Protected Cell Company ("PCC") as Pension Service Provider ("PSP")

Closed 11 Nov 2024

Opened 16 Sep 2024

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1. Introduction

This paper provides feedback on the responses received to the Commission's consultation paper ("CP") on Protected Cell Company ("PCC") as Pension Service Provider ("PSP") which was issued on 16 September 2024 and closed on 11 November 2024.

Whilst the CP was open for comments from any interested stakeholder, it was noted that the proposal was likely to be of particular interest to PSPs.

1.1 Background

The CP proposed that licensed PSPs should be included within the scope of companies permitted to be formed as PCCs and that this should be implemented by a regulation made by the Commission prescribing PSPs as a class of companies for the purposes of s.437(1) of The Companies (Guernsey) Law, 2008 ("The Companies Law").

2. Response

Feedback Summary

All respondents, including the pension sector industry body, were supportive of the proposal to include licensed PSPs as an additional class of companies eligible to be formed as PCCs. It was noted that this would broaden the range of structures available for PSPs and would be likely to be attractive to those offering pension products into civil law jurisdictions.

The use of cells for holding pension assets only

The respondents agreed with the proposal to impose a licence condition on a licensed PSP which is formed as a PCC so as to restrict the use of cells solely for the purpose of holding and segregating pension scheme assets. This was recognised as a flexible approach to achieve this objective.

Prudential requirements

The CP highlighted that the licensed PCC would have to comply with the minimum licensing criteria and that the financial resources requirements rules (Rule 4.2 of the Fiduciary Rules and Guidance, 2021, the "FRR rules") will apply at the PCC Core. Whilst the respondents agreed with the proposal, they requested confirmation that the FRR rules would not extend to the licensed PCC if it holds a secondary fiduciary licence. The Commission would like to clarify that in meeting the FRR Rules licensed PCCs will be subject to the same treatment as other non-cellular licensed fiduciaries i.e. if the licensed PCC (acting as a PSP) holds a primary fiduciary licence, the FRR Rules must be met at the core of the PCC only, but if the licensed PCC holds a secondary fiduciary licence, then similar to other secondary licensees section 4.2 of the Fiduciary Rules is not applicable to them[1].

Other

A respondent sought clarification that the proposal includes PSPs which operate gratuity schemes (not just pension schemes). The Commission would like to confirm that regulated activity in respect of gratuity schemes under section 2(1)(e) of the Regulation of Fiduciaries, Administration Businesses, and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 is within scope.

3. Next steps/ Conclusion

Regulations prescribing pensions and gratuity service providers as a new class or description of company which can be formed as PCC, for the purposes of s.437(1) of The Companies Law, have been issued by the Commission and will come into effect on 20 December 2024.

The Commission would like to thank all respondents for taking the time to read and respond to the CP.

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[1]Secondary licensees present limited prudential risk because they do not trade independently, but simply serve a primary licensee. Secondary licensees are, therefore, not subject to the FRR Rules.

Links:

- Feedback statement PCC as PSP

Overview

Introduction

This Consultation Paper proposes amendments to the current legal framework to allow a protected cell company ("PCC") to be licensed under the Regulation of Fiduciaries, Administration Businesses, and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 ("Fiduciaries Law") to carry on pension business.

The proposed change may be beneficial to the Bailiwick as it would enable an expansion in the use of the PCC structure, recognising that the PCC is now mature, well-understood and relied upon across the financial services sector. The proposal would permit licensed pension providers to use the particular features of a PCC to ring-fence pension scheme assets thereby facilitating an efficient mechanism for pension products to be developed while at the same time ensuring that pension assets are protected and pensions activity continues to operate under the umbrella of the Commission's supervision.

Why your views matter

Who might benefit from reading this paper?

This discussion paper is a public document and feedback is welcomed from any interested stakeholder. The proposal is likely to be of particular interest to Pension Service Providers.

Related

Consultation Paper - PCC as PSP

Audiences

Anyone from any background

Consultation feedback

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Issue date 17 December 2024

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Guernsey Financial Services Commission

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How to respond

Responses to this Consultation Paper are sought by 11 November 2024.

Feedback may be provided via the Consultation Hub section of the Commission's website (www.gfsc.gg).

Introduction

This Consultation Paper proposes amendments to the current legal framework to allow a protected cell company ("PCC") to be licensed under the Regulation of Fiduciaries, Administration Businesses, and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 ("Fiduciaries Law") to carry on pension business.

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Restrictions on formation of PCCs

Currently a Pension Service Provider ("PSP") cannot be incorporated as a PCC because section 437(1) of The Companies (Guernsey) Law, 2008 ("The Companies Law") restricts the formation of PCCs[1] to companies falling into one of the following categories:

- the company is an authorised or registered fund;
- the company is licensed under the Insurance Business (Bailiwick of Guernsey) Law, 2002 or the Protection of Investors (Bailiwick of Guernsey) Law, 2020 ("PoI Law");
- the company is administered by an entity licensed under the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002, the Banking Supervision (Bailiwick of Guernsey) Law, 2020, the PoI Law, or the Fiduciaries Law; or
- the company is of any other class or description prescribed by the Commission.

