



# **PRACTICE NOTES**

**ON**

# **INCORPORATOR COMPANIES**

**(PN-010904)**

**(Issued under section 7(1)(a) of the Financial Services Development Act 2001)**

**6 September 2004**

## INTRODUCTION

1. Management Companies (MC) are licensed by the FSC to provide *inter alia* by way of business an exclusive company incorporation service for the setting up of Category 2 Global Business Companies (GBC2) for which they also act as registered agents. The FSC has the responsibility for the supervision of the overall Global Business sector to reduce the risk of money laundering and other financial crime and to protect the good repute of Mauritius as a financial centre. It discharges this responsibility through a number of regulatory laws, statements of policy and principles, guidelines and codes of practice, or practice notes.
2. Practice notes explain the manner in which the principles already established under a law or a guideline will be understood, interpreted and implemented. They are issued under section 7(1)(a) of the Financial Services Development Act 2001 (FSD Act). As such they do not have the force of law in that breaches will not by themselves constitute criminal offences but may entail regulatory sanctions. However where as a result of a breach or failure to comply with the Practice Notes, the FSC directs the Management Company under section 7(1)(d) of the FSD Act to comply with the Practice Notes or any part thereof, a failure to do so will constitute a contravention of the law and may lead to prosecution, quite apart from any other regulatory action that may be taken.

### Structure of Practice Notes

3. The Practice Notes are structured in three parts: Part 1 deals with Preliminary Matters; Part 2 sets out specific Practice Notes, and Part 3 deals with Miscellaneous Provisions which include some traditional provisions. Where necessary, the Practice Notes are accompanied by Explanatory Notes. This form of presentation is adopted for the sake of clarity. Compliance is expected with all the provisions of this Practice Notes – including the paragraphs under the heading “Explanatory Notes” – and regulatory action can be taken for breach of any of its provisions. A Glossary which defines certain terms used in the Practice Notes is also attached.

## **PART 1**

### **PRELIMINARY MATTERS**

#### **Purpose of these Practice Notes**

4. The purpose of these Practice Notes is to provide guidance to Management Companies on the application of the fundamental principle set out in Paragraph 8 below relating to the incorporation and licensing of GBC2 in the name and on the account of a Management Company itself and not as agent of a beneficial owner or under his instruction.

#### **Definition of an Incorporator Company**

5. For the purpose of these Practice Notes, an Incorporator Company refers limitatively to a GBC2 incorporated and licensed as such but held in the name and on behalf of the Management Company ('MC') who itself incorporated the Company to the exclusion of any beneficial owner or shareholder with the intention of transferring control in the Company either directly to other persons who become the beneficial owners of the Company, or to nominees to hold it on behalf of and on the instruction of the ultimate beneficial owners. In relation to an Incorporator Company, the MC will not be a beneficial owner but an incorporator.

#### **Status of the Practice Notes**

6. Compliance with these Practice Notes will afford the MC with a defence to any regulatory action that the FSC may otherwise take against it in respect of Incorporator Companies for breach of the fundamental principle set out under Paragraph 8 as expounded in the FSC Guide to Compliance, the FSC Guide to Global Business, the FSC Code on the Prevention of Money Laundering and Terrorist Financing, and the AML/CFT Framework. Failure to comply with the Practice Notes conversely will expose the MC to regulatory sanctions which may include one or more of the following –
  - (a) a direction under section 7(1)(d) of the FSD Act to observe the Practice Notes; failure to comply with the direction may be met by criminal sanction and regulatory action;
  - (b) a direction under section 7(1)(d) of the FSD Act not to set up and/or hold Incorporator Companies;
  - (c) a direction to the MC to dissolve at its cost any Incorporator Companies subsisting on its name, and
  - (d) revocation of the Management Licence.
7. These Practice Notes may be amended from time to time or repealed wholly or partly without any provision being grandfathered.

## PART 2

### PRACTICE NOTES

#### Statement of the Principle

8. Derived from the FSC Guide to Compliance and the Guide to Global Business and from the Code on the Prevention of Money Laundering and Terrorist Financing ('the Code'), the principle can in essence be stated as follows-

#### PRINCIPLE

**A Management Company shall not apply for the incorporation and the licensing of a Category 2 Global Business Company unless it has identified the beneficial owner of that company and has carried out all due diligence and identity ascertainment and verification in accordance with the relevant legislation, FSC Guides and the Code.**

