



PRIVATE SECTOR CONSULTATION
**Minimum Criteria for Maintaining Physical
Presence for Licensees Providing Business of
Company Management and Trust Business**

Private Sector Consultation

Rule and Statement of Guidance on Minimum Criteria for Maintaining Physical Presence for Licensees Providing Business of Company Management and Trust Business

A. Introduction

1. Section 34(1)(a) of the Monetary Authority Act (2020 Revision) ("MAA") states that:

"After private sector consultation and consultation with the Minister charged with responsibility for Financial Services, the Authority may -

(a) issue or amend rules or statements of principle or guidance concerning the conduct of licensees and their officers and employees, and any other persons to whom and to the extent that the regulatory laws may apply;"

2. Requirements specific to the private sector consultation are outlined in section 4(1) of the MAA as follows:

"When this Law requires private sector consultation in relation to a proposed measure-

(a) the Authority shall give to each private sector association a draft of the proposed measure, together with -

- i. an explanation of the purpose of the proposed measure;*
- ii. an explanation of the Authority's reasons for believing that the proposed measure is compatible with the Authority's functions and duties under section 6;*
- iii. an explanation of the extent to which a corresponding measure has been adopted in a country or territory outside the Islands;*
- iv. an estimate of any significant costs of the proposed measure, together with an analysis of the benefits that will arise if the proposed measure is adopted; and*
- v. notice that representations about the proposed measure may be made to the Authority within a period specified in the notice (not being less than thirty days or such shorter period as may be permitted by subsection (3)); and*

(b) before proceeding with the proposed measure, the Authority shall have regard to any representations made by the private sector associations, and shall give a written response, which shall be copied to all the private sector associations."

3. The Cayman Islands Monetary Authority ("the Authority" or "CIMA") seeks consultation and comment from the private sector associations concerning the proposed *Rules and Statement of Guidance on Minimum Criteria for Maintaining Physical Presence for Licensees Providing Business of Company Management and Trust Business* ("the Rules and Guidance") (attached as **Appendix 1**).
4. The Rules and Guidance apply to all persons carrying out business of company management under Section 3(1)(a) to (f) of the Companies Management Act ("the CMA").
5. The Rules and Guidance should be read in conjunction with the *Rule and Statement of Guidance on Nature, Accessibility and Retention of Records for Trust and Corporate Service Providers* (attached as **Appendix 2**).

B. Background

- 6.** The Authority has identified the need to establish express requirements for the adequate presence of trust service providers ("TSPs") and corporate service providers ("CSPs") in accordance with the *Standard on the Regulation of Trust and Corporate Service Providers* ("the Standard") published by the Group of International Finance Centre Supervisors ("GIFCS"). Currently, physical presence requirements for TSPs and CSPs are addressed in legislation only and there is a need for the Authority to prescribe guidance and requirements for an adequate physical presence by TSPs and CSPs in the Cayman Islands ("Islands").
- 7.** The Authority has encountered several accessibility restrictions when attempting to conduct local on-site inspections of TSPs and CSPs. These accessibility restrictions relate to inadequately resourced registered offices; inadequate segregation (or ethical walls or barriers) of client files and assets where licensees share a premise/facility with other service professionals; and relevant books and records not being readily accessible in the Islands by the Authority.
- 8.** Additionally, the Authority's 2019 *Sector Specific Risk Assessment* ("Risk Assessment") identified that the lack of adequate physical presence of service providers in the Islands is a major factor increasing the TSP and CSP sectors' susceptibility to financial crime, such as money laundering. The Risk Assessment also substantiates the medium-high risk rating assigned to the sector by the Caribbean Financial Action Task Force in the *2019 Mutual Evaluation Report of the Cayman Islands*.
- 9.** Therefore, to address the inherent risks of the Islands' TSP and CSP sector, to expand on and clarify existing legislation and to enhance transparency and accountability of CIMA's prudential supervision, the Authority proposes to issue the Rules and Guidance.

