

Guernsey Financial Services Commission

Consultation Paper on the proposed replacement of the current Fiduciary Rules, 2020 by the new Fiduciary Rules, 2021

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Responses to this Consultation Paper are sought by 17 June 2021.

We welcome and strongly encourage respondents to provide feedback or comment on any section and question. Feedback may be provided via the Consultation Hub section of the Commission's website (www.gpsc.gg).

Introduction

Purpose of the Consultation Paper

The Commission seeks to regulate and supervise financial services in the Bailiwick of Guernsey with integrity, proportionality, and professional excellence, and in so doing help to uphold the international reputation of the Bailiwick of Guernsey as a finance centre.

The purpose of this Consultation Paper is to seek feedback from all interested parties on the proposed replacement of the current Fiduciary Rules, 2020 (and certain other associated secondary legislation as set out below) with the Fiduciary Rules, 2021.

Consistent with the Commission's objectives, the proposals in this Consultation Paper are designed to enhance the levels of confidence and security in the Bailiwick's regulatory and supervisory framework.

The detailed proposals are set out within this document and in the draft Fiduciary Rules, 2021 which are provided in Appendix 1 to this paper in "consolidated" form including Commission Guidance.

This Consultation Paper is a working document and does not prejudice any final decision to be made by the Commission.

Background - Law

For the past 20 years, Licensees and the Commission have been operating under the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 (the "2000 Fiduciaries Law").

In 2020 the States of Guernsey, the States of Alderney, and the Chief Pleas of Sark, as part of a comprehensive review of the legislation governing the finance industry, approved The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 (the "2020 Fiduciaries Law"). This law forms part of the suite of amended legislation contemplated in the Policy Letter submitted by the Policy Council on the Revision of the Financial Supervisory and Regulatory Laws on the 30th of October 2015.

This underlying law change necessitates the Commission to review all associated secondary legislation to ensure it is compliant with the new law.

Background - Rules

The Fiduciary Rules, 2020 ("the Current Fiduciary Rules") have been in operation since 31 December 2020 and were made in exercise of the Commission's powers under the 2000 Fiduciaries Law. These rules were introduced following comprehensive sector-specific consultation on the consolidation and revision of previous fiduciary codes.

It is proposed that the Fiduciary Rules, 2021 will repeal the Current Fiduciary Rules and also the Regulation of Fiduciaries (Annual Return) Regulations, 2017 (the "Annual Return Regulations") and the Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations, 2012.

Whilst the proposed new Fiduciary Rules, 2021 will largely mirror the Current Fiduciary Rules and incorporate the provisions of the repealed Regulations, there are certain proposed amendments and additions, which reflect matters which will be introduced or changed when the new 2020 Fiduciaries Law is enacted and these are considered in this Consultation Paper.

Besides amending references to relevant laws under which the Rules are made, other proposed material changes include:

- The introduction of rules to account for, and relevant to, the different and new categories of licence under the new law, and how changes of categorisation can be effected (proposals in this respect were previously made in a Commission Discussion Paper, details of which as set out below);
- Provisions for annual returns – coming from relevant regulation; and
- Repeal of restrictions on PFL advertising.

These are covered individually in the following sections of this Consultation Paper.

Contemporary Commission consultations

The Commission has also published two additional parallel consultation papers which may be of relevance to the reader of this consultation paper.

The first consultation paper¹ consults on proposed re-issuance of other Regulations and Rules reflecting the aforementioned Revision of the Financial Supervisory and Regulatory Laws. In the main, the changes proposed in that paper are minor.

The second consultation paper² consults on notification rules for vehicles which are ancillary to investment activity. While notification will be made under the Protection of Investors (Bailiwick of Guernsey) Law, 2020, the activity notified will be exempt from the scope of the new 2020 Fiduciaries Law.

^{1 2} Both consultation papers can be found at the Commission's Consultation Hub [here](#).

