

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay. The foreground shows a paved plaza with a pattern of light and dark tiles. A dark blue horizontal bar is positioned below the main text.

Bermuda Private Trust Companies

Preface

This publication has been prepared for the assistance of anyone who is considering establishing a private trust company in Bermuda. It deals in broad terms with the requirements of Bermuda law. It is not intended to be exhaustive but merely to provide general information to our clients and their professional advisers.

We recommend that our clients seek legal advice in Bermuda on their specific proposals before taking any steps to implement them.

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1. INTRODUCTION

In Bermuda, a private trust company is a company whose sole purpose is to act as a trustee for a specific trust or a related group of trusts.

A Bermuda private trust company is exempt from the licensing requirements under the Trusts (Regulation of Trusts Business) Act 2001, as amended so long as it only offers trustee services to those trusts specified in its memorandum of association. The exemption is provided for under section 3 of the Trusts (Regulation of Trust Business) Exemption Order 2002, as amended.

2. RATIONALE FOR ESTABLISHING A PRIVATE TRUST COMPANY

2.1. Control

Settlers of trusts are sometimes reluctant to relinquish complete control over and involvement with the assets settled into trust. Where tax and other considerations permit, and provided the private trust company is administered properly by observing all correct formalities, a settlor and his family may retain a certain degree of control and involvement without prejudicing the legal validity of the trust structure. Where a settlor client is not comfortable with a trust structure because of minimal experience, the corporate form of a private trustee company will be more familiar and easier to explain (i.e. "it is like having your own company with directors, etc").

2.2. Familiarity and Continuity

Settlers expect the trustee to be knowledgeable of and sensitive to their family's circumstances and to administer the trust accordingly. Through the involvement of family members and/or close family advisors on the board of directors, a private trust company will be more familiar with the settlor's family than an institutional trustee. Furthermore, a private trust company is less likely to experience the disruption caused by the potential turnover of staff often seen in institutional trustees as employees are re-assigned or promoted.

2.3. Confidentiality

Where the board of directors consists of family members and/or close personal advisors, the circulation and disclosure of information regarding the trust and the family's affairs is more restricted and secure.

2.4. Flexibility

A private trust company can be tailor-made to best serve the settlor's intentions and the scope of its role and powers as trustee can be fine-tuned accordingly. In particular, use of a private trust company will be designed to co-ordinate administration with the family's independent investment advisors and any family office, and streamlining and simplifying administration.

2.5. Cost

The annual fees of institutional trustees are usually calculated on an *ad valorem* basis and can be considerable where assets of significant value are placed in trust. By comparison, the costs of

incorporating and running a private trust company can be subject to client control and should be less expensive for large trusts.

2.6. Family Education and Governance

As a family "owned" company, a private trust company provides a structured forum which can enhance the education of beneficiaries who will inherit large fortunes. It will be important that such beneficiaries understand how the family's assets are managed and, where appropriate, to contribute to the decision making of the trustee.

2.7. Professional Liability

Institutional trustees, increasingly concerned about their potential liability and the risk of being sued, can be reluctant to take on ownership of assets with perceived higher risks (e.g. high-risk capital investments, companies operating business assets such as ships or aircraft and commercial real estate). In these circumstances, a professional or bank trustee will often be more agreeable to administer a private trust company and provide directors rather than acting as trustee itself.

2.8. Individual Liability

If given a choice of acting as a trustee directly or as a director of a private trust company, an individual would be well advised to choose the latter since this will enable him to avoid the risk of personal unlimited liability which flows from individual trusteeship.

3. SETTING UP A PRIVATE TRUST COMPANY

3.1. Form of Private Trust Company

In Bermuda, a private trust company can be incorporated as either a company limited by shares or as a company limited by guarantee pursuant to the provisions of the Companies Act 1981, as amended (the "**Companies Act**"). Bermuda law distinguishes between "local" companies (those which are owned predominantly by Bermudians) and "exempted" companies (those which are owned predominantly by non-Bermudians). Generally, with some exceptions, exempted companies may only carry on business from Bermuda in connection with transactions and activities which are external to Bermuda. Exempted private trust companies are permitted to carry on their business wholly in Bermuda where the settlor is not ordinarily resident in Bermuda at the time of creation of the relevant trust.

3.2. Forming a Private Trust Company

The Bermuda Monetary Authority (the "**BMA**") must approve the incorporation of all Bermuda exempted companies. The application for the incorporation of a private trust company must include background information on the owners of the private trust company and where, as is common, the company is owned by a purpose trust, the settlor of the underlying trusts should provide information. The BMA requires a signed personal declaration to be submitted with regards to the settlor of the underlying trust and each ultimate beneficial owner of the private trust company who will own, directly or indirectly, 10% or more of the private trust company. The BMA also reserves the right to ask for a personal declaration from any beneficial owner of the private trust company who owns less than 10%. All private information submitted with the application is required by statute to be treated as confidential and is not a matter of public record.

Where the purpose trust is a declaration of trust, executed by a licensed trust company in good standing, a letter describing the ownership is submitted.

A private trust company may use the word “trust” or “trustee” in its name.

3.3. Private Trust Company Exemption from Trustee Licence Requirement

A private trust company must, within three months of its incorporation, file a letter with the BMA certifying it qualifies for exemption and giving particulars of the nature and scope of its trust business. Thereafter, the company will need to declare on or before 31 March in every year that it continues to qualify for the exemption.

4. TIMESCALE FOR INCORPORATION

A private trust company can usually be incorporated within 5 – 10 business days of submission to the BMA of the completed application together with the supporting information on the ultimate beneficial owners and any required personal declarations.

