

# GUIDE TO PRIVATE TRUST COMPANIES IN THE BRITISH VIRGIN ISLANDS

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## PREFACE

This Guide focuses on the legislative enactments concerning the establishment of private trust companies in the British Virgin Islands (**BVI**) and illustrates the clarity of the new regulations following the wholesale repeal of the Banks and Trust Companies (Application Procedures) Directions 1991.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the Corporate Department, using the [contact information](#) provided at the end of this Guide.

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## 1. INTRODUCTION

Rules relating to private trust companies (**PTCs**) known as the Financial Services (Exemptions) Regulations, 2007 (**Regulations**) came into force in the BVI on 1 August 2007 following amendments made on 15 January 2007 to the BVI's Financial Services Commission Act, 2001 (**FSC Act**), the latter paving the way for the introduction of the Regulations. Further amendments to the trust legislation were introduced in 2013, enhancing the PTC regime.

In this Guide, we discuss the Regulations and outline the conditions which must be satisfied to enable a company to benefit from the exemption from the trust licensing regime in the BVI as well as, in particular, highlighting the responsibilities imposed by the rules upon the registered agent acting for a PTC.

Under the current regulatory framework, certain types of company are able to seek an exemption from the usual requirement to obtain a trust licence under the BVI's Banks and Trust Companies Act 1990 (**Act**). It was the general intention of the BVI Government to create a system whereby specific classes of trust company are granted an exempt status.

Most unremunerated PTCs which do not offer trustee services to the general public (i.e. do not carry on the business of a trustee) are able to benefit from the exemption regime. Also, unremunerated BVI-incorporated companies which merely hold assets as nominees (or bare trustees) are automatically entitled to benefit from the exemption, provided that they do not carry on the business of a trustee.

## 2. WHAT IS A PRIVATE TRUST COMPANY?

A PTC is, essentially, a company which possesses trustee powers and which does not conduct trust business with the general public, its sole purpose being to act as a trustee of a family trust or a group of related trusts.

The Regulations define the term "private trust company" to mean a company:

- that is a qualifying BVI company;
- that is a limited company within the meaning of the BVI Business Companies Act, 2004 (**BVIBC Act**); and
- the memorandum of which states that it is a private trust company.

A "qualifying BVI company" in turn is defined to mean a company that:

- was first incorporated under the BVIBC Act;
- has been re-registered under Part II of Schedule 2 of the BVIBC Act;
- has been re-registered under paragraph 6(1)(a) of Part III of Schedule 2 of the BVIBC Act and in respect of which an election to disapply Part IV of Schedule 2 has been registered; or
- has been re-registered under paragraph 6(1)(b) of Part III of Schedule 2 of the BVIBC Act and in respect of which an election to disapply Part VI of Schedule 2 has been registered.

## 3. WHEN IS THE EXEMPTION AVAILABLE?

A PTC will not be required to obtain a trust licence under the Act where its trust business consists solely of either:

- unremunerated trust business; or

- related trust business.

For the avoidance of doubt, the business of a PTC shall be deemed to consist solely of unremunerated trust business, notwithstanding that part or all of such unremunerated trust business also qualifies as related trust business. The same rule applies in respect of related trust business.

### 3.1 What is Unremunerated Trust Business?

Unremunerated trust business is trust business which is carried on by a PTC where remuneration is not payable to, or received by, the PTC or indeed any person associated with the PTC, in consideration for, or in relation to, the services that constitute the trust business.

For the purposes of the rules "remuneration" includes money or any other form of property and it matters not whether such remuneration is payable, or is received, out of the assets of a "relevant trust" (defined by the Regulations to mean a trust with respect to which a PTC is providing services that constitute trust business), from the settlor or beneficiary of such a trust, or from any other person pursuant to an arrangement with the settlor or a beneficiary of a relevant trust.

Any remuneration paid to a director of the PTC or a person associated with the PTC is regarded as "remuneration" under the new rules unless it is paid or received by way of the director's remuneration:

- with respect to professional director services provided to the PTC; and
- the director is not otherwise associated with the PTC, i.e. by virtue of having a direct or an indirect beneficial interest in it.

