

Guernsey Financial Services Commission

**Consultation Paper on Proposals to Create a Single
Fiduciary Handbook**

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Responses to this Consultation Paper are sought by 7 November 2019.

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.gfsc.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.

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 for fiduciary services.

The purpose of this Consultation Paper is to seek feedback from all interested parties on detailed proposals for potential modernising of the regulatory framework under the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 (the "Fiduciaries Law") with the objective of ensuring that the regime continues to be both compliant with international standards and appropriate for the Guernsey market.

The publication of this Consultation Paper follows the Commission's review and consideration of feedback received on the Discussion Paper issued in March 2019¹. A high level summary of this feedback is provided in Part 1 of this paper and additional discussion on specific elements is provided in Part 2.

The detailed proposals are set out in a draft Fiduciary Handbook comprising both Rules and Guidance. The draft Fiduciary Handbook is provided in the Appendix to this paper.

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

Background to the proposals

Fiduciaries

In its March Discussion Paper the Commission proposed a refresh of the policy framework underlying the Fiduciaries Law, primarily in the area of business conduct to ensure compliance with international standards and introduce simplification and consolidation with the creation of a single Fiduciary Handbook (the "Fiduciary Handbook"). The Discussion Paper also highlighted proposals for further enhancements to the underlying policy framework including new provisions for client money, outsourcing, communication to clients (including advertisement) and terms of business.

¹ [Discussion Paper on Proposals to Create a Single Fiduciary Handbook and Revise Pension Rules, March 2019](#)

At present licensed fiduciaries are subject to relevant Codes of Practice (Codes of Practice for Corporate Service Providers (CSP), Trust Service Providers (TSP), Foundation Service Providers (FSP) and Company Directors together, “the Codes”), the Regulation of Fiduciaries (Accounts) Rules, 2001 (“the Account Rules”), and, for full fiduciary licensees only, the Financial Resources Requirements Rules, 2018 (“the FRR Rules”). It is proposed that these rules and Codes will be repealed and the current provisions reframed and strengthened under a single Fiduciary Handbook. New provisions relating to international standards will also form part of this new Handbook. This approach provides for consolidation of 6 pieces of legislation into one.

It should be noted that the introduction of the Fiduciary Handbook, which applies only to fiduciary licensees, will not vary the requirement for all licensees to comply with the Handbook on Countering Financial Crime and Terrorist Financing.

Review of Pension Licensees (Conduct of Business) & Domestic and International Pension Scheme and Gratuity Scheme Rules (No. 2) 2017 (the “Pension Rules”)

The March Discussion Paper provided feedback on industry comments on the Pension Rules and proposed the consolidation of the conduct of business-related elements of the current Pension Rules into the new single Fiduciary Handbook with the publication of separate, revised Pension Rules covering pension specific requirements. This Consultation Paper is therefore relevant to all licensed Fiduciaries, including pension providers. **It should be noted that a separate consultation on proposals in respect of revised Pension Rules is taking place concurrently with this consultation and licensed pension providers and other interested parties should consider these separate proposals in addition to the proposals in this Consultation Paper.**

Next Steps

The closing date for the Consultation Paper is 7 November 2019. Responses to this Consultation Paper will be considered by the Commission with a view to the future publication of the Fiduciary Handbook in final form.

Part 1 – Feedback to the Discussion Paper

The Discussion Paper made high-level proposals to revise the rules and codes underlying the regulatory framework for licensed fiduciaries and sought feedback on these proposals from interested parties.

Twenty six responses were received from trade associations and a cross-section of industry. Overall the majority of feedback was supportive of the proposals contained in the Discussion Paper. Responses indicate a willingness by stakeholders to contribute positively to the policy development process and a number of suggestions to improve the framework were received. Where possible, the Commission has attempted to address and reflect these suggestions and comments in the proposed Fiduciary Handbook.

The Commission would like to thank everyone who responded to the Discussion Paper.