5. CAPITAL AND FUNDING

There is no statutory minimum authorised or issued share capital for a private trust company. The minimum number of shareholders in a Bermuda exempted company is one. Shares may be registered in the name of a nominee. Shares of no par value and bearer shares are not permitted.

6. DIRECTORS, OFFICERS AND AGENTS

Each Bermuda exempted company is required to have at least one director and a secretary. A secretary of an exempted company may be an individual or a company. A director of an exempted company may be an individual or any type of legal person (including any company or association or body of persons, whether corporate or unincorporate). For practical reasons, it is most common for the office of director to be filled by an individual or a company.

The Companies Act requires that each exempted company must have one representative of the company who is ordinarily resident in Bermuda. This requirement can be satisfied by the company having a director who is ordinarily resident in Bermuda; or, a secretary who is ordinarily resident in Bermuda; or, by the appointment of a resident representative in Bermuda.

Alternate directors may be appointed with power to act in the place of an absent director. An alternate director has the full authority of a director and is entitled to exercise the full powers of such office at any time when the director for whom he is alternate is not present. It is usual to provide for alternate directors in respect of, at least, the Bermuda directors. Neither directors nor alternate directors need hold any shares in the company in order to act.

All Bermuda exempted companies must have a secretary, who holds office in accordance with the by-laws and is required to keep the records of the company. There is no requirement to have a registered agent. Additional offices can be appointed as desired.

7. REGISTERED OFFICE

A Bermuda exempted company must have a registered office in Bermuda and this must be advised to the Registrar of Companies in Bermuda. A post office box cannot be used as a registered office.

8. MEETINGS

A Bermuda exempted company must hold an annual general meeting once in every calendar year unless this requirement is waived by resolution of the members. The directors may convene a special general meeting at any time by giving 5 days' notice, as may any shareholder(s) holding not less than one-tenth of the issued share capital.

There are no statutory requirements in relation to directors' meetings and, subject to the terms of the company's bye-laws, the directors may regulate their proceedings as they think fit.

An action that may be taken by the directors or shareholders at a meeting may also be taken by a resolution of the directors or shareholders in writing.

9. RECORDS AND PRIVACY

Trust documents and internal correspondence and records are confidential and neither available to the public nor generally to third parties.

The following records of a Bermuda exempted company are available for public inspection at the Registrar of Companies in Bermuda:

- (a) the memorandum of association;
- (b) the certificate of incorporation;
- (c) the notice stating the registered address of the company; and
- (d) the register of charges.

In addition, the register of directors and officers and, upon payment of a nominal fee the register of shareholders, is available for inspection by the public during specified business hours at the registered office of the company.

A company's Bye-laws are not available for inspection by the public.

A Bermuda exempted company is not generally required to file accounts with the Registrar of Companies in Bermuda, although it is required to keep basic accounts at its registered office in Bermuda so as to be available to any director of the company. As non-private trust companies have minimal corporate assets, these accounts are normally in very simple format.

10. COMPANY'S AND DIRECTORS' DUTIES

10.1. Duties of the Company

A Bermuda private trust company owes the same fiduciary and statutory duties to act in the best interests of beneficiaries as any other trustee (subject to any exclusions in the trust instrument). The directors of the private trust company must act in the best interests of the company and are subject to certain statutory duties as well as fiduciary duties and duties of skill and care at common law.

10.2. Directors and Officers Duties

The duties and responsibilities of directors derive from the company's memorandum and bye-laws, common law and statute. There are two main categories of directors' duties:

- (a) fiduciary duties, imposed by common law, which include the obligation to act honestly and in good faith in the best interests of the company; and
- (b) duties of skill and care which impose an obligation to ensure that the director's actions are performed with the degree of skill and care which would reasonably be expected from a person of like knowledge and experience.

Directors' duties are owed by each director individually and are generally owed to the company and not to individual shareholders nor to beneficiaries of an underlying trust. In addition, there are a number of offences for failure to comply with the various duties imposed on directors and officers by the Companies Act.

11. REGULATORY OBLIGATIONS

Pursuant to Section 9 of the Proceeds Of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008, an 'AML/ATF regulated financial institution' that is not otherwise licensed, registered or authorised by the BMA under any of the regulatory acts is required to register with the BMA as a non-licensed person (NLP). This applies to private trust companies that are not serviced by a licensed corporate service provider or a licensed trust company. Once registered, the BMA will monitor NLPs to ensure they are complying with the applicable regulations. The BMA has the power to levy civil penalties and cancel the registration of an NLP for serious breaches of the regulations. A private trust company that is serviced by a licensed corporate service provider or licensed trust company will not have to register as a NLP.

12. TAXATION

There is no Bermuda income or profits tax, withholding tax, capital gains tax, capital transfer tax, estate duty or inheritance tax payable by a Bermuda exempted company or its shareholders, other than by shareholders who are ordinarily resident in Bermuda.

A Bermuda exempted company may apply for, and is likely to receive, from the Minister of Finance (under the Exempted Undertakings Tax Protection Act 1966) an assurance that if the Bermuda legislature adopts any legislation imposing tax computed on profits or income, or computed on any capital assets, gain or appreciation, or any tax in the nature of estate duty or inheritance tax, then such taxes shall not apply to the company until at least March 2035.

Generally no stamp duty is payable in respect of any instrument executed by a Bermuda exempted company or in respect of an instrument relating to an interest in a Bermuda exempted company. Stamp duty may, however, be payable in respect of transactions involving Bermuda property.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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