

CODE OF PRACTICE – TRUST SERVICE PROVIDERS

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Coming into operation: 1 August 2009

This Code of Practice is published by the Guernsey Financial Services Commission under section 35 of The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 (“the Law”) for the guidance of individuals, partnerships and companies carrying on trust business (as defined below) in or from within the Bailiwick of Guernsey or through a company incorporated in the Bailiwick. There are separate codes for those providing corporate services as described in section 2(1)(b)(i) and (ii) and acting as directors as described in section 2(1)(b)(iii) of the Law.

This Code attempts to set out sound principles of practice for Trust Service Providers but is not a statement of the law. A failure to comply with this Code does not automatically make a Trust Service Provider liable to any sanction or proceedings, but the Court may, and the Commission will, take into account any breach of this Code which is relevant to any decision which either of them has to make. The Commission may amend this Code from time to time after consultation with representative bodies.

Each principle is followed by a guidance note which does not form part of the Code but gives further information on the reasons behind the relevant principle or the Commission’s interpretation of it.

1. Definitions

In this Code, the following words have the following meanings:

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| “client” | a person with whom a TSP has entered an agreement to provide services constituting trust business or who has received or might reasonably be expected to receive the benefit of such services, |
| “full fiduciary licence” | a licence of the category described in section 4(2) of the Law, |
| “holding company” and “subsidiary” | have the meanings set out in schedule 2 to the Law, |
| “personal fiduciary | a licence of the category described in section 4(3) of the Law, |

licence”

“regulated fiduciary activities” the activities described in section 2 of the Law, when carried on by way of business and not exempt from regulation under any provision of section 3 of the Law,

“staff” includes directors, partners and indirect employees such as temporary or contract staff as well as employees,

“the Commission” the Guernsey Financial Services Commission, established under The Financial Services Commission (Bailiwick of Guernsey) Law, 1987,

“the Law” The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000,

“trust business” the activities described in section 2(1)(a) of the Law, when carried on by way of business and not exempt from regulation under any of the provisions of section 3 of the Law, and

“Trust Service Provider” or “TSP” a person carrying on trust business.

2. Integrity

TSPs should conduct their businesses with integrity and should not attempt to avoid or contract out of responsibilities under this Code.

Guidance note

A breach of this principle will be regarded as being amongst the most serious of breaches. Without limiting its scope, TSPs must deal with clients fairly and communicate with them in a way which is suitable and not misleading.

3. Know your client

TSPs should comply with The Criminal Justice (Proceeds of Crime)(Financial Services Businesses)(Bailiwick of Guernsey) Regulations, 2007 and the Handbook for Financial Services Businesses on Countering Financial Crime and Terrorist Financing (“the Handbook”), as amended from time to time. Section 4.6.3 of the Handbook, which includes Commission Rules, requires that, where the verification subject is a trust, the identity of underlying principals such as settlors, protectors and beneficiaries should be verified.

Guidance note

The Criminal Justice (Proceeds of Crime)(Financial Services Businesses)(Bailiwick of Guernsey) Regulations, 2007 and the Handbook apply as much to TSPs as to other financial services businesses. Section 13.2 of Chapter 13 of the Handbook provides material specifically for the trust sector but TSPs also need to be fully familiar with the whole of the Handbook, The Criminal Justice (Proceeds of Crime)(Bailiwick of Guernsey) Law, 1999 and the Regulations referred to above.

4. Beneficiaries' best interests

TSPs should treat the interests of beneficiaries as paramount subject to their legal obligations to other persons or bodies. In particular, TSPs should:

invest, distribute or otherwise manage each trust's assets in accordance with the law and the trust deed,

manage the investment and custody of trust assets professionally and responsibly,

maintain confidentiality except where disclosure of information is required or permitted by an applicable law or by guidance published by the Commission, or authorised by the person(s) to whom the duty of confidentiality is owed,

provide promptly to clients information to which they are entitled about a trust,

ensure that the funds of different trusts are kept separately from each other and from the TSP's own funds,

agree a clear fee structure in advance of taking an appointment and charge fees in accordance with that and in a fair and transparent manner,

notify clients that the TSP is licensed by the Commission,

avoid setting up or participating in discretionary trusts where the trustees merely carry out the settlor's instructions and exercise no significant discretion, and

deal in a timely manner and in the best interests of the beneficiaries with any transfer to other trustees.