#### *Explanatory Notes*

9. A MC in its business as corporate service provider acts on behalf of its client in applying for the incorporation and licensing of a GBC2. It acts as agent and not as principal. The MC is required to carry out due diligence of the client, establish and verify his identity and obtain and keep record of the details of the due diligence exercise both for the converging purposes of Global Business regulation and for Anti-Money-Laundering purposes. The company on incorporation is under the control of a beneficial owner whether by directly holding the shares in the company or indirectly through shares registered in the name of his nominees.
10. In processing the application for a GBC2, the Commission takes comfort on the assumption that the MC as its licensee has fulfilled the pre-licensing identification requirements set out in regulatory guidelines or of the AML/CFT Framework before submitting the application and that those records of the beneficial owners and promoters of the GBC2 are actually on the files of the MC as required. Reliance on the MC's compliance with their fundamental obligations make it possible to reconcile the imperatives of the AML/CFT Framework and the principle of sound regulatory and licensing policy on the one hand, and the need to protect the legitimate confidentiality of clients on the other. It further explains the gravity of any failure on the part of the MC to meet its obligations concerning due diligence and the maintenance of records about their clients. Its failure jeopardises the whole licensing process and damages the integrity of the regulatory framework and exposes the jurisdiction to high reputation risk.
11. Application of these fundamental principles of licensing and regulation excludes the practice of holding and maintaining off-the-shelf companies. Such a practice which was fairly prevalent among company service providers in the past runs counter to the

requirement of customer due diligence and encourages opacity about the identity of the actual beneficial owners and provides the means for perpetrating fraud. It is now neutralised to a large extent by the AML/CFT Framework and the regulatory rules for incorporating and licensing Global Business Companies.

## **Application to operate an Incorporator Company Register**

### ***Practice Note 1***

***A Management Company will not set up and hold an Incorporator Company except-***

- (a) after giving notice to the FSC of its intention to do so; and***
- (b) where no objection has been raised by the FSC to its operating an Incorporator Company Register, or it has been prohibited from operating a Register under a direction of the FSC under section 7(1)(d) of the FSD Act.***

### ***Explanatory Notes***

12. A Management Company which intends to set up and hold Incorporator Companies shall give notice in writing to the Commission of its intention to do so. On giving notice, the Management Company shall give an express undertaking to the Commission to comply with the Practice Notes set out in this Circular Letter. The notice should be given at least 14 days before operating an Incorporator Company Register. Unless within 14 days as from the date of receipt of the notification the FSC directs the Management Company that it should not operate an Incorporator Company Register ('the Register'), the no-objection should be assumed.
13. In giving the undertaking, the Management Company will be assumed to have fully appreciated the gravity of any failure to comply with the Practice Notes in dealing with Incorporator Companies and realise that such failure may lead to a direction not to operate a Register or even the revocation of the Management Licence.

## **Register of Incorporator Companies**

### ***Practice Note 2***

***The MC will maintain a register of Incorporator Companies which shall be true, accurate and updated at all times.***

## *Explanatory Notes*

14. The use of agents in the incorporation and administration of companies can at times create confusion as to the true beneficial owners and their identity. Agents like nominees - are by nature of their functions - provide cover to the identity of the principals. With the setting up of Incorporator Companies, the presumption that all GBC2's have a beneficial owner who directly or indirectly instructs the MC, is whittled away. The Register may be kept in printed or in electronic form. Whatever be its form, the Board and principal officer of the MC will ensure the integrity, reliability and security of the Register, which will at any time be available for inspection and any record or information in the Register will be accessible to the FSC on request; and can be verified, printed or copied. It should be at all times clear whether the GBC2 which the MC has incorporated is already under the control of a beneficial owner or it is still in the name of the MC as incorporator with no specified beneficial owner.
15. A Management Company shall set up and manage a sound and efficient system which includes the compilation of a Register to identify Incorporator Companies and to segregate them from the other GB2's. It should be at any time immediately possible to identify the Incorporator Companies from amongst the other companies under the administration of the MC.
16. The Register shall contain the name of the Incorporator Company (and any subsequent change of name), the reference number of the licence, the date of issue of the licence, the date of the transfer of control to the beneficial owner, the identity, address and the particulars of the beneficial owner. On transfer of control to a beneficial owner, the name of the Incorporator Company shall immediately be erased from the Register by means of a strikethrough.
17. The Register shall be under the custody of the principal officer of the MC who shall under the direction of his Board of Directors ensure the accuracy of the Register and compliance with the present FSC Practice Notes. The Board of Directors shall put into place adequate measures to ensure that there is no unauthorised modification to the Register. A modification is unauthorised if the person whose act causes it, is not himself entitled to determine whether the modification should be made; and he does not have the approval of any person who is entitled according to the internal rules of the MC to cause such modification.

