

CODE OF PRACTICE – FOUNDATION SERVICE PROVIDERS

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Coming into operation: 2 September 2013

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, companies and partnerships carrying on foundation 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 undertaking corporate services, trust business, or acting as a director as described in sections 2(1)(b)(i) and (ii), 2(1)(a) and 2(1)(b)(iii) respectively of the Law.

This Code attempts to set out sound principles of practice for Foundation Service Providers (“FSP”) but is not a statement of the Law. A failure to comply with this Code does not automatically make a Foundation 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:

“client”	a person with whom an FSP has entered an agreement to provide services constituting foundation business or who has received or might reasonably be expected to receive the benefit of such services,
“foundation business”	the activities described in section 2(1)(d) of the Law, when carried on by way of business,
“foundation official”	has the meaning within section 2(1)(d) of the Law,
“FSP”	a person carrying on foundation business,

“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 licence”	a licence of the category described in section 4(3) of the Law,
“resident agent”	has the meaning within section 12 of The Foundations (Guernsey) Law, 2012,
“regulated fiduciary activities”	the activities described in section 2 of the Law, when carried on by way of business,
“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.

2. Integrity

FSPs 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, FSPs must deal with clients fairly and communicate information to them in a way which is suitable and not misleading.

This will include notification that the FSP is acting as agent or instructing an agent in relation to particular services where that is the case. It will also include keeping foundation officials sufficiently informed where the FSP is not itself a foundation official.

3. Know your client

FSPs 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. The Handbook, which includes rules , requires that, where the verification subject is a foundation, the identity of the beneficial and underlying principals such as founders, councillors, guardians or any other person with ultimate effective control over the assets of the foundation should be verified.

Beneficiaries and default recipients shall also be identified and verified in accordance with the relevant sections of the Handbook.

Where an FSP is a foundation official, they should know and have regular contact with all other foundation officials to establish the nature of the activities and assets of foundations and ensure that they are informed of any material changes.

Where an FSP only acts as resident agent of a Guernsey foundation, they must maintain regular contact with foundation officials and be reasonably aware of the nature of the activities and assets of foundations and be aware of any material changes.

Guidance note

The Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations, 2007 and the Handbook apply as much to FSPs as to other financial services businesses. The Handbook provides material specifically for the foundation services sector but FSPs 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. Oversight of Foundations

FSPs acting as a councillor (or similar role) must act in good faith when exercising their functions and subject to the terms of any constitutional documentation and their legal obligations to other persons or bodies.

In particular, FSPs should:

- invest, distribute or otherwise manage each foundation’s assets in accordance with the law and the foundation’s constitutional documents,
- manage the investment and custody of foundation assets professionally and responsibly,
- provide promptly to beneficiaries information to which they are entitled about a foundation.

FSPs acting as guardians of Guernsey foundations must comply with the duties set out within section 19(2) of the Foundations (Guernsey) Law, 2012.

5. Client agreements

FSPs should discuss terms of business with at least one of; the founder; the foundation; or such other person as is regarded as the client, and as the FSP deems appropriate and keep a written record of the terms of the agreement with that person, including evidence of their agreement to those terms. That agreement should include a:

- clear description of the services to be provided and fees to be charged,
- record of how and by whom requests for action are to be given,
- record of any provision for the termination of the agreement and the consequences of termination,
- description of the FSP's procedure for dealing with any complaints, and
- statement that the FSP is licensed by the Commission.

Guidance note

FSPs should consider carefully with whom to enter into client agreements being mindful that this will be dependent on the stage at which and by whom they are engaged and the specific services they are asked to perform.

The Commission regards the points listed above as central (not exhaustive) in any agreement for the provision of foundations services.

6. Competence and effective management

An FSP should, through its staff:

- understand and comply with its statutory, contractual and other legal obligations,
- identify, avoid or deal properly with any conflict of interest,
- ensure that any person who it arranges to act as a foundation official is fit and proper to do so (within the meaning of paragraph 3(2)(a) to (g) of Schedule 1 to the Law),
- keep the affairs of clients confidential 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,
- keep the funds of each foundation separate from each other and from the FSP's own funds,
- keep and preserve (so far as appropriate for the FSP's retainer and for at least as long as required by any applicable law) appropriate records including proceedings at council

meetings, accounting records, registers, records of material communications with clients and others,

- maintain records as required by section 22 of the Foundations (Guernsey) Law, 2012, where providing a registered office for a Guernsey foundation prepare and file forms, documents and accounts as required by any applicable law, unless the agreement with the client provides that the client will do so,
- 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,
- record, investigate and, as appropriate, act on complaints,
- satisfy the “four-eyes” criterion (save where they are the holder of a personal fiduciary licence resident in Guernsey),
- record and monitor compliance with the Law and this Code.

Holders of a full fiduciary licence should:

- have effective management and systems and suitably chosen, trained and supervised staff to comply with this principle,
- 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 roles,
- 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 an FSP needs to comply with this principle will depend upon the nature and scale of its business. The Commission will in each case consider the FSP’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 the constitutional documentation of client foundations and of both the FSP’s duties to foundations and the extent to which the FSP must exercise independent judgement in performing its functions,

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

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

up to date records of all foundations including, for example, details of foundation officials and places of registration, and

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

The requirement for staff to be suitably qualified and experienced for their responsibilities extends to staff who act as foundation officials of foundations and requires them to understand their duties under the laws of the jurisdiction in which those foundations are registered or established and to seek legal or other advice where necessary.

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.

7. Adequate resources

FSPs 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 FSPs 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 FSPs and the range of activities undertaken by them that it is impossible to prescribe scales for solvency, capital adequacy and insurance cover which achieves appropriate results in all cases. Each FSP 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 FSP's business and of the extent to which those risks can be avoided or reduced.

The Commission will generally expect FSPs 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 FSPs which are companies to have a paid-up share capital of substance, the exact level depending on the business of the individual FSP. 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 FSP’s actual and intended activities in each case. Professional indemnity insurance cover needs to include cover against negligence, errors or omissions by the FSP and against any liability it might have for the dishonest acts of its employees. Cover must extend to liabilities which the FSP might incur in any jurisdiction in which it carries on business as a FSP and to liabilities of the FSP’s staff who, in the course of their duties to the FSP, perform functions (for example acting as director) 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 it would be unlikely to 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 FSP or its parent or ultimate parent is of sufficient stature, for self-insurance.

8. Co-operation with regulatory authorities

FSPs 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 FSPs 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 FSP's business, to its insurance arrangements or to the structure of a group of companies of which the FSP is part,

the grant or refusal of any application by the FSP 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 FSP'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 FSP or that any complaint about the FSP has not been resolved within 3 months, a notification to the FSP's professional indemnity insurers, or any payment by the FSP's insurers under its professional indemnity cover,

the commencement of proceedings against the FSP in any country,

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

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 FSP or a company which is a subsidiary or holding company of the FSP, or the summoning of any meeting to consider a resolution to wind up the FSP or a subsidiary or holding company of it,

the making of an application to wind up or dissolve any FSP 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 FSP or any holding company or subsidiary,

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

the conviction of the FSP, its holding company or subsidiary or any member of staff of the FSP 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 FSPs to behave towards their regulators in an open and cooperative 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.