The Regulations make clear that payments which are made to a PTC to indemnify it for costs and expenses paid or incurred by the PTC (e.g. regulatory fees and registered agent fees) will not be regarded as "remuneration" within the meaning of the new rules.

### 3.2 What is Related Trust Business?

Related trust business is trust business provided in respect of a single trust or a group of related trusts where each beneficiary of a trust is either a "connected person" in relation to the settlor of that trust, or is a charity. The term "connected person" refers to any person whose relationship to another is established by affinity or consanguinity (which may also be established by adoption).

A trust is, in respect of another trust, a "related trust" where the settlor of the first trust is a connected person with respect to the settlor of the second trust. Thus, in a group of trusts, the trusts are "related trusts" if the settlor of each trust in the group is a connected person with respect to all of the settlors of the other trusts in that group.

A PTC will be treated as carrying on "related trust business" if it acts as trustee of:

- a single trust, all the beneficiaries of which are charities or have certain specified blood, marital or adopted relationships to the settlor or are the settlor; or
- more than one trust, each of the settlors of which have any of those relationships to each other and all the beneficiaries of which have any of those relationships to the settlors of the trusts, or are the settlors (or are charities).

## 4. WHEN IS THE EXEMPTION LOST?

A PTC will lose the benefit of the exemption under the Regulations where:

- it fails to ensure that at all material times its registered agent holds a Class I trust licence issued under the Act (incidentally, where the registered agent ceases to hold such a licence, it has a period of four weeks' grace from the date on which the licence ceased before the disqualification applies);
- it carries on business that is not trust business;
- it solicits trust business from members of the public; or
- it carries on any trust business other than either unremunerated trust business or related trust business.

## 5. **WHAT ARE THE CONSEQUENCES OF THE EXEMPTION BEING LOST?**

Where the exemption is lost and a company no longer qualifies as a PTC, there will be an obligation on the PTC's part to ensure that it forthwith removes any reference in its constitutional documents to it being a PTC. The company will be regarded as carrying on unauthorised financial services business if it either carries on any trust business without having the benefit of the exemption or, having the benefit of the exemption, it carries on trust business which is not unremunerated or related trust business.

The Regulations impose strict duties on a registered agent which acts for the PTC where the exemption is lost (see section 7 below).

## 6. **SANCTIONS**

Unremunerated trust business and related trust business are both deemed to represent "financial services business" under the FSC Act. This means that the BVI Financial Services Commission (FSC) has available to it certain sanctions specified under the Act which will apply in the event that there is any breach or contravention of, or non-compliance with, a requirement on the part of a PTC. The PTC is effectively treated as a licensee under the FSC Act.

For example, section 32 (power to request information and documents) and the enforcement provisions of sections 36 (appointment of examiners), 37 (enforcement action), 37A (public statements) and 40 (power to issue directives) of the FSC Act all apply to a PTC subject to necessary modifications, although these provisions in no way restrict the powers of the FSC to take appropriate action against a PTC which is acting in breach of the Regulations.

## 7. **DUTIES OF THE REGISTERED AGENT OF A PTC**

A registered agent intending to act as such in respect of a PTC is obliged:

- to satisfy itself that the company complies with the requirements of the Regulations;
- on a periodic basis, to take all reasonable steps to satisfy itself that the company continues to comply with the requirements of the Regulations;
- to take all reasonable steps to ensure that up-to-date records of the following documents in respect of the company are kept at the registered agent's office in the BVI:
  - the trust deed or other document that creates or evidences a trust and any deed or document that varies the terms thereof, for each trust; and
  - documentation and other information on which the registered agent has relied to satisfy itself that the company complies with the requirements of the Regulations; and
- to immediately notify the FSC in writing if at any time the registered agent forms the opinion that the company has failed to comply with the requirements of the Regulations.

As alluded to above, these duties call for continued vigilance on the part of the registered agent and the degree to which it adheres to these obligations will be an important measure as to its liability in the event that a PTC is found to be in breach of the Regulations.

#### 8. **FORMAL APPLICATION NOT NECESSARY**

There is no formal process for application to the FSC seeking approval for the grant of exempt status. Exemption will be automatic if the PTC meets the criteria laid down in the Regulations. Apart from an annual return which will need to be filed by the PTC, the only other document required to be filed publicly are the PTC's Memorandum and Articles of Association.