## **Application of laws, rules and guidelines**

### *Practice Note 3*

***By the adoption of a procedure for Incorporator Companies, a Management Company shall not defeat, foil, or derogate from the application of any company law, regulatory rules or guidelines that otherwise apply to GBC2's.***

## ***Explanatory Notes***

18. Since the use of Incorporator Companies is an alternative to incorporation on behalf of a beneficial owner (where the identity of the beneficial owner is known at the time of application for a GBC2), it would create an anomalous situation if the requirement applicable at the critical time of assumption of control by the beneficial owner of an Incorporator Company derogates from the requirements generally applicable to ordinary incorporation and licensing. If the assumption of control implies the registration of the shares of the Incorporator Company in the name of the beneficial owner or his nominee, that transfer of shares shall be effected in accordance with the normal procedures and legal requirements. In the same way if the MC who incorporated the company is given instruction to act as nominee, the MC should record that fact in the Register of Incorporator Companies and shall record it in the file of the company as well and shall in so doing comply with all requirements concerning the establishment and verification of the identity and the nature of business of the beneficial owner.
19. Further on the transfer of control, notice should be given to the beneficial owner about the limitations on the activities conducted through or by the GBC2 and that no transfer is effective towards any third party unless the transfer is registered in the share register of the GBC2.
20. The adoption of a practice concerning the Incorporator Companies shall not affect in any way the application of any company law or rules or requirements otherwise applicable.

## **Reinforcing the AML/CFT Framework**

### ***Practice Note 4***

***A Management Company shall adhere strictly with all the provisions of the law on Anti-Money-laundering and the applicable FSC Code on Anti-Money Laundering, and shall not in managing a regime of Incorporator Companies -***

- (a) create any hindrance to discover the true identity of the beneficial owners of GBC2's;***
- (b) increase the risk of abuse of GBC2's.***

## ***Explanatory Notes***

21. It is essential that the Incorporator Company regime does not defeat the safeguards that have been adopted to protect against abuses and malpractices, or increase the risk of misuse of GBC2's. Such risks are met by the generally applicable Customer Due Diligence and the Anti-Money-Laundering framework.

22. For that purpose it is important to recall the provisions of the AML/CFT laws and the Code particularly those concerning -
- (a) The establishment and verification of the identity of a beneficial owner of a GBC2 at all times whether on first allotment of shares or subsequent transfer of shares and appointment of nominees.
  - (b) Eligible Introducers.
  - (c) Obtaining and maintaining documentary proof of identity of Beneficial Owner.
23. The regime of Incorporator Companies cannot cause any indent into the requirements of the AML/CFT laws and framework.

### **Transfer of an Incorporator Company**

*Practice Note 5*

*A Management Company shall not allow or cause a share transfer document signed by the transferor pertaining to the transfer of a share of an Incorporator Company to be issued except directly to the beneficial owner for perfecting the transfer or indirectly through an Eligible Introducer strictly on escrow for transmittal to the beneficial owner.*

### ***Explanatory Notes***

24. One of the most important changes affecting international business companies has been the prohibition of bearer shares. The issuance of bearer share transfer deeds is bad practice. It causes serious difficulty to the maintenance of a proper AML/CFT regime. However for practical purposes, account must be taken of the geographical situation of a beneficial owner taking over an Incorporator Company.
25. The status of the Eligible Introducer is critical. The quality of the Introducer is very relevant as much as the relationship of the Introducer to the local Management Company. The transfer of documents of an Incorporator Company on escrow to an Introducer will not be viewed as acceptable unless:
- (a) The Eligible Introducer through whom an Incorporator Company is transferred should be a bank, accountancy or legal, or investment services firm or other similar professionals located in an equivalent jurisdiction under the definition of the AML/CFT framework and are subjected to the AML/CFT obligations of suspicious transaction reporting, customer due diligence and recording of clients' identity.

- (b) The Eligible Introducer must have a written agreement with the local Management Company concerning the transfer of control of an Incorporator Company, whereby it undertakes to hold any share transfer instrument on escrow until effective transfer to a beneficial owner and to establish and verify the identity of the beneficial owner. Where required under the AML/CFT Framework, it must convey all the details and the documentary evidence of identity to the local Management Company as soon as is reasonably possible but not later than three days after the transfer whether by fax or otherwise, and not to use the documents on escrow or the Incorporator Company for any other purpose.
- (c) The Eligible Introducer must give an undertaking that it will not object on request by the FSC to the production of information on an Incorporator Company held on escrow by it or transferred to a beneficial owner through its services.