PART 1 Categorisation of Fiduciary Licensees

Background

Whilst the existing category of a Personal Fiduciary Licensee will remain, the 2020 Fiduciaries Law, inter alia, introduces the concept of two new categories of Fiduciary Licensee, being Primary and Secondary Fiduciary Licensees. These will effectively replace the existing “lead” and “joint” Licensee categorisations, respectively. The 2020 Fiduciaries Law places a prohibition on corporate directors on the board of a Primary Licensee and a common ownership requirement on Secondary Licensees.

Discussion Paper

In October 2020 the Commission published a Discussion Paper on the new categories of Primary and Secondary Fiduciary Licensee (“the Discussion Paper”). The Discussion Paper set out the Commission’s intention to further distinguish between the categories of Primary and Secondary Licensee by the making of rules prohibiting a Secondary Licensee from actively trading, and sought views on a proposed definition of “actively trading” as being “the charging or receipt of fees directly from third parties”. The Discussion Paper also considered proposals for the transition to the new categories of licence.

Feedback received on the proposed definition of “actively trading”

A limited number of responses were received from interested parties, and these largely sought for more clarity to be provided in respect of the definition of “actively trading”, activity which the proposed new rules will prohibit a Secondary Licensee undertaking.

Commission response

The Commission has considered the responses provided and has included within the proposed new Fiduciary Rules, 2021 a more comprehensive definition. For ease of reference it is now proposed that the term to “actively trade” is defined as:

“to provide services to third parties, in relation to fiduciary regulated activities, for which a fee, commission, or other form of income is received directly by the licensee.”

The Commission also intends to include guidance stating its expectation that regardless of which entity charges the client for the service (the Primary Licensee or another group entity), payment from the client would not be received directly by the Secondary Licensee.

Please refer to Rules 1A.2 and 6.1 of the proposed Fiduciary Rules, 2021 in order to fully understand the new definition and the associated guidance (as included in the consolidated version of the proposed new rules).

Q1: Do you have any comments on the proposed definition of “actively trade” and the associated guidance?

Feedback received in respect of the transition to the new categories of licence and any other matters

The limited feedback received concentrated on two areas:

- 1) Responses indicated that certain licensees currently categorised as “Joint Licensees” might be deemed to be “actively trading” under the proposed new rules, and therefore these might not meet the requirements to be categorised as a Secondary Licensee. Such responses went on to question how such licensees might be treated under the proposals.
- 2) A further line of questions related to whether it is envisaged that a single Secondary Licensee could be associated with more than one Primary Licensee.

Commission response

1) The Commission has been engaging with industry since 2015 on this matter and during this period we have seen the majority of licensees review the position of Joint Licensees. As set out in the Discussion Paper, it is recognised that, currently, the rationale for Joint Licensees is to support a Lead Licensee and not to operate independently. As such, Joint Licensees are deemed to present a different level of risk and are therefore carved out from the scope of capital and liquidity requirements under the Current Fiduciary Rules. However, where a Joint Licensee is not truly passive and provides fiduciary services independently from a Lead Licensee the level of risk it poses is not significantly different from that posed by a lead Licensee and the Commission does not consider it appropriate for such an entity to benefit from carve outs. Under these circumstances the entity would be categorised as a Primary Licensee under the 2020 Fiduciaries Law, and would be expected to meet the requirements of all rules and regulations relevant to such a category of licensee in order to help mitigate any associated risks. It is intentional that the proposed new rules, made under the 2020 Fiduciaries Law, aim to clarify and distinguish the licensing of fiduciaries that actively trade and those which play a secondary, supporting role.

In order to provide clarity in this respect, further guidance has been included within the consolidated version of the proposed new Rules (see Rule 1A.2) expressing the Commission’s view that a Secondary Licensee’s role is to provide certain specific regulated fiduciary services to the clients of its Primary Licensee only. A Secondary Licensee is therefore not expected to trade independently from its Primary Licensee in respect of regulated fiduciary services, for example, by providing these services to clients who are unrelated to the clients of its Primary Licensee.

Other than the above guidance, no changes are therefore anticipated as a result of this specific section of feedback. Licensees are encouraged, as they have been since 2015, to review their current business model and to consider any necessary adjustments.