C. International Standards

- 10.** The GIFCS prescribes guidance and essential frameworks for the adequate oversight of the TSP and CSP sectors; for combating money laundering and terrorist financing; and for the promotion of financially sound TSP and CSP sectors.
 - i.** The GIFCS' Standard supports that regulators may consider that physical presence is duly demonstrated by –

"(1) persons representing the mind and management of the [Trust and Corporate Service Provider] as a resident in the Regulator's jurisdiction and actively involved in the governance of the business; and having an operational place of business in the Regulator's jurisdiction."
 - ii.** The Standard's Principles for Enforcement provide that: *"regulators should have comprehensive inspection, investigation and supervision powers"*.
- 11.** The Financial Action Task Force ("FATF") recommendations are internationally endorsed global standards against money laundering, proliferation financing, and terrorist financing.

- i. The FATF's *Guidance for a Risk-based Approach for Trust and Company Service Providers*¹ provides that a supervisor should ensure that:

"...its licensing or registration requirements require the TCSP to have a meaningful physical presence in the jurisdiction. This usually means that the TCSP should have its place of business in the jurisdiction. Where the TCSP is a legal person, those individuals who form its mind and management should be actively involved in the business and may also be required to be resident in the jurisdiction (although this may not be a necessity provided that there is an appropriate person resident in the jurisdiction who has a responsibility to report to the supervisor or [Self-regulatory body]".

D. Purpose of Proposed Measure and Consistency with the Authority's Functions

12. Pursuant to Section 6(1)(b) of the MAA, one of the principal functions of the Authority is:
"(b) regulatory functions, namely –
 - (i) to regulate and supervise financial services business carried on in or from within the Islands in accordance with this Law and the regulatory laws;*
 - (ii) to monitor compliance with the anti-money laundering regulations; and*
 - (iii) to perform any other regulatory or supervisory duties that may be imposed on the Authority by any other law;"*
13. Section 6(3) of the MAA provides that in performing its regulatory functions, the Authority shall, *inter alia*:
 - (a) endeavour to promote and enhance market confidence, consumer protection and the reputation of the Islands as a financial centre;*
 - (b) endeavour to reduce the possibility of financial services business or relevant financial business being used for the purpose of money laundering or other crime;*
 - (c) recognise the international character of financial services and markets and the necessity of maintaining the competitive position of the Islands, from the point of view of both consumers and suppliers of financial services, while conforming to internationally applied standards insofar as they are relevant and appropriate to the circumstances of the Islands;*
 - (d) recognise the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction; and*
 - (f) recognise the need for transparency and fairness on the part of the Authority.*
14. The CMA makes no express provision for the physical presence of persons conducting the business of company management and therefore, the Authority seeks to make clear that sections 3(1)(a) to (f) of the CMA **must** be conducted in the Islands:
 - a) *Acting as a company formation agent;*
 - b) *Providing a registered office or business address for a company;*
 - c) *Providing an accommodation, correspondence or administrative address for a company or for any other person;*
 - d) *Filing statutory forms, resolutions, returns and notices; and*
 - e) *Acting or fulfilling the function of or arranging for another person to act as or fulfil the function of a person authorised to accept service of process on behalf of a foreign company carrying on business in the islands or to accept any notices required to be served on it; or*

¹ See page 45 of the FATF RBA for TCSPs <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA-Trust-Company-Service-Providers.pdf>

f) *Acting as or fulfilling the function of or arranging for another person to act as or fulfil the function of an officer of a company.*

15. A key benefit of the proposed Rules and Guidance is that it will allow for the Authority to better regulate and supervise TSPs and CSPs, and to take enforcement action where necessary. The proposed Rules and Guidance seek to establish the minimum requirements for a person engaged in the business of company management and trust business, in relation to the physical presence of its *Governance, Direction and Management; Physical Premises and Facilities; and Records and Record-Keeping.*