The Memorandum and Articles of Association do not need to include the names of the directors or shareholders of the PTC. Such information is retained separately by the registered agent of the PTC and so those details are not a matter of public record in the BVI. Furthermore, none of the substantive documents relating to the trust, copies of which must be held by the registered agent (as mentioned in section 7 above), need to be presented to the FSC. While the register of directors is required to be filed with the Registrar, it is not public. Some clients may find this a particularly attractive aspect the overall BVI regime.

#### 9. **BARE TRUSTEES AND NOMINEES**

As mentioned previously, a company is not required to obtain a trust licence under the Act where it acts solely as a bare trustee or a nominee. The criteria for determining whether a trustee acts as a bare trustee for the purposes of the Regulations will be specified in the Regulatory Code (which is yet to be issued by the FSC).

#### 10. **ADVANTAGES OF ESTABLISHING A PTC**

PTCs enable family-controlled structures to be created whereby family members and/or trusted family advisers, who together have a wealth of knowledge about the family's affairs, can become involved in the decision-making processes by assuming the role of director or consultant to the PTC. As the assets of the PTC are controlled by a board of directors comprised of the settlor and his family and/or persons who are familiar to the settlor and his family, this enables them to exercise more control over the trustee's actions. The structure provides considerable comfort to those who are ordinarily reluctant to relinquish control of assets to third party trustees over whom they are able to exercise little or no governance. This added element of control, also affords greater privacy and confidentiality for the settlor and his family over their assets and activities.

Institutional trustees may not be prepared to take on the role of trustee where the trust is comprised of high risk assets because they may consider the potential liability resulting from their fiduciary duties over such assets as being unduly onerous. Where the PTC provides the trusteeship, there is still a role for the institutional trustee as it may be convenient for the board of directors of the PTC to delegate the PTC's administrative function to a professional trustee services provider. The provider will be more inclined to take on this purely administrative function as it will have only a contractual relationship with the PTC (rather than a fiduciary relationship) with the consequent mitigated risk and restricted liability over the trust assets. This, in turn, is likely to result in a cost-saving for the family as lower risk invariably translates into lower professional fees.

Lastly, as it is a company, a PTC also offers the benefits of limited liability status.

## 11. PTC CAN ACT AS TRUSTEE OF A VISTA TRUST

The BVI's highly acclaimed VISTA trust legislation was amended in 2013 to allow for co-trusteeship of VISTA trusts. A PTC may now be the qualifying trustee of a VISTA trust as an alternative to a licensed BVI trustee. Thus clients have a number of options when selecting trustees of VISTA trusts: the sole trustee may either be a licensed BVI service provider or a PTC; alternatively, one or more foreign companies or individuals may act as co-trustee together with the licensed BVI trustee or a PTC. For further information on VISTA trusts, please see Appleby's "Guide to VISTA Trusts in the British Virgin Islands", available from our website ([www.applebyglobal.com](http://www.applebyglobal.com)).

## 12. CONCLUSION

In the short time since their introduction, the Regulations have made a positive impact in the BVI as the BVI is now able to offer a more efficient and more cost-effective application process to those seeking to incorporate a PTC than that previously available under the old regime.

BVI-incorporated PTCs offer significant opportunities for families in their wealth planning and protection strategies. Provided that careful consideration is given to the incorporation of the PTC and the transaction is properly structured, a PTC can be a very useful vehicle for those who have previously felt reluctant to adopt trust structures because of traditional concerns regarding trustee control, cost and confidentiality issues. Indeed, it is becoming common practice in the BVI for structures to be established using a BVI VISTA non-charitable purpose trust (which is administered by a locally licensed trust company pursuant to a services agreement) to hold the shares of a PTC, which in turn will hold and deal with the shares of the holding or operating companies in accordance with the terms of one or more family trusts which the PTC is able to administer. As well as benefiting from the advantages offered by the BVI's VISTA regime thus disengaging the trustee from any responsibility over the management of the PTC and providing an effective succession mechanism in regard to the directors of the PTC through the "Office of Director rules", the purpose trust is an ideal vehicle for ownership of the PTC where personal ownership can give rise to tax or other problems for individual shareholders.

For more information on private trust companies in the BVI, we invite you to contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).