TRUSTEES CLEANING OUT THEIR CLOSETS... TRENDS ACROSS THE TRUST INDUSTRY

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Working day in and day out with trust companies both in Guernsey and further afield, as advisers we are well placed to see common trends and themes developing. One of the most prevalent in 2021 and 2022 has been the rise of trustees filing suspicious activity reports (SARs) in relation to their client structures.

Taking a step back and confining ourselves to Guernsey for present purposes, trust companies in Guernsey are licensed under the Regulation of Fiduciaries, Administrations Businesses and Company Directors etc (Bailiwick of Guernsey) Law, 2020 and are required to comply with Guernsey's anti-money laundering framework. This requires them to identify and verify the identity and source of wealth of their customers and, where they have grounds to believe that their customers may have committed a money laundering offence, to make a suspicious activity report to their money laundering reporting officer (MLRO). By doing so, the individual employee of the trust company is relieved of any liability for failing to disclose and the MLRO in turn then makes a decision about whether or not to file a SAR with the Guernsey Financial Intelligence Unit (FIU).

The threshold for having a suspicion is low – the trust company employees need only form a view that there is a possibility that is more than fanciful that the relevant facts (which give rise to the suspicion) exist.

As such, there is an increasing trend to report suspicious activities where there is any risk at all that there may be an issue. It is easy to have sympathy with that approach in circumstances where the penalty for not so reporting can be very significant fines or a criminal sentence.

However, where a SAR has been filed, the trustee can be left in a very difficult position if it is then not provided with consent by the FIU to proceed with any requested transaction in relation to the client structure.

Trust companies are increasingly spending time reviewing their historic client files to ascertain whether there are any grounds that give rise to such suspicion. Where such grounds are identified, it may be many years after the structure was first taken on and now extremely difficult to obtain the necessary documentation to allay those suspicions and to prove the legitimacy of the funds in the structure. The impetus for such reviews may be updates to the Guernsey Handbook on Countering Financial Criminal and Terrorist Financing in Guernsey which took effect in 2019, an impending regulatory visit (or the aftermath of one) or an exercise undertaken in anticipation of a sale of the trust company's business.

The practical effect is an informal freeze of the structure together with a risk of committing the offence of tipping off if the existence of the SAR is disclosed to the underlying principals behind the client structure. The informal freeze may continue for an indefinite period.

Guernsey's new summary civil forfeiture regime

Guernsey has introduced a new summary civil forfeiture procedure that will have an impact on just these situations. The Forfeiture of Money etc, in Civil Proceedings (Bailiwick of

Guernsey) (Amendment) Ordinance (the Ordinance) came into effect on 31 January 2023. It allows the court to make an order for the forfeiture of assets in a Bailiwick bank account where a relevant consent request has been made and refused at least 12 months previously. The order can only be made on the application of His Majesty's Procureur on the basis that she has reasonable grounds to believe that the funds in the account are linked to criminality. The FIU's "no consent" is likely to satisfy that test.

Guernsey has had a non-conviction based forfeiture regime since 2008. But it has only been available where assets have been previously frozen or detained, and the authorities have had the burden of persuading the court that on the balance of probability the assets are either the proceeds of criminal conduct or intended for use by any person in unlawful conduct. The Ordinance reversed the burden of proof.

Under the new summary procedure, a forfeiture notice with details of the court hearing will be served on the bank account holder and the bank at which the account subject to the "no consent" is held. If the account holder fails to appear, the court can make the forfeiture order. If the account holder does appear, they have the option to request a later hearing date, or they can try to satisfy the court there and then that the funds are not tainted.

Where trust assets are the subject of a summary forfeiture notice, it is likely to be the trustee as account holder who is served with the notice. The trustee will need to consider:

- to what extent it should participate in the proceedings?
- its duties to the beneficiaries as a whole. If the target of the forfeiture notice is a single beneficiary, do the interests of the other beneficiaries require a challenge to be made?
- if the procedure stems from a SAR filed by the trustee, can it demonstrate why the SAR was filed and that there are grounds for continuing to hold suspicion? The procedure applies to existing SARs, and any time that has passed between the FIU notifying the account holder of the refusal of consent and the commencement of the Ordinance will be taken into account in calculating the 12 month period.

Conclusion

The summary forfeiture procedure means that trustees will need to be very careful when deciding to file a defensive SAR in the first instance as there may now be more far-reaching consequences from doing so. Where SARs have been filed prior to the entry into force of the Ordinance, trustees should now carefully review the position to ascertain what steps they now need to take. That may involve now proactively investigating the matter more carefully to ensure the trustee is well placed to address any summary forfeiture notice.