

## **Guidance Notes for Corporate Service Providers re Services provided to companies registered under the Companies Act 2006**

These notes are prepared by the Financial Supervision Commission for general guidance on the Commission's policy in respect of the supervision of corporate service providers ("CSPs") providing services to companies registered under the Companies Act 2006 ("2006 Act companies") including acting as a registered agent\*.

This is not a legal document and should not be relied upon in respect of points of law. Reference for that purpose should be made to the appropriate statutory provision and to the Fiduciary Services (General Requirements) Regulatory Code 2005 in respect of CSP activities.

This guidance is in addition to the existing guidance relating to the provision of CSP services.

### **Anti-Money Laundering Provisions**

The provisions of the Criminal Justice (Money Laundering) Code 2007 the Anti-Money Laundering Guidance Notes apply to services provided by CSPs in relation to 2006 Act companies and CSPs will therefore be expected to demonstrate compliance with the Anti-Money Laundering requirements in respect of these services.

### **Accountability of the Registered Agent**

The Act requires that a 2006 Act company must, at all times, have a registered agent (s.74).

Although not an officer of the company, the registered agent is recognised as a key functionary of a 2006 Act company and in addition to the responsibilities specified in the Act, the director(s) may delegate authority to the registered agent to act on behalf of the company in certain circumstances.

The Commission expects a CSP, acting as a registered agent, to be fully cognisant with its own and the 2006 Act company's responsibilities under the Act at all times.

**The Commission expects a registered agent to ensure that 2006 Act companies for which it acts do account to it for their activities, and other matters, in a timely and comprehensive manner.**

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\* Companies Act 2006 amends Corporate Service Providers Act 2000 to include "Acting as a registered agent within the meaning of section 218 of the Companies Act 2006" as a CSP regulated activity (see paragraph 7A in Part I of Schedule I to the Corporate Service Providers Act 2000).

When a CSP is invited to take over as registered agent for an existing 2006 Act company, the CSP should communicate in writing with the company's existing or former registered agent to ascertain if there are any matters which need to be brought to its attention in considering whether or not to act.

One very important point to note is that if a registered agent is not comfortable with a company for which it is acting, it can resign from that position by giving eight weeks advance notice. If, after twelve weeks, the company has failed to appoint a new registered agent, the Registrar may start its strike-off procedure for the company. The ability for the registered agent to resign, and the consequence of such a resignation, in effect give the registered agent power to call the client company to account. It should be noted that conditions for termination of CSP services must be stated in the written client agreement required under paragraph 5(3)(b) of the Fiduciary Services (General Requirements) Regulatory Code 2005 and resignation as a registered agent would be such a condition.

Where a registered agent has resigned from providing services to a 2006 Act company, the Commission would expect the reason(s) to be documented and available for it to review during a compliance visit.

It should be noted that if an offence committed by the company under the Act –

*“is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of a director, manager or other officer of the body corporate, or its registered agent, or a person who was purporting to act in any such capacity, such person, as well as the body corporate is also guilty of the offence and is liable to be proceeded against and punished accordingly.”(s.223)*

A CSP should therefore carefully consider the responsibilities and risks associated with the role of registered agent in deciding whether or not to act as such.

### **Responsibility for company administration**

The Act specifies that the registered agent is responsible for a number of administrative functions in respect of filing notices and other documents and, in certain circumstances, making applications to the Registrar of Companies. These include making an application to incorporate a 2006 Act company and filing the company's Annual Return (see s.2 and s.85). Where the Act provides that the person(s) responsible for filing the relevant documents with the Registrar will be prescribed by regulation, the regulations in most cases prescribe the registered agent as the person (or one of the persons) responsible for that filing (see SD736/06 - Companies (Prescribed Persons) Regulations 2006).

The company is required to keep the original or a copy of certain documents at the office of its registered agent. As the registered agent is therefore the repository for such records, the Commission expects the agent either to be responsible for maintaining those records under the delegated authority of the director(s) or if the original records are held elsewhere, that any copy records mirror the original.

The registered agent is required to hold copies of the Memorandum and Articles of Association with the signatures of the subscribers and of all notices and documents filed by the company in the previous 6 years and (see s.78(1)(a) & (e)).

The Commission expects the registered agent to have systems and procedures in place to ensure that it holds up to date records of all notices and documents filed by the company and that the copy of the Memorandum and Articles which it holds has been duly signed.

The company is also required to keep the following registers (or copies) at the office of its registered agent (see s.78(1)(b), (c) & (d)) –

- register of members
- register of directors
- register of charges

The Commission expects the registered agent to be able to demonstrate that it holds these registers in written form, or wholly or partly as electronic records (see s.81).

