

10 data protection FAQs for fiduciaries' administered entities ("AEs")

1 What triggers Guernsey's data protection framework?

Section 2 of The Data Protection (Bailiwick of Guernsey) Law, 2017 sets out various factual combinations in which the Law applies. The most common for AEs is that an AE is "established in the Bailiwick" **and** is processing personal data in a "filing system".

Those terms are defined to include:

Established in the Bailiwick - where any of these applies to the AE in the Bailiwick:

- formation - Guernsey or Alderney companies, limited liability partnerships, limited partnerships or foundations (as applicable)
- maintenance of an office, branch, agency or regular practice
- processing or permitting the processing of personal data through processing equipment (e.g. a server), other than purely for transit through the Bailiwick, or
- engaging in effective and real processing activities through stable arrangements.

So for AEs formed outside the Bailiwick, whose administration by a fiduciary does not amount to the AE having a branch etc, the key is often whether administration involves stable arrangements for data processing in the Bailiwick. Administration in a professional, regulated environment tends to involve this - e.g. there should be processes for updating the aspects of the AE's records which involve personal data. Full administration by a fiduciary will often bring an AE within the last bullet above, irrespective of place of incorporation.

Filing system - any structured set of personal data which is accessible according to specific criteria, whether centralised, decentralised, or dispersed on a functional or geographical basis. Similarly, administering an AE professionally tends to involve structuring its personal data according to criteria such as the capacity an individual is acting in.

2 But aren't there broad exemptions from registration?

There were some limited exemptions but they expired at the end of 2020. They were exemptions from registration, not from compliance (see 8 below).

3 How does the difference between a data processor and a data controller work with AEs?

Essentially a data controller determines the purpose and means of processing any personal data. An AE is responsible for meeting the data protection requirements which apply to it and, as in other areas, it can delegate the activity or function, but not the responsibility. Generally this falls to its board or equivalent, whose responsibility means it controls whatever personal data the AE holds.

A data processor processes (including holding) data on controller's behalf. An AE may retain another party, such as the fiduciary, to process its personal data but the starting point is that unless exempt, any entity which can decide how or why to collect any personal data, or what personal data to collect, is a data controller needing registration.

4 As a fiduciary we have CDD for all entities, generally involving individuals - does that put all AEs in scope?

No. The AE is not collecting and keeping the CDD because as an unregulated entity it doesn't have CDD obligations. Those fall on you as a fiduciary, so you're the controller for that purpose.

The position for beneficial ownership information required under The Beneficial Ownership of Legal Persons (Guernsey) Law, 2017 appears to be similar, although less obvious. Where a fiduciary acts as a company's resident agent, the BO Law suggests that, like CDD, the beneficial ownership data is controlled by the fiduciary as resident agent rather than by the company. Similarly a Guernsey foundation's beneficial ownership duties fall on its resident agent.

5 What could trigger registration for an AE?

Each AE will need its own check, but common factual triggers include:

- AEs maintaining registers containing data on individuals such as names, addresses etc of individual company directors or shareholders, foundation councillors, guardians, beneficiaries etc
- Individual or corporate trustees maintaining information on individual beneficiaries (also see 7 below on corporate trustees)
- AEs employing staff or using individuals as contractors, consultants, yacht crew etc
- AEs holding residential property which is let to individual tenants whose details are held
- AEs which act as general partner of a limited partnership, where that involves processing data on limited partners who are individuals (or whose data includes individuals)
- AEs which are regulated or registered, therefore needing to process personal data to meet their own obligations (CDD, investor/client/borrower data as applicable).

6 So could an AE ever be outside registration?

This is possible but likely to be exceptional, as one or more of the above will so often apply. An AE deciding not to register would need to be ready to show it does not process (including control) any personal data.

7 Does this apply in the same way to trusts, companies, limited partnerships, foundations etc?

The obligations don't differentiate according to type of entity such as companies or foundations.

For trusts, the trust itself does not have legal personality so the person controlling the data will be the trustee. Where there's a licensed corporate trustee, it will be registered for the overall operation of its business, irrespective of any specific trustee role. So the activity of controlling trust level data will not require separate registrations per trust, although it will require generic inclusion in the trustee's registration.

This only works at trust level and doesn't extend to data controlled by a trust's underlying companies.

Where a corporate trustee administers a trust with external trustees, obviously its registration does not cover the fact that those trustees are the controllers of the personal data relating to the trust.

8 Is registration the end of the obligations?

No, it's an initial step which recognises that an AE is controlling personal data. The AE then needs to process the data lawfully and comply with the seven Data Protection Principles. The ODP has made it very clear its ultimate interest is in compliance, and which is not achieved purely by registration.

9 Does Guernsey registration mean an AE doesn't have to register elsewhere?

No, registration with the ODP is completely independent of any other requirements an AE's activities could engage. For example if an AE has Guernsey directors but UK operations or administration it will also need to consider the UK data protection regime.

10 How does this fit with the AE's relationship with the fiduciary?

A common scenario is that the AE is the controller of whatever personal data it holds, and the fiduciary's administration of the AE includes processing the data on the AE's behalf.

The administration agreement would reflect this by stating that the AE and the fiduciary are both data controllers (e.g. the fiduciary in relation to CDD as in Q4), and that the fiduciary is also a processor of the AE's data. The agreement should cover scenarios such as data breaches involving the AE's data, and data subject requests. For example it may provide that the fiduciary will report any data breach to the AE, and that they will cooperate on any data subject requirements. The AE's interests will require the fiduciary to commit to processing its data in accordance with Guernsey data protection requirements.

The fiduciary's data protection policies and procedures should cover its processing of an AE's data (this can be done according to categories, e.g. maintaining corporate registers, rather than specifically for each AE) as well as its processing of its own data on CDD subjects, employees and

others. Generally the Data Protection Officer will be at fiduciary level, unless for any reason an AE is required to have its own DPO.

These notes give an overview only and are not a substitute for considering or seeking legal advice on the effect of The Data Protection (Bailiwick of Guernsey) Law, 2017 in this area.

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