Observance of these pre-conditions to the holding of constitutive or transfer documents in respect of an Incorporator Company by an Introducer or an affiliated firm will be a key factor to the maintenance of a proper AML/CFT Framework.

#### **Payment of Incorporation and Licensing Costs**

***Practice Note 6***

***The Management Company shall be responsible to the FSC and to the Registrar of Companies for payment of all costs associated with the setting up of the Incorporator Company.***

#### ***Explanatory Notes***

- 26. For so long as the Incorporator Company has not been transferred to the control of a beneficial owner, it is the responsibility of the Management Company who incorporates the Incorporator Company to pay all processing fees or licence fees in relation to that Incorporator Company, as well as for payment of any other costs or expenses, including those related to its dissolution.

## Use of an Incorporator Company

### *Practice Note 7*

*The Management Company shall not allow or cause an Incorporator Company's name to be used in any transaction other than in connection with the transfer of the control of the company to a beneficial owner; nor allow or cause the company to take on any assets or to incur any liabilities for so long as it is not under the control of a beneficial owner.*

### *Explanatory Notes*

27. For so long as an Incorporator Company is on the Register of Incorporator Companies of a Management Company, it cannot be used for any purpose other than for transferring the control of the company to a beneficial owner. It is conceivable that the directors adopt a resolution for a change of name prior to being transferred to the beneficial owner for instance but it is not possible for the Management Company to use the Incorporator Company or allow the Incorporator Company to be used in any transaction so that it incurs or is likely to incur liabilities or to obtain assets or be a creditor to anyone.

## Restrictions on Management Companies

### *Practice Note 8*

*The Management Company shall -*

- (a) not at any point in time have more than 50 Incorporator Companies on its Register of Incorporator Companies; and*
- (b) wind up and dissolve at its own cost and expense any Incorporator Companies that have not been transferred to a specified beneficial owner within 6 months of the date of the Incorporator Company's licence.*

### *Explanatory Notes*

28. Because of the obvious convenience of the Incorporator Company procedure, MC's will have to adopt a prudent approach to managing such companies and properly assess their commercial needs. An over-optimistic stock of incorporator companies may expose the MC to quite a heavy pressure on its budget not only at the time of incorporation but also at the time of winding up of such companies. The limitation to 50 companies at any point in time may appear to be amply sufficient for some MC's but may be perceived as being

too restrictive for others. Though as a matter of practice this limitation will be strictly adhered to, it is possible for an MC to apply to have a greater number of incorporator companies on its register if it can demonstrate, on the basis of its past record of transfers of companies, that it is commercially viable for it to hold a stock of more than 50 incorporator companies and that it has a safe system of control over that amount of Incorporator Companies.

29. The whole system of operating an Incorporator Company Register will fail unless there is a limitation on the time during which a company may remain as Incorporator Company on the Register. Because of the dangers of abuse that are already highlighted, it will not be sound practice to hold any such company for an undue period without either a transfer to a beneficial owner in a proper commercial transaction, or for the dissolution of the company.

***Practice Note 9***

***An Incorporator Company will not have or be granted a dormant status nor can it be struck off the companies register kept under the Companies Act 2001 merely for the sake of its disposal in the absence of an acquisition by a beneficial owner.***

***Explanatory Notes***

30. For consistency with the system established under these Practice Notes, an application cannot be made for an Incorporator Company to be treated either as dormant companies or to have them struck off under the provisions of the Companies Act 2001. An Incorporator Company will not have a dormant status nor will it seek to be struck off merely for the sake of its disposal either because it has not been transferred to or to the control of a beneficial owner, or the 6-month expiry period has been reached. Any cost attending to the disposal of these Incorporator Companies are to be borne by the MC itself.

**Enforcement of Practice Notes**

***Practice Note 10***

***A Management Company –***

- (a) must not set up and/or hold Incorporator Companies and/or operate an Incorporator Companies Register when it has been issued with a direction by the FSC to that effect;***
- (b) must proceed to dissolve an Incorporator Company when so directed by the FSC in case of breach of these Practice Notes.***

## *Explanatory Notes*

31. Reference has been made earlier to possible sanctions for breach of the Practice Notes. However the sanction will not be an adequate remedy by itself unless the company which has been the subject-matter of the breach is properly qualified. An obvious example of such breach is likely to be the failure of an MC to dissolve at his own initiative an Incorporator Company which has outlived the prescribed limitation period of 6 months without being transferred to a beneficial owner. The FSC may in such circumstances direct the MC to dissolve the Incorporator Company at the MC's costs and state the time within which such dissolution should be effected. But other circumstances of default may arise where the FSC may issue a direction. Where so warranted by the circumstances of the breach, the FSC may take action directly against the MC by issuing a direction to cease the operation of an Incorporator Company Register and to debar it from setting up Incorporator Companies or holding of Incorporator Companies.
  
