION, 23 November 2022, https://www.gfsc.gg/sites/default/files/inline-files/Six%20directorship%20consultation%20Consultation%20Paper%20FINAL.pdf

framework for prescribed businesses under Schedule 5 to the Proceeds of Crime Law. The proposal includes certain exemptions from the requirement to register, including the exemption of a director of a company administered by a licensed fiduciary, that also acts as the company's resident agent.

The P&R Consultation Paper also highlights the Commission's intention to review the future treatment of directorships of companies connected to registered and authorised collective investment schemes vis-à-vis the six directorship exemption.

Directorships of Companies Connected to Registered and Authorised Collective Investment Schemes

A typical collective investment scheme structure may comprise a number of companies, and other entities, facilitating the collective investment scheme's operation and investment activity. Often the companies within one structure will have common directors (and will be administered by the same licensed firm responsible for ensuring compliance with AML/CFT obligations). The treatment of each directorship activity, however, may not be the same under the Fiduciaries Law. For example, an individual, acting by way of business, may hold a directorship of a registered collective investment scheme and this activity would be exempt under section 3(1)(e) of the Fiduciaries Law because the collective investment scheme meets the definition of a supervised body. Activity in respect of the same individual's directorships of other companies, which are connected to the collective investment scheme but which do not meet the definition of a supervised body, would not fall under the same exemption provision, but may instead use the six directorship exemption. Where directorships exceed six in number, and no other exemptions apply, an individual would be required to hold a Personal Fiduciary Licence.

Objective

The proposals in this consultation paper seek to achieve the following two objectives:

1. To provide a clear and specific exemption for directors of companies that form part of the wider structure of a registered or authorised collective investment scheme - recognising the mitigation of risk associated with the connection to a regulated fund and the oversight of a licensed administrator - where such directors may otherwise, in some cases, have relied on the more general six directorship exemption or been required to hold a Personal Fiduciary Licence.
2. To create greater alignment between the scope of those directorships relying on the six directorship exemption and those that will be required to register under the proposals of the P&R Consultation Paper.

Key Proposals

It is proposed that regulations are made to add a new category of activity exempted from the licensing requirement as a new sub-section (1)(ad) to section 3 of the Fiduciaries Law. This is described with draft language as follows (or in similar terms)[2] for respondents' consideration:

> *"(ad) acting as a director of a company where–*
>
> (i) *the company is –*
>
> *(A) connected to a collective investment scheme authorised or registered under section 8 of the Protection of Investors Law;*
> *(B) administered, where being administered includes appointment as a resident agent (within the meaning of the Companies (Guernsey) Law, 2008), by the same person appointed as the designated administrator (within the meaning of the Protection of Investors Law) of the connected collective investment scheme described in item A ("administering person"); and*
> *(C) subject to the requirements to forestall, prevent and detect money laundering and terrorist financing of that administering person where compliance with such requirements is supervised by the Commission; and*
>
> (ii) *the director –*
>
> *(A) is an individual; and*
> *(B) acts either as a director of, or a director of the general partner of, the connected collective investment scheme described in subparagraph (i).*
>
> *For the purposes of this paragraph a company is connected to a collective investment scheme where it directly facilitates the management, operation or investment activity of the collective investment scheme."*

Q: Do you have any comments on the key proposal highlighted?

[2] The Policy & Resources Committee may by regulation add any exemption to section 3 of the Fiduciaries Law. The regulations may also contain consequential, incidental, supplementary, savings, transitional or other ancillary provisions that may appear to be necessary or expedient.

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- the directorship is incidental to the carrying on of the individual's primary executive role and the significant part of the individual's day-to-day activities are given over to the conduct of the executive role;
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