E. Jurisdictional Comparison

16. In reviewing the implementation of the GIFCS Standard in other jurisdictions, the frameworks of the following jurisdictions were considered for comparison:

Bahamas

17. The Central Bank of the Bahamas has issued *Guidelines for The Minimum Physical Presence Requirements for Banks and Trust Companies Licensed in the Bahamas* which outlines the Central Bank's minimum requirements for licensees to qualify as being physically present. These requirements require that licensees:

- i. maintain at least two resident executive officers/directors;
- ii. maintain accessible records and documentation as specified under the issued guidelines; and
- iii. maintain its physical facilities as specified under the issue guidelines.

Jersey

18. In regard to physical presence or physical structure, the Jersey Financial Services Commission ("JFSC") provides that an applicant demonstrate the availability of or access to resources in order to carry out its activities and manage its risk profile. Applicants must satisfy the JFSC by operating in the jurisdiction:

- i. with staff and a business premises;.
- ii. as a managed entity utilising the services of a manager that is physically located in the jurisdiction; or
- iii. through an organisation that is regulated and supervised by a relevant supervisory authority.

19. The JFSC also encourages local control and management and requires that an applicant demonstrates that it will have and maintain sufficient management; control and oversight of its activities; comprehensive operational records that must be readily accessible in the jurisdiction; and staff that are fit and proper to competently deliver its services.

Guernsey

20. The *Fiduciary Rules and Guidance of the Guernsey Financial Services Commission* ("GFSC"), and the *Code of Practice for Trust Service Providers, TSPs* (which includes corporate service providers, company directors and foundation service providers), must ensure that they have effective management and systems, adequate financial resources and adequate records.

Isle of Man

21. The trust and corporate service providers sector of the Isle of Man is supported by a comprehensive Licensing Policy for regulated activities under the Financial Services Act. The Isle of Man Financial Services Commission ("the Isle of Man FSC") provides that licensees "*should not be a mere shell*" and must therefore demonstrate "*real presence*" by having the trust and corporate service provider's business centre of activity (or principal office) in the jurisdiction. The Isle of Man FSC also provides that:

- i. no licence will be issued unless the applicant is managed and controlled in the Isle of Man;
- ii. a Professional Officer must be resident in the jurisdiction; and
- iii. all business records must be located or accessible from the jurisdiction without recourse to third parties.

F. Cost and Benefit Analysis

22. The relevant costs and benefits associated with the implementation of the proposed Rules and Guidance are presented in Table I.

Table I: Costs and Benefits of Implementing the Proposed Rules and Guidance

	Costs	Benefits
CIMA	<ul style="list-style-type: none"> 1. Conducting industry consultation. 2. Gazetting and publishing of new measure. 3. Amending internal supervisory procedures and documents, where required. 	<ul style="list-style-type: none"> 1. Provides clarification to current and prospective licensees on what is expected of them regarding the maintenance of a place of business in the Cayman Islands. 2. Minimises the need for legal interpretation. 3. Reduces the need for foreign travel and related costs for on-site inspection. 4. The supervision of licensees, particularly on-site inspection, is better facilitated where there is meaningful physical presence in the jurisdiction. The Authority has the responsibility of ensuring that all licensees maintain adequate systems, procedures and controls in place. Physical presence allows the Authority to carry out this responsibility in an efficient and effective manner. 5. Improved compliance with the physical presence requirements by licensees given the role enforceable rules can be expected to play in dissuading non-compliance. 6. Promoting its principal functions under the MAA, such as reducing the possibility of financial services business or relevant financial business being used to facilitate money laundering and other financial crime.