2) The current concept of “Lead” and “Joint” licensees only exists from the relevant Fee Regulations³ whereby upon submission of an application for fiduciary licences, a “group” of companies has to nominate which entity is the “Lead” Licensee (making the rest “Joint” Licensees). The Commission believes that the current practice of nominating the Lead Licensee (i.e. the Primary) should continue after the enactment of the 2020 Fiduciaries Law.

It is therefore proposed that any given Secondary Licensee should not be associated with more than one Primary Licensee. However, a Primary Licensee would be permitted to have more than one associated Secondary Licensee. In reaching this position the Commission is mindful that it would pose supervisory and practical challenges, increase risks and create a lack of clarity if a Secondary Licensee was permitted to act for more than one Primary Licensee.

On that basis, the proposed new Rules include a requirement that a Secondary Licensee must have a designated Primary Licensee with which it is associated. The notification of such designation should be made upon application for a new Secondary Licence or upon application to convert from a Primary to a Secondary Licensee, or to be notified to the Commission on an immediate basis should a Secondary Licensee’s designated Primary Licensee subsequently change. Please refer to Rule 1A.2(1) of the proposed Fiduciary Rules, 2021.

Again businesses are encouraged to review their current business model at an early stage and to consider any necessary adjustments if Joint Licensees are currently serving more than one Lead Licensee.

Q2: Do you have any comments on the proposed requirement for a Secondary Licensee to nominate a designated Primary Licensee with whom it is associated?

³ The Financial Services Commission (Fees) Regulations, 2020

The Commission's Proposals Regarding the Transition to the New Categories of Licence

Personal Fiduciary Licensees ("PFLs")

Under Section 60(1)(b)(ii) of the 2020 Fiduciaries Law, upon its enactment, any current PFL will become a PFL under the new law and there are, therefore, no other specific transitional arrangements required in respect of PFLs.

Full Fiduciary Licensees ("FFLs")

Upon enactment of the 2020 Fiduciaries Law, all current FFLs (that is, Licensees currently categorised as either Lead Licensees or Joint Licensees) will initially be categorised as Primary Licensees under Section 60(1)(b)(i) of that law.

Therefore, in respect of current Lead Licensees, no action should be required as these will automatically be re-categorised as Primary Licensees upon the law being enacted.

The proposed new rules include provisions for any future re-categorisation of a Primary Licensee into a Secondary Licensee, should this be required, providing certain criteria are met, as contemplated by Section 61(1) of the 2020 Fiduciaries Law. Please refer to Part 1A of the proposed Fiduciary Rules, 2021.

It should be noted that the 2020 Fiduciaries Law makes provisions for new licence applications to be made in a similar manner as they are made today. Applications may be made for any category of licence, i.e. a Primary, Secondary or Personal Fiduciary Licence.

Q3: Do you have any comments on the provisions in the proposed new rules for the future re-categorisation of a Primary Licensees into a Secondary Licensee?

However, as a one-off process, the Commission is also proposing that immediately upon the coming into operation of the 2020 Fiduciaries Law and the proposed new rules, and providing the Commission has not received a request to the contrary prior to that date, that all FFLs currently categorised as Joint Licensees will be re-categorised by the Commission as Secondary Licensees.

Please note that under these proposals, if the Commission has not received clear communication from the current Joint FFL by the operational date advising that it does not wish to be re-categorised as a Secondary Licensee, the Licensee will be deemed to have agreed:

- 1) to the conversion under Section 61(1)(b) of the 2020 Fiduciaries Law (upon its coming into operation) and Rule 1A.1(1)(b) of the proposed Fiduciary Rules, 2021, and
- 2) that it meets the requirements of Section 4(3)(a) of the 2020 Fiduciaries Law (upon its coming into operation) and Rule 1A.2(2) of the proposed Fiduciary Rules, 2021 regarding trading actively.

The Commission also proposes to treat the entity which is currently recorded as the Lead Licensee for any Joint Licensee so re-categorised, as the designated Primary Licensee of the Joint Licensee (for the purposes of Rule 1A.2(1) of the proposed Fiduciary Rules, 2021) following its re-categorisation as a Secondary Licensee, again, providing the Commission does not receive notification to the contrary prior to the operational date.