Guidance note

Compliance with this principle will require TSPs to act with due care, skill and diligence. For example, it will require TSPs:

to identify beneficiaries and their respective interests correctly,

to be aware of their personal circumstances, including their current needs, residence and domicile, so far as those are relevant to the administration of the trust,

to consider the tax status of the trust and, where appropriate, to file tax returns and to provide information to beneficiaries to enable them to file their own tax returns, and

to comply with their obligations under section 23 of The Trusts (Guernsey) Law, 2007 (or any equivalent obligation for a trust to which that provision does not apply) to ensure that trust property is under the TSP's control and to preserve and enhance, so far as is reasonable and consistent with the terms of the trust, the value of the trust property.

The Commission considers that the obligation to manage the investment and custody of trust assets professionally requires the TSP:

to have regard to any different interests of beneficiaries and of classes of beneficiaries,

to exercise, so far as required by the duties of trustees in each case, professional oversight of any company owned by the trust,

to consider appointing competent agents and managers, including investment managers. If investment managers are appointed, to record the agreement, instructions, investment parameters and investment benchmarks and to require and review regular reports (at least quarterly unless that is inappropriate having regard to the nature of the trust assets) on performance, including a valuation and a schedule of assets bought and sold,

to consult with any other trustees, and

to consider and, where appropriate, effect the insurance of trust assets.

Where a TSP advises on the formation, or acts as trustee, of a pension scheme, the Commission acknowledges that the terms of the trust are ultimately a question for the settlor or sponsoring employer. However, the Commission would expect a TSP to be able to justify any involvement in restricting the rights of beneficiaries who contribute to the fund to receive information about it.

The Commission does not expect TSPs to notify all clients that the TSP is licensed by the Commission immediately after the grant of a fiduciary licence. It is sufficient to include that information when next communicating with them in writing.

5. Competence and effective management

TSPs should, through their staff:

understand and discharge fiduciary and other duties,

when establishing a trust, use their best endeavours to ensure that settlors receive any necessary professional advice and that the trust is suitable for their needs,

once a trust has been established, identify and act in the best interests of the beneficiaries and avoid or deal properly with any conflict of interest between trusts or between the TSP and the beneficiaries of a trust,

keep and preserve (so far as appropriate for the TSP's functions and for at least the periods required by any applicable law) appropriate records of trust business including accounts, tax records and minutes of meetings,

record, investigate and, as appropriate, act on complaints,

comply with the requirements of The Criminal Justice (Proceeds of Crime)(Financial Services Businesses)(Bailiwick of Guernsey) Regulations, 2007 and of the Handbook, as amended from time to time,

satisfy the "4-eyes" criterion (except TSPs who hold a personal fiduciary licence), and

record and monitor compliance with the Law and this Code.

TSPs should have effective management and systems and suitably chosen, trained and supervised staff to comply with this principle. TSPs should ensure that the responsibilities and authority of each member of staff are clear and appropriate to his or her qualifications and experience and that staff receive any training which is necessary for their rôles. TSPs should formulate and keep up to date plans for staff training and development, including training in relation to anti-money laundering and countering the financing of terrorism, and for disaster recovery.

Guidance note

The staff and procedures which a TSP needs to comply with this principle will depend upon the nature and scale of its business. The Commission will in each case consider the TSP's resources and systems as a whole but, for example, it may wish to see evidence of the following in addition to the specific points set out in this principle:

an understanding on the part of staff of both the TSP's duties to clients and the extent to which the TSP must exercise independent judgement in performing its functions,

anti-money laundering policies, procedures and controls including staff training on those and compliance with them,

procedures documenting the risk assessment both of the TSP's business as a whole and of each of the TSP's business relationships,

up to date records of all trusts which the TSP administers or of which it is a trustee, including details of trust property and of the TSP's arrangements for preserving it and keeping it separate from the property of other trusts and of the TSP itself, and

a diary system or systems to ensure that critical dates are not missed.