32. In considering suspected breaches of the Practice Notes, where an MC is unable to demonstrate to the satisfaction of the FSC that a GBC2 has been transferred to a beneficial owner who is exercising control over the company, it will be deemed to be an Incorporator Company. This presumption will arise particularly if the MC is unable to show any record pertaining to the identity of the beneficial owner. Quite independently of any infringement of the AML/CFT Framework, regulatory sanction may be taken by the FSC under these Practice Notes or the FSC Guides or any other applicable laws or guidelines.

## **PART 3**

### **MISCELLANEOUS PROVISIONS**

33. These Practice Notes shall come into force on **13<sup>th</sup> September 2004**.
34. It is not expected that any Management Company will have on its books before the Commencement Date of this Circular Letter GBC2's which correspond to the definition of an Incorporator Company. In case it does, it will be a contravention of the FSC Guides and of the Code, particularly of the fundamental principle set out in Paragraph 8.
35. To ensure the smooth operation of the new regime of Incorporator Companies, Management Companies are required before 01 November 2004–
- (a) to identify GBC2's which are Incorporator Companies as at the Commencement Date, (for the avoidance of any misunderstanding, they are companies incorporated and licensed as GBC2's before the Commencement Date and which satisfy the definition of an Incorporator Company set out in Paragraph 5);
  - (b) to inform FSC of their intention to hold these as Incorporator Companies, declaring the names, licence numbers and licence dates of these companies;
  - (c) to enter them on the Incorporator Companies Register and to follow in respect of these Companies the present Practice Notes; and
  - (d) to proceed forthwith to wind up and dissolve any GBC2 referred to in sub-paragraph (a) which has not been declared to the FSC under sub-paragraph (b).
36. Further Management Companies are required to wind up and dissolve at the Management Company's cost any Incorporator Company which has not been transferred to a beneficial owner before 31<sup>st</sup> January 2005, provided it has been declared under Paragraph 35 (b).
37. FSC will not take any action against Management Companies which have declared the GBC2's in accordance with this Part; and have entered them on the Register.
38. Conversely, any Management Company which is found to have retained GBC2's whether incorporated before or after the Commencement Date contrary to the provisions of these Practice Notes, shall be considered to have acted deliberately in contravention of the FSC Guides and the Code and will be amenable to appropriate action, regulatory or otherwise.

**06 September 2004**

**Financial Services Commission**

**GLOSSARY**

<b>AML/CFT Framework</b>	All the set of requirements, processes and mechanisms, and the legal obligations prescribed by the Financial Intelligence and Anti-Money Laundering Act 2002, and regulations made under that Act, and the FSC Code on the Prevention of Money Laundering and Terrorist Financing intended for Management Companies issued by the FSC on 18 April 2003.
<b>Beneficial Owner</b>	The Person having control over an Incorporator Company by means of his share ownership or of his control on the Board of Directors of the company; or a person acting as principal on whose behalf instructions are being given as to the management of the company, and includes the ultimate owner.
<b>Principal officer</b>	The chief officer, by whatever name called, who manages the day-to day affairs of a Management Company and who is principally responsible to its Board for such management.
<b>Code</b>	The Code on the Prevention of Money Laundering and on Terrorist Financing intended for Management Companies issued by the FSC on 18 April 2003.
<b>Eligible Introducer</b>	Has the same meaning as in the Code, and includes a Group Introducer as defined in the Code.
<b>FSC or Commission</b>	Financial Services Commission.
<b>FSC Guides</b>	(i) The FSC Guide to Compliance;  (ii) The FSC Guide to Global Business.
<b>FSD Act</b>	The Financial Services Development Act 2001.
<b>GBC2</b>	Category 2 Global Business Company licensed under section 20(5) of the FSD Act 2001.

<b>Incorporator Company</b>	A GB2 as described in Paragraph 5
<b>MC</b>	Management Company holding a Management Company licence issued under section 24 (2) of the FSD Act.
<b>Register</b>	The Register of Incorporator Companies.
<b>Transfer to a beneficial owner</b>	Assumption of control and direction of an Incorporator Company by the beneficial owner either directly or through his agent or nominee.