Structure of the new framework

The Discussion Paper proposed that a consolidated Fiduciary Handbook be introduced encompassing the current scope of the Codes of Practice for TSP, CSP and FSP. It was further proposed that Chapters 2 to 9 of the Pension Rules (concerning Conduct of Business) would be repealed and absorbed within the consolidated Fiduciary Handbook.

An overwhelming majority of respondents agreed with the proposal to create a single Fiduciary Handbook and welcomed the improved ease of reference and elimination of duplication that this will bring.

Overall policy approach

A number of factors have influenced the policy proposals in the draft Fiduciary Handbook.

In seeking to replace the existing Codes and relevant Pension Rules, the proposed Handbook covers much of the same territory as the existing policy and will be familiar to licensees and consistent with their current practices. Some respondents called for a review and update of the provisions of the Codes and this has formed part of the drafting process.

As highlighted in the Discussion Paper the Fiduciary Handbook introduces new rules in line with the GIFCS Standard². The Commission, along with all other GIFCS members, is committed to the Standard. In seeking to meet this objective the Commission has sought to introduce rules and

² The Group of International Finance Centre Supervisors (“GIFCS”), of which the Commission is a member, issued the Standard on the Regulation of Trust and Corporate Service Providers² (“the GIFCS Standard” or “the Standard”) in 2014, <https://www.groupgifcs.org/letsgo/uploads/gifcsstandardontcps.pdf>. The Standard sets a minimum benchmark for the supervision of businesses administering international trusts and companies.

guidance consistent with the Standard while at the same time considering proportionality and impact on the local industry.

Feedback also raised the issue of dual-licensees and the need for consistent approaches across different regimes. The proposed new rules are in some areas now more closely aligned to the provisions of the Licensees (Conduct of Business) Rules 2016 (the “CoB Rules”) but in other areas owing to the differences in the nature of the business lines alignment is not always possible or appropriate. In drafting the Fiduciary Handbook the Commission has, however, aimed not to create any direct conflict between obligations under other regulatory laws.

In addition to international standards and existing requirements, the drafting of the Fiduciary Handbook has also been informed by the ongoing supervisory and thematic work of the Commission.

One respondent highlighted the need to avoid conflict with the provisions of the Trusts (Guernsey) Law 2007 (the “Trusts Law”). It should be noted that in seeking to perform its functions the Commission is respectful of the jurisdiction of the Court with regard to the Trusts Law.

Scope

The Commission is conscious of the wide breadth of licensee business models falling within scope of the proposed Fiduciary Handbook. Some respondents also highlighted the need to clarify the scope of applicability of each Rule to the different “types” of licensee (e.g. CSP, TSP, Personal Fiduciary Licensee, pension providers, etc.)

The general approach is that the Rules have been drafted at a relatively high-level with the aim that common principles can be conveyed and, in turn, observed by licensees. Certain rules, however, by their very nature lend themselves to a higher degree of prescription and in some cases a more limited scope of applicability is appropriate and is therefore explicitly stated in the individual rule. The applicability of certain rules may also depend on the nature of the licensee’s business e.g. if no client money is held then client money rules would not apply.

There was also feedback calling for the embedding of guidance within the Fiduciary Handbook alongside Rules. Such guidance has been incorporated in the Fiduciary Handbook and has been used to clarify scope where relevant.

Part 2

This part of the paper highlights key amendments to the framework which may be worthy of consideration but comments are welcomed in respect of any element of the proposed Fiduciary Handbook.

Key amendments

The Code of Practice for Company Directors

It was proposed in the Discussion Paper that the Codes of Practice for Corporate Service Providers (CSP), Trust Service Providers (TSP) and Foundation Service Providers (FSP) be repealed and the Code of Practice for Company Directors be retained.

The majority of respondents expressed their strong support for having one key reference source for licensees. It was also suggested that consideration should be given to reviewing the Code of Practice for Company Directors at the same time. With the view to achieve a simpler regulatory regime through the introduction of a consolidated Fiduciary Handbook and taking into account feedback received, the Commission proposes that the Code of Practice for Company Directors is repealed with this activity now coming within scope of the Fiduciary Handbook.