	Costs	Benefits
Cayman Islands	<ol style="list-style-type: none"> 1. Potential loss of revenue for the Government where licenses are not renewed if companies do not establish physical presence. 	<ol style="list-style-type: none"> 1. Better alignment with international best practice, standards and principles. 2. Enhanced reputation of the Cayman Islands. 3. The jurisdiction will benefit from improved results in international assessments including the International Monetary Fund's Financial Sector Assessment Program ("FSAP"). 4. Deterring financial crime in the jurisdiction as a result of implemented recommendations and international best practice of the standard setters such as the FATF and GIFCs.
Regulated Entities	<ol style="list-style-type: none"> 1. Costs related to establishing physical presence (where minimum criteria not met). 2. Possible reduction of licenses for renewal. 	<ol style="list-style-type: none"> 1. TCSPs will benefit from greater clarity surrounding their obligations as it relates to their physical presence and access to books and records. 2. Compliance with the proposed Rules and Guidance will improve the anti-money laundering and countering terrorist financing obligations of TCSPs.
<p>Consequent to the above, it is determined that the benefits outweigh the costs and the issuance of the <i>Rules and Statement of Guidance – Minimum Criteria for Physical Presence for Licensees Providing Business of Company Management and Trust Business</i> should be pursued by the Authority.</p>		

G. Consultation Feedback and Comments

23. Before proceeding with the proposed measure, the Authority shall have regard to any representations made by the private sector associations only. Feedback submitted by individuals, entities, or other bodies, unless acting on behalf of private sector associations, will not be accepted by the Authority. Representations from private sector associations must be submitted as a consolidated document, and a listing of the entities which provided feedback should be included. Private sector associations should ensure that conflicting positions are resolved prior to submission to the Authority. Where positions conflict within or across associations, the Authority will consider all available information in taking a decision, which will be at its sole discretion.
24. To ensure that all responses are given due consideration, it is important that private sector associations make clear reference to the sections of the measure being commented on, and that responses are unambiguous, clearly articulated and based on fact. The consultation process is not designed to address complaints or grievances.

Feedback of this nature should be submitted through the established complaints process.

- 25.** In cases where the feedback proposes to change a policy position of the Authority or substantially amend any requirement of the draft measure, information to support the position of the association must be provided. The table below provides an example of the Authority’s expectation with regard to feedback for the proposed measure.

Reference	Example of a Helpful Comment	Examples of Comments needing more Support
Rule 4.2 ²	<p>In Rule 4.2 the current text omits the fair value measurement of liabilities. Also, as defined it is not asymmetrical with the Market Price definition and thus scenarios exist that fall into neither category.</p> <p>Suggested wording: <i>Hard-to-Value Securities means an asset or liability for which there is no Market Price which is required to be measured at fair value pursuant to 5.2</i></p>	<ul style="list-style-type: none"> × This is not what is done in other jurisdictions. × I don’t think we should do this. × CIMA is not considering the position of the experts.

- 26.** All feedback submitted by private sector associations will be given due consideration, nevertheless, the decision to adopt any feedback provided into a proposed measure will be at the sole discretion of the Authority.

H. Notice of Representations

- 27.** The Authority seeks consultation through written comments and representations from the private sector associations concerning the:

Rules and Statement of Guidance on Minimum Criteria for Maintaining Physical Presence for Licensees Providing Business of Company Management and Trust Business

- 28.** The Authority must receive representations by 1700hrs on **26 March 2021**. Representations received after this deadline may not be considered and will not form part of the collated written response provided to private sector associations.

- 29.** Comments and representations must be addressed to:

The Managing Director
 Cayman Islands Monetary Authority
 P.O. Box 10052
 SIX, Cricket Square
 Grand Cayman KY1-1001
 Cayman Islands
 Tel: 345-949-7089
 Fax: 345-946-5611
 Email:
consultation@cima.ky
 With copy to: almachollette-lopez@cima.ky

² This example is not reflective of the content of the proposed measure.

- 30.** The Authority shall have due regard to any representation made by the private sector associations and industry stakeholders. The Authority shall provide a written response collating the feedback received and the Authority's position on this feedback. This response shall be copied to all relevant private sector associations only.



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