The principle requiring an understanding of fiduciary and other duties in turn requires TSPs to understand the trust deed in each case and to seek legal or other advice where necessary. The requirement for staff to be suitably qualified and experienced for their responsibilities extends to any staff who act as trustees and requires them to understand their duties under the laws applicable to each trust.

The following is an extract from the guidance on the "four-eyes" criterion which has appeared in the Commission's Annual Reports:

"The Commission applies the "four-eyes" criterion and normally requires at least two individuals to direct the business of a licensed/registered institution. It is expected that the individuals will be either executive directors or persons granted powers by, and reporting immediately to, the board. These provisions are designed to ensure that at least two minds are applied both to the formulation and the implementation of the policy of the institution. The Commission would not regard it as sufficient for the second person to make some, albeit significant, decisions relating only to a few aspects of the business. Both must demonstrate ability to influence strategy and day-to-day policies and their implementation, and both must actually do so in practice. Both persons' judgements must be engaged in order that major errors leading to difficulties for the business are less likely to occur. Both persons must have sufficient experience and knowledge of the business and the necessary personal qualities to detect and resist any imprudence, dishonesty or other irregularities by the other person."

Paragraph 4(1) of Schedule 1 to the Law (which sets out the minimum criteria for licensing) requires that the two individuals fulfilling the "four-eyes" criterion must be "sufficiently independent of each other". Paragraph 4(2) of Schedule 1 states that an individual is sufficiently independent of another where, in the opinion of the Commission, that individual would not be unduly influenced by the other individual.

6. Adequate resources

TSPs must maintain and be able to demonstrate adequate financial resources for the nature and scope of their businesses, including adequate professional indemnity insurance cover.

Guidance note

It is of paramount importance that TSPs are solvent and able to meet the risks which they face, for example of a well-founded claim by a client. There is such variation in the size and structure of TSPs and the range of activities undertaken by them that it is impossible to prescribe scales for solvency, capital adequacy and insurance cover which achieve appropriate results in all cases. Each TSP is responsible for assessing the level of resources (including insurance cover) which is necessary to enable it to meet its liabilities as they fall due and to withstand the risks to which it is subject. This will involve consideration of the risks which exist as a result of the nature of the TSP's business and of the extent to which those risks can be avoided or reduced.

The Commission will generally expect a TSP which holds a full fiduciary licence to maintain minimum gross capital of 25% of annual expenditure, where:

“gross capital” means total assets less total liabilities after adjustments,

“total assets” means the aggregate of assets of any type (whether employed in regulated fiduciary or other activities) including fixed assets, current assets (including debtors) and, with the Commission's approval, contingent assets,

“total liabilities” means the aggregate of liabilities of any type (whether arising from regulated fiduciary or other activities), including creditors and provisions for liabilities and charges,

“adjustments” means deductions for intangible fixed assets, debtors arising from sales to associates, any deficiencies where the liabilities of a subsidiary or liabilities of associates of a licensee exceed its assets, and any other assets specified in writing by the Commission, and additions for creditors arising from purchases from associates, other liabilities and subordinated loans specifically permitted in both cases by the Commission,

“annual expenditure” means either:

an estimate of budgeted expenditure for the first 12 months which is submitted to the Commission by an applicant or a licensee which has not yet commenced regulated fiduciary activities, or

the total revenue of any type for the immediately preceding accounting period less profit before appropriations of a licensee and, in the case of a loss before appropriations, the amount of the loss shall be added to the total revenue,

“associate” in relation to a licensee means:

a company in the same group as the licensee,

a company at least one-third of the issued equity share capital of which is beneficially owned by the licensee or an associate, and

any other person whose business or domestic relationship with the licensee or its associate, or with the partners, directors, managers or employees of the licensee or its associate, places the person in a position to exercise significant influence over the licensee which might reasonably be expected to give rise to a conflict of interest in dealings with third parties,

“group” in relation to a licensee means that licensee, any company which is its holding company or subsidiary, and any other company which is a subsidiary of that holding company,

“director” includes any person who occupies the position of director, by whatever name called, and

“manager” means an employee who, under the immediate authority of his employer, is responsible either alone or jointly with one or more other persons for the conduct of the employer’s regulated fiduciary activities.