Corporate Governance

Rule 2.1 of the draft Fiduciary Handbook sets out corporate governance-related expectations in respect of the board and senior management. These provisions are in line with requirements under current Codes, the GIFCS Standard and the Pension Rules. It is viewed that such provisions would reflect current practice of licensees meeting the Code of Corporate Governance and the minimum licensing criteria of integrity, skill and prudence.

Conflict of Interest

Rule 2.3 establishes requirements around the management of conflicts of interest largely building on provisions in the existing frameworks and the GIFCS Standard and it is envisaged that they will formalise the practice already applied by the majority of licensees. It should be noted that a provision has been included specifically prohibiting licensees from profiting from the holding of client money. This reflects findings from the Commission's recent thematic work in this area.

Q1: Do you have any comments on the proposed rules under the Conflict of Interest section?

The Regulation of Fiduciaries (Accounts) Rules, 2001 (“the Account Rules”) and the Financial Resources Requirements Rules, 2018 (“the FRR Rules”)

To form part of the Fiduciary Handbook?

Feedback to the DP showed that respondents welcomed the consolidation of regulatory requirements into one source document. With this in mind it is proposed that the existing Account Rules and FRR Rules should form part of the Fiduciary Handbook, but that no material change to the provisions of these Rules will be made with the exception of clarification that Account Rules submissions can be made electronically through the Commission’s online portal.

Q2: Do you have any comments on the above proposal to include the Account Rules and the FRR Rules within the Fiduciary Handbook?

Client Money

All respondents to the Discussion Paper agreed with the proposed introduction of Client Money Rules, the aim of which is to formalise existing good practice and move towards compliance with GIFCS Standard in this area. It is hoped that this will provide clients of licensed fiduciaries with a greater degree of protection in the event of firm failure, equivalent to that afforded to the customers of other financial institutions.

The Discussion Paper also sought views on the definitions of “Client” and “Client Money”. Several respondents expressed the concern that the definition of “Client”, which is consistent with the definition under the Fiduciary Law, was too broad and that the scope of application of client money requirements would extend to individual members of multi-member pension plans, arrangements which would not ordinarily use individual client bank accounts.

Other respondents advocated close alignment with the definitions, and other client money provisions, under the COB Rules.

The proposed Fiduciary Handbook has retained the definition of client from the Fiduciary Law. The Commission is of the view that this is broadly fit for purpose and to seek to redefine a statutory

definition would, in any event, be problematic. The proposed Fiduciary Handbook seeks to address respondents concerns regarding the scope of application through the drafting provisions of the core segregation rule.

Rule 2.5.3 introduces the requirement that Client Money is held separately from the money of licensees. The rule also requires that any client’s money must be held separately from another client’s money, except where to do so is impracticable or impossible and the interests of clients are not adversely affected. Further guidance on this rule is provided recognising that the maintenance of separate member bank accounts for multi-member pension schemes may not be practical and also addressing other pooling arrangements.

It should also be noted that several elements of the CoB Rules have been incorporated into the proposed Fiduciary Handbook (although it should be noted that the definition of “client” differs under both regimes owing to the differing nature and applicable regulatory law).

In response to feedback a minor change has been made to the definition of “Client Money” to provide clarity that client money includes not only the money which is owed to a client at present, but also money which is held for payment to the client at some time in the future.

Q3: Do you have any comments on the proposed client money rules?

Record Keeping

Rule 2.6.4 introduces record keeping provisions which are consistent with the existing Pensions Rules and the CoB rules.

Q4: Do you have any comments on the proposed record keeping rules?

Outsourcing

In its Discussion Paper the Commission proposed the introduction of sector-specific outsourcing rules with the objective of consistency with the Code of Corporate Governance and approaches

applicable to other sectors, and broad compliance with the GIFCS Standard. It is intended that this proposal will assist licensed fiduciaries by providing greater clarity around the Commission’s expectations with respect to outsourcing and will reinforce existing standards of good practice and control observed by licensees.