The Commission is proposing this approach as it considers it likely that most (if not all) existing Joint Licensees would elect to become Secondary Licensees, and that most current Joint Licensees would nominate their current Lead Licensee to be their designated Primary Licensee under the new regime. The proposal will avoid such Licensees having to communicate their agreement and nomination to the Commission, thus reducing the risk of an error and a potential administrative burden both to the Licensees and the Commission. Licensees would only need to advise the Commission if they do not want to be re-categorised as a Secondary Licensee because:

- such a re-categorisation is not considered appropriate in its particular circumstances;
- it will not meet the criteria for being a Secondary Licensee, or
- if the nominated Primary Licensee of any re-categorised Secondary Licensee will not be the current Lead Licensee.

If the proposed approach is adopted, further communications will be issued by the Commission reminding Full Fiduciary Licensees that Joint Licensees will be transitioned into Secondary Licensees (as set out above), if the Commission has not been notified to the contrary prior to the operational date of the 2020 Fiduciaries Law and the proposed new rules. Such further communications will set out how businesses should make such notifications to the Commission, if applicable. **However, firms are being notified of these proposals at this early juncture in order that they are fully aware of the suggested approach and can make appropriate arrangements for the Commission to be notified in good time.**

Q4: Do you have any comments on the Commission's proposals regarding the "one-off" automatic re-categorisation of Joint Licensees into Secondary Licensees on enactment of the 2020 Fiduciaries Law?

PART 2 Provisions for Annual Returns

It is proposed that the Fiduciary Rules, 2021 will repeal the Annual Return Regulations and make rules equivalent to Regulations 3 and 4 of those Regulations. It is, therefore, proposed that, aside from the returns requirement now being placed in rules, the provision for the filing of Annual Returns will remain unchanged. These provisions are made in proposed Rule 2.4A.

Q5: Do you have any comments on the proposed provisions relating to annual returns?

PART 3 Removal of restrictions on advertising by Personal Fiduciary Licensees (“PFLs”)

It is proposed that the Fiduciary Rules, 2021 will repeal the Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations, 2012. The only significant active provision within these Regulations is the prohibition on advertising by PFLs. The Commission does not propose making any equivalent provisions in the Fiduciary Rules, 2021, thereby removing the bar on advertising by PFLs. This proposal will bring the treatment of PFL advertising in line with that under all other Commission supervised licence categories and regimes. It should be noted that the rules on advertisements and communications with clients (Rule 3.3 of the proposed Fiduciary Rules, 2021) will apply to PFLs in the same manner as they will apply to Primary and Secondary licence holders.

Q6: Do you have any comments on the proposed removal of restrictions on advertising by PFLs?

PART 4 Other changes proposed in the new Fiduciary Rules, 2021

There are two other noteworthy revisions in the Fiduciary Rules, 2021 as follows:

- The Current Rules require the auditor’s report to be prepared in accordance with the International Standards on Auditing issued by the Financial Reporting Council (the ISA (UK)). However, the Commission has also recognised that reports prepared in accordance with the standards issued by the International Auditing and Assurance Standards Board (“IAASB”) are acceptable. It is proposed that the Rules be revised to provide formal clarity on this point.
- Amendments to bring the annual financial reporting for PFLs into line with current practice – it is proposed that Fiduciary Rules, 2021 require particulars of a PFL’s financial position to be provided to the Commission annually as part of a PFL’s Annual Return.

Q7: Do you have any comments on the other changes proposed in the new Fiduciary Rules 2021?

PART 5 The draft new Fiduciary Rules, 2021

The proposed new Fiduciary Rules, 2021 are attached in Appendix 1 to this Consultation Paper in a “consolidated” version including relevant Commission Guidance.

For ease of reference a “tracked” version showing changes from the current rules and guidance has also been provided in Appendix 2.

It should be noted that where terms used in the Fiduciary Rules, 2021 have already been defined in the 2020 Fiduciaries Law, such definitions are not repeated in the Rules.

Q8: Do you have any other comments on the consolidated version of the proposed new Fiduciary Rules, 2021 which incorporate Commission Guidance, which are not already covered in your responses to previous questions?