The Commission will expect TSPs which are companies to have a paid-up share capital of substance, the exact level depending on the business of the individual TSP. The Commission will consider a lower share capital and a parent company’s guarantee for a company whose parent has a higher level of capital, particularly if the parent is itself a regulated financial services institution in the Bailiwick of Guernsey.

The Commission regards suitable professional indemnity insurance as an important aspect of financial resources, and will consider the adequacy of those resources against the background of the TSP’s actual and intended activities in each case. Professional indemnity insurance cover needs to include cover against negligence, errors or omissions by the TSP and against any liability it might have for the dishonest acts of its employees. Cover must extend to liabilities which the TSP might incur in any jurisdiction in which it carries on business as a TSP and to liabilities of the TSP’s staff who, in the course of their duties to the TSP, perform functions (for example acting as trustee) in their own names.

The Commission is likely to consider insurance cover to be adequate where it provides annual aggregate cover which matches or exceeds the greater of:

3 times turnover (previous year's turnover or, for new businesses, estimated turnover for the first year) from regulated fiduciary activities, and

£1,000,000.

The Commission regards the level of excess as important and would not usually regard as acceptable an excess of more than 3% of turnover from regulated fiduciary activities.

The Commission will consider arrangements under group policies or, where the TSP or its parent or ultimate parent is of sufficient stature, for self-insurance.

7. Co-operation with regulatory authorities

TSPs should deal openly and honestly and co-operate with the Commission and any other regulatory authorities to whose supervision they are subject. The attention of TSPs is drawn to sections 14, 21, 39 and 46(2) of the Law. In relation to section 46(2), the Commission would expect to be notified of any of the following events:

significant changes to the information submitted to the Commission as part of an application for a fiduciary licence, for example, changes of address or significant changes to the nature of the TSP's business, to its insurance arrangements or to the structure of a group of companies of which the TSP is part,

the grant or refusal of any application by the TSP or any holding company or subsidiary for authorisation to carry on any financial services business in any country, or the revocation of or attachment of conditions to such an authorisation,

the serious or prolonged breakdown of the TSP's administrative systems if that could result in an inability to keep proper records or to comply with any other principle,

the fact that a significant complaint has been made about the TSP or that any complaint about the TSP has not been resolved within 3 months,

a notification to the TSP's professional indemnity insurers, or any payment by the TSP's insurers under its professional indemnity cover,

the commencement of proceedings against the TSP in any country,

the making, or any proposals for the making, of a composition or arrangement with creditors of the TSP,

the presentation of any application to the court for the commencement of any insolvency proceedings, including *désastre*, winding up or the appointment of a receiver, administrator or provisional liquidator, under the law of any country in relation to the TSP or a company which is a subsidiary or holding company of the TSP, or the summoning of any meeting to consider a resolution to wind up the TSP or a subsidiary or holding company of it,

the making of an application to wind up or dissolve any TSP which is a partnership, including a limited partnership or a limited liability partnership,

the appointment of inspectors (however described) by any regulatory authority to investigate the affairs of the TSP or any holding company or subsidiary,

the imposition of disciplinary measures or sanctions against the TSP by any regulatory authority, or

the conviction of the TSP, its holding company or subsidiary or any member of staff of the TSP in any country of any offence relating to financial services, companies or insolvency or involving fraud, dishonesty, money laundering or tax evasion.

Guidance note

The Commission expects TSPs to behave towards their regulators in an open and co-operative manner. The list above is not exhaustive. It is intended to indicate the type of event of which the Commission would expect to be notified but it does not limit the scope of section 46(2) or any other provision of the Law.