Where the director(s) place the originals of any of these registers with the registered agent, it would be assumed that the agent has prime responsibility for ensuring that that register is correct and up-to-date. Where the registered agent holds a copy of a register, the Commission expects it to be able to demonstrate that it has in place systems and procedures to ensure that, subject to such endeavours as it would be reasonable to expect of the agent in the circumstances, it is aware at all time of the location of the original and that the copy-register reflects any changes made in the original register.

Where a company's register of members and/or register of directors show business addresses, the registered agent must maintain a separate record of the relevant residential addresses. This is a direct obligation on the registered agent under s.78(3) and the Commission expects this record to be in a format that facilitates easy identification and retrieval of the information. Registered agents may wish, for example, to hold the residential address information with existing anti-money laundering KYC records, or within electronic company secretarial packages.

There is an obligation on the company to keep minutes of meetings and resolutions of directors' meetings and members' meetings at the office of its registered agent or, if the directors so decide, elsewhere inside or outside the Isle of Man. Where these records are not kept at the offices of the registered agent, the company must provide the registered agent with a written record of the physical address of the place the records are kept.

The Commission expects the registered agent to have appropriate systems and controls in place to ensure that, subject to such endeavours as it would be reasonable to expect of the agent in the circumstances, if it holds these records, they

are maintained and, if held elsewhere, it is aware at all times of their location. The Commission considers it best practice for a 2006 Act company to keep such minutes and resolutions or copies thereof in the Isle of Man so that in the case of an investigation into the company's affairs, access to those records is practicable.

## **Accounting Records**

The company is required to keep reliable accounting records at the offices of the registered agent. As the registered agent is therefore the repository for such records, the Commission expects the agent either to be responsible for maintaining those records under the delegated authority of the director(s) or if the original records are held elsewhere, that the copies held by the registered agent mirror the original records.

The records may be kept in written or electronic form (see s.81). The extent and nature of those accounting records will vary depending upon the activity of the 2006 Act company. However, it is important to note that the accounting records must be reliable, and capable of –

- correctly explaining the transactions of the company; and
- determining with reasonable accuracy the financial position of the company at any time; and
- allowing financial statements to be prepared.

Accounting records should therefore be sufficiently organised to enable the above to be achieved. It is also important to note that there are a number of circumstances where the “solvency test” (see s.49) applies. For example, before declaring a dividend the directors must satisfy themselves that immediately after its payment the company will be able to meet the solvency test. If the directors prepare financial statements for this or any other purpose, the Commission expects the registered agent to hold copies of any financial statements that have prepared in this or any other context.

The Commission expects the registered agent to be able to demonstrate that it holds in written form, or wholly or partly as electronic records, the accounting records the company is obliged to keep under s.80. Where records are held electronically, the Commission expects the registered agent to be able to access them at all times without recourse to third parties. To facilitate such access, the registered agent may need to download the records onto its own system.

A 2006 Act company would not be precluded from outsourcing some or all accounting services provided the registered agent holds copies and/or has access to those records at all times.

## **Directors**

The Act states that the business and affairs of the company shall be managed by, or under the direction or supervision of, one or more directors of the company (see s.91). A director may be an individual or a body corporate, but corporate directors are restricted to either the holder of a CSP licence or a subsidiary of a CSP licenceholder.

The Commission has issued guidance in respect of the duties and responsibilities of directors under Isle of Man law. The principles contained in that guidance apply equally to individuals and bodies corporate acting as directors and although the references to specific statutory duties in that guidance currently only refer to companies registered under the Companies Acts 1931 – 2004, the general principles apply equally to directors of 2006 Act companies. These references are currently being reviewed to include, where appropriate, the specific duties of directors of 2006 Act companies.

In respect of CSPs acting as corporate directors of 2006 Act companies, the Commission's guidance regarding the number of directorships an individual may competently be able to handle should be noted. The Commission will continue to take into account all pertinent factors as explained in that guidance and would look more carefully at the circumstances where an individual holds in excess of 250 directorships, whether in his individual capacity or as a director of a corporate director. In respect of corporate directorships, this assessment will include the number of directors on the board of the corporate director and how decisions are made by the board.

The guidance on the duties and responsibilities of directors can be found at <http://www.fsc.gov.im/lib/docs/fsc/companiesReg/practicenotes/pn122006.pdf> and guidance in respect of CSPs acting as directors of client companies is given in relation to paragraph 10 of the Fiduciary Service Providers (General Requirements) Regulatory Code 2005 which can be found at <http://www.gov.im/fsc/handbooks/guides/csps/pdf/CSP%20-%20Appendix%20E.PDF>

## **Professional Indemnity Insurance**

If the nature of a CSP licenceholder's activities in relation to 2006 Act companies go beyond the activities currently undertaken, the CSP should ensure that it has in place appropriate Professional Indemnity Insurance covering those additional activities (for example, the functions and responsibilities relating to the CSP's activities as a registered agent and/or corporate director) and should be able to demonstrate this to the Commission if requested to do so.