

HARNEYS

British Virgin Islands Private Trust Company Legislation

As of 1st August 2007, unlicensed private trust companies are now permitted in the British Virgin Islands (“**BVI**”).

The statutory provisions are contained in the Financial Service (Exemptions) Regulations, 2007 (the “**Regulations**”).

The Regulations have expressly revoked the Banks and Trust Companies (Application Procedures) Directions, 1991, (the “**Directions**”), subject to a transitional period ending on 31st July 2008¹.

Trust companies that had prior to 2nd August 2007 been relying on paragraph 7(c)² or paragraph 7(d)³ of the Directions therefore have until 31st July 2008 to either fall within the Regulations or obtain a trust licence under the Banks and Trust Companies Act, 1990 (“**BTCA**”).

A private trust company (“**PTC**”) must satisfy the following conditions in order to be exempt from the requirements to obtain a trust licence under the BTCA:

1. It must be a “qualifying BVI company”, which is satisfied if the company was either:
 - (i) first incorporated under the BVI Business Companies Act, 2004 (“**BVIBC Act**”); or
 - (ii) incorporated under the International Business Companies Act, 1984 (“**IBC Act**”) which had been voluntarily re-registered under the BVIBC Act; or

¹ Financial Services (Exemptions)(Amendment) Regulations, 2007

² ‘...a trust company formed on behalf of a company or a group of companies to be the trustee of one or more trusts for which no remuneration is received, directly or indirectly, by the trust company shall be regarded as not carrying on “trust business” for the purposes of the Act.....’

³ ‘...a trust company formed on behalf of and owned by one or more members of a family to be the trustee of one or more trusts of which one or more members of the family are the principal beneficiaries and for which no remuneration is received, directly or indirectly, by the trust company shall be regarded as not carrying on “trust business” for the purposes of the Act....’

- (iii) incorporated under the IBC Act and compulsorily re-registered under the BVIBC Act, and in respect of which an election to disapply Part IV of Schedule 2 to the BVIBC Act has been made and registered; or
 - (iv) incorporated under the Companies Act (Cap. 285) and voluntarily re-registered under the BVIBC Act.
2. It must be a “limited” company as defined in the BVIBC Act;
 3. Its memorandum of association must state that it is a “private trust company”;
 4. Its name must end with the designation “(PTC)”, placed before, “Limited” “Ltd”, “Corporation”, “Corp” or “Inc” etc as the case may be;
 5. Its registered agent must, at all times, hold a Class 1 licence under the BTCA;
 6. It must not carry on any business other than “trust business” which must comprise either “unremunerated trust business” or “related trust business”.

The Regulations do not define “trust business”, and therefore reference is made to section 2 (1) of the BTCA⁴, note under the Regulations a PTC cannot solicit trust business from members of the public.

The Regulations provide a test for “unremunerated trust business”, which broadly requires that the PTC not receive any remuneration in consideration for or with respect to the services provided in the trust business – however, payments to indemnify against costs and expenses are permitted.

The Regulations also prohibit “persons associated with the PTC” from receiving remuneration. A director of the PTC is an associated person for these purposes, however the Regulations contain an important proviso, in that remuneration can be paid in respect of services provided by a “professional director”.

The Regulations do not define “professional director”, and therefore this will in each case be a matter of fact, with consideration as to whether or not the director is authorized to provide fiduciary, trust, company management or similar services by the Financial Services Commission (“FSC”) in the BVI or similar regulatory authority in any other jurisdiction.

The Regulations provide a test for “related trust business”, which requires a family connection between the settlor and the beneficiaries of the trust (which may include a charity), or that the trust is wholly charitable.

⁴ “trust business” means the business of:

- (a) acting as a professional trustee, protector or administrator of a trust or settlement; or
- (b) managing or administering any trust or settlement.

A PTC may act for a group of “related trusts” (as described above) provided that the settlor of each trust is within or connected to the same family, as provided in the Regulations.

The principal differences therefore between the “unremunerated” and “related trust” heads of exemption are follows:

“unremunerated trust business”

- PTC is not able to receive remuneration, it cannot make a profit;
- PTC is not able to remunerate non-professional directors;
- PTC is not restricted in the type of trust for which it can act, save that it can only act as protector of a non-charitable purpose trust.

“related trust business”

- PTC is able to receive remuneration, and therefore make a profit;
- PTC is able to remunerate non-professional directors;
- PTC is only able to act for non-charitable trusts where the settlor and beneficiaries are within the same family (as provided in the Regulations);
- PTC is not able to act for a non-charitable purpose trust.

The Regulations are “self-exempting” in that provided the above is complied with the exemptions automatically apply, it is not necessary to apply for or obtain an ‘exempt licence’.

The PTC’s registered agent (“**RA**”) is primarily tasked with policing compliance with the Regulations.

The Regulations provide that the RA shall not agree to act as the registered agent of the PTC unless the RA has taken all reasonable steps to satisfy itself that the PTC does not:

- (i) carry on any business that is not trust business;
- (ii) solicit trust business from members of the public; or
- (iii) carry on any trust business other than either unremunerated trust business or related trust business, as the case may be.⁵

The RA is required to conduct periodic reviews to satisfy itself that the PTC continues to comply with the above requirements, and to immediately notify the FSC if at any time it forms the opinion that the PTC has ceased to comply.

The RA is further required, in respect of each trust for which the relevant PTC provides services, to keep up to date copies of the relevant trust deed, or other document creating the trust and any document varying the terms of the trust. The RA also needs to retain any documentation which it has relied on in conducting a periodic review of the PTC.

⁵ Para 10 (1), and para 6 (1)(b) of the Regulations.

The FSC is given wide enforcement powers, to investigate and issue directives under section 40 of the Financial Services Commission Act, 2001, where (amongst other grounds), the FSC is of the opinion that:

“...the PTC is carrying on, or is likely to carry on, business in a manner detrimental to the public interest or the interests of beneficiaries of any trust with respect to which it provides, or has provided, trust services....”⁶

This may permit beneficiaries a further method to seek redress against a PTC, where there are concerns as to the manner of administration of the relevant trust.

The Regulations further enhance the BVI’s ability to meet modern international expectations, and provide a simple process to exemption from the requirements to obtain a licence to conduct trust business under the BTCA.

It should be noted that in a recent amendment to the BTCA, the penalties for a BVI company conducting trust business without a valid licence was increased to a fine not exceeding \$50,000 and or a term of imprisonment not exceeding two years, the incentive is therefore clear, either obtain a valid trust licence or fall within the Regulations.

If you would like further information on the subject matter of this Guide please contact Zac Lucas at zac.lucas@harneys.com or Sheila George at sheila.george@harneys.com or your usual contact at Harneys. Alternatively, you can visit our website at www.harneys.com.

This Guide is general in scope and is not intended to be comprehensive. It is not a substitute for legal advice.

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⁶ Para 9 (3)(ii) of the Regulations.