To date, the Commission has not prescribed a class or description of companies which can be formed as a PCC. The proposal to include PSPs within the scope of companies permitted to be formed as PCCs, as set out in this Consultation Paper, can be achieved by a regulation made by the Commission prescribing PSPs as a class of companies for the purposes of s.437(1) of The Companies Law.

Reason for the current restriction

Protected Cell Companies were an innovative concept introduced in 1997. There were concerns at the time of implementation that third parties dealing with PCCs may not fully understand the nature of these companies. PCCs were, however, recognised as a means to efficiently create insurance structures, and later investment funds, while protecting customer assets. Consequently, the legislation was drafted to restrict the use of PCCs to the regulated financial sector. PSPs were not included, such entities were not part of the regulated financial sector at that time, with regulation for PSPs being introduced in 2017. Today the concept of PCCs is

[1] Section 437

widely used, does not affect the application of counter-financial crime or beneficial ownership obligations, and has been replicated in many peer jurisdictions.

Proposal

It is proposed that the scope of companies permitted to be formed as PCCs should be expanded to include a class of licensed fiduciary, specifically those licensed fiduciaries that carry out pension activity (i.e. engaged in "*the formation, management or administration of pension schemes or gratuity schemes, and the provision of advice in relation to the formation, management or administration of pension schemes or gratuity schemes*[2]").

It is proposed that the above change to the scope of companies eligible to be a PCC be achieved by the Commission's prescription of a new eligible class of company, this class being licensed fiduciaries carrying out pension activity. The Commission would prescribe this class in Regulations using the powers granted to it under the Companies Law to make Regulations in respect of PCCs[3]. The proposed drafting for the prescribing regulation is provided in the Appendix.

This proposal would therefore not require any amendment to the Companies Law, merely the use of existing powers already granted to the Commission under that Law.

Advantages of making this change

The proposal in this paper responds to a request from the Bailiwick's pensions sector to enable a broadening of the use of PCCs to facilitate their offering of pensions services.

Several licensed fiduciaries that carry out pension activity currently use PCCs as part of structures that facilitate contract-based pension schemes. For example, the licensed PSP may issue pension contracts directly to pension scheme members but may use an underlying subsidiary PCC to hold and segregate assets attributable to each pension scheme member. From engagement with representatives of the pension's sector industry body the Commission understands that the ability for a licensed PSP to form as a PCC would enable activity to be consolidated within a single company allowing the licensed firm to hold the pension assets directly in segregated, protected cells attributable to the pension member. Such consolidation might potentially reduce structure complexity through the use of a single legal entity, and thereby reduce cost. The proposal may, therefore, enable the development and offering of a broader range of pension products by Bailiwick PSPs.

The chart below presents one example of how a PCC might be used for pension business if the changes proposed in this document are made.

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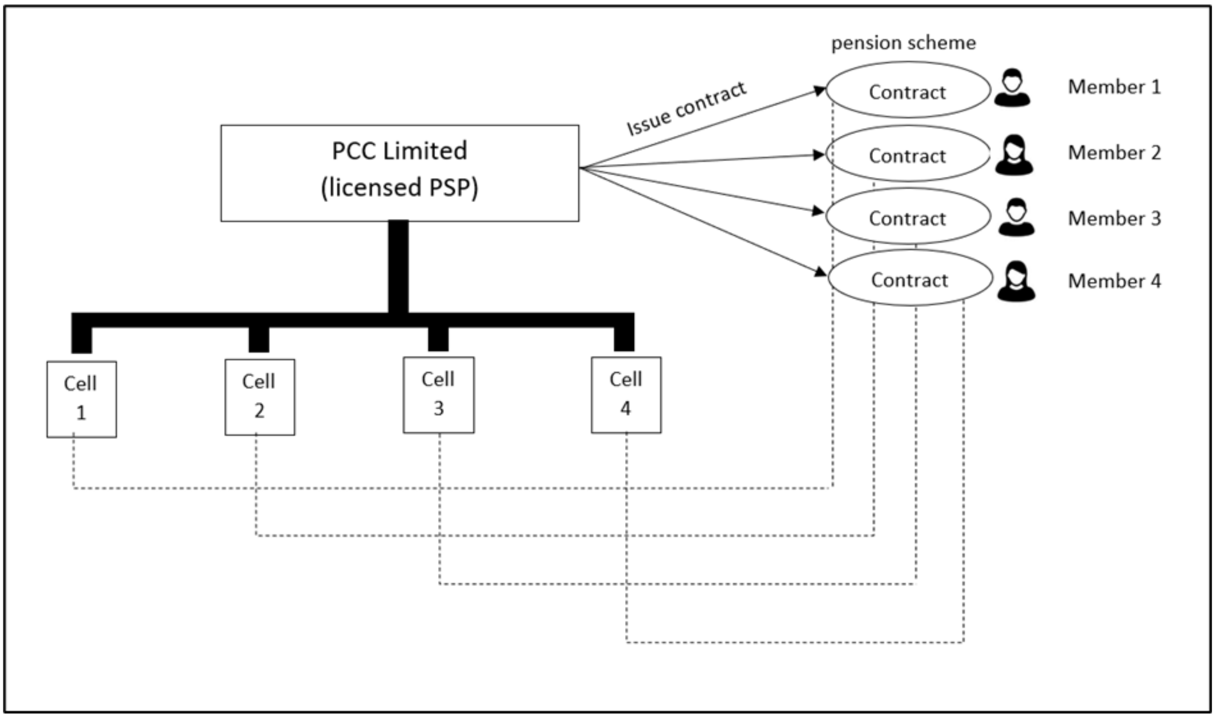
[2] Regulated activity as described under section 2(1)(e) of the Fiduciaries Law.