The majority of respondents were supportive of this proposal but some noted concerns about specific elements of the GIFCS Standard including the contractual requirements to enable the Commission direct access to licensee information held by an outsourced service provider, the requirements around sub-outsourcing approval and more generally about the scope of outsourcing requirements. The Commission has taken the position that access to licensee information held by significant outsourcing providers is an important element of supervision allowing equivalent supervision irrespective of outsourcing decisions by the licensee. In performing its functions, the Commission, therefore, may require access to relevant records held by an outsourced service provider as and when necessary, although it is unlikely that for the majority of licensees that this would be a routine element of ongoing supervision.

Furthermore the Commission has noted feedback and concerns in respect of sub-outsourcing requirements in the Standard and has addressed this concern in proposing that no supervisory approval would be required in the case of a sub-outsourcing arrangement, on the basis that the licensed fiduciary would continue to be responsible for monitoring outsourcing risk and regulatory compliance. (For the avoidance of doubt there is no proposed requirement for regulatory approval of outsourcing arrangements in the Fiduciary Handbook but there is a requirement for notification only of significant outsourcing arrangements.)

The Discussion Paper sought feedback on the definition of “significant outsourcing arrangement” and respondents provided differing, well-considered proposals, some quantitative and some qualitative in nature. The drafting of the Fiduciary Handbook employs a more principles based approach and therefore a qualitative approach has been taken in defining “significant outsourcing arrangement” linking significance to the potential outcome of the failure of the arrangement.

Q5: Do you have any comments on the proposed outsourcing rules?

Employee Screening and Training

Rule 2.8 of the proposed Fiduciary Handbook introduces requirements for the screening and training of employees which are in line with the GIFCS standard and also broadly consistent with the provisions of the Pension Rules and the AML Handbook. The Rules requires proportionate

application and corresponds with the statutory minimum licensing criterion to carry on business with appropriate levels of prudence, integrity and professional skill.

Q6: Do you have any comments on the proposed employee screening and training rules?

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Best interests of Clients

Rule 3.2 of the proposed Fiduciary Handbook makes provision relating to licensee consideration of the best interests of clients. The majority of the content of this Rule is drawn from the existing sector specific Codes, with some additions relating to the GIFCS Standard, and the Rule also contains general and sector-specific provisions.

Q7: Do you have any comments on the proposed provisions relating to clients' best interests?

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Terms of Business

As initially proposed in the Discussion Paper, it is proposed to introduce a Rule, in line with the GIFCS Standard, requiring written terms of business with persons for whom a firm has agreed to act. There are at present similar provisions in the current Codes of Practice for CSPs and FSPs and respondents were generally supportive of this proposal on the basis that this reflects normal business practice. TSP and pension provider respondents did, however, raise concerns about the relevance of, and the ability to apply, such a requirement. The Commission has sought to address such concerns by limiting the scope of application of the proposed Rule.

Q8: Do you have any comments on the proposed terms of business rules?

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Complaints

Rule 3.6 of the proposed Fiduciary Handbook makes provision relating to the handling of complaints and is consistent with the GIFCS Standard and defines “complaint” consistently with the CoB Rules.

Q9: Do you have any comments on the proposed complaints rules?

Notifications to the Commission

Rule 5.2 provides for notification of certain significant events and changes by a licensed fiduciary to the Commission and is based closely on current provisions under the Codes. It should be noted that new requirements are introduced to provide:

- a cessation of business plan, setting out the arrangements made for clients in event of business closure; and
- notification when a complaint is upheld by or a notification of breach is made to the Office of the Data Protection Authority.

Q10: Do you have any comments on the proposed notification rules?

Transitional Arrangements

Should the proposed Fiduciary Handbook be introduced, appropriate transitional arrangements would be made in order to provide licensed fiduciaries sufficient opportunity to prepare for compliance.

Q11: Do you have any views on an appropriate period of transition for the Fiduciary Handbook? Are there any specific elements which provide a particular challenge to timely compliance?

Q12: Please provide any further comments you may wish to share with respect to the proposed Fiduciary Handbook