[3] Section 466



As illustrated above, the example company, "PCC Limited", issues pension contracts to members and keeps assets of members separately in its relevant cells. The PCC uses its cells only to hold assets. There are no shares issued by the cells and therefore the PCC owns the cells, but pension members have the rights under the pension contract to assets attributable to their corresponding cell. Any creditors of the company who are not creditors of a cell are unable to claim cellular assets under that cell as this is prohibited under s.449 of the Companies Law.

No expansion of the scope of PCC use to other non-pension fiduciary activity

While there may be a specific use case for PCCs in the segregation of pension assets, it is not proposed that the use of PCCs should be expanded to other non-pension fiduciary activity. While a PCC may be an effective structure for asset segregation it does not provide a means to segregate other fiduciary activity or assets. Where a licensed fiduciary wishes to segregate different business lines and activity the Commission believes that the use of distinct, licensed legal entities using the existing primary and secondary licensing regime provides an effective framework.

Risks related to this proposal

Contagion risk

A potential risk of contagion could arise if pension scheme assets are not appropriately segregated and ring-fenced in cells, but such risk would arise only where the arrangement is not properly constituted and administered. Such risk is not, however, peculiar to the proposed structure and could be present in any structure.

The use of PCCs to segregate and protect assets is now a well-established practice both in the Bailiwick and internationally, nevertheless the risks identified at the time of the introduction of the PCC concept remain potentially relevant. For this reason, the proposal is only for a limited and controlled expansion of the scope of PCC use, remaining within the regulated finance sector.

Regulatory arbitrage

While there may be an advantage to using a PCC structure to segregate pension scheme assets there may also be a risk that cells might be used for other purposes, for example as a means to hold non-pension assets, offer other financial products or services, to issue cell specific shares or seek to conduct or attribute distinct or third-party fiduciary activity to individual cells. While it may be unlikely that such activity would occur, it is proposed that appropriate licence conditions would be used to address this risk. It is proposed that a licensed PSP formed as a PCC would be subject to a standard licence condition restricting the use of cells solely for the purpose of holding and segregating pension scheme assets. For the avoidance of doubt, this licence condition is in addition to the standard licence conditions currently imposed on fiduciary licensees.

Overall, the above risks are mitigated by limiting the scope of PCC use to PSPs and the use of cells for holding pension assets only.

Consultation Paper questions

Q1: Do you have any comments on the proposal to extend the scope of companies permitted to be PCCs to include PCCs which are licensed under the Fiduciaries Law as a pension service provider, particularly in relation to:
a) the potential benefits of the proposal?
b) the risks associated with the proposal?

Q2: Do you have any comments on the proposed use of licence conditions?

Minimum Licensing Criteria

A licensed PSP formed as a PCC would, like any other licensed fiduciary, be required to meet the minimum criteria for licensing as set out in Schedule 1 of the Fiduciaries Law and comply with all other laws, rules and guidance applicable to fiduciary licensees.

In meeting the prudential requirements under the Fiduciary Rules, 2021 a licensed PCC would be required to satisfy the financial resources rules in respect of the capital and resources of the PCC Core.

Q3: Do you have any comments on the proposed prudential requirements?

Q4: Would your firm consider making use of the expanded scope and setting up a PCC as a PSP? Do you have any other comments on the likely take up of this proposal?

Q5: Do you have any other comments on the proposals in this paper?

APPENDIX - Extension of permitted activities by PCCs

To effect the proposed changes the Commission would make a Regulation prescribing a "class or description" of company, under s.437(1)(e) of the Companies Law, as follows:

"*For the purposes of section 437(1)(e) of the Companies (Guernsey) Law, 2008, the Commission prescribes any company falling within the class of companies which are (or when incorporated will be) licensed to carry on the regulated activity under section 2(1)(e) of the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020.*"