

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

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Feedback statement on the new Fiduciary Rules, 2021 Consultation Paper

We asked

We asked for feedback on proposals to replace the current Fiduciary Rules, 2020 (and certain other associated secondary legislation as set out in the Consultation Paper) with the Fiduciary Rules, 2021.

You said

Eleven responses were received from a cross section of industry, including licensees, a law firm and industry representative bodies.

We did

Proposals relating to the re-categorisation of fiduciary licences.

A summary of the feedback received, together with the Commission's responses, are presented below.

Definition of “actively trade”

Half of the respondents either had no comments on the proposed definition or provided some minor drafting suggestions. Other respondents highlighted the following points:

- Some respondents raised a concern that the proposed definition might conflict with the statutory definition of carrying on activity “by way of business”;
- One respondent suggested that the definition should be consistent with accounting recognition of income;
- Two respondents questioned the application of the draft Guidance Note on page 5 of the draft Fiduciary Rules, 2021 with respect to invoicing practice; and
- One respondent expressed the view that the proposed definition may conflict with the provisions of the Trusts (Guernsey) Law 2007 (the “Trusts Law”).

Commission response

The definition of “actively trade” and associated guidance have been amended with a view to address the concerns raised in respect of the potential inconsistency with the “by way of business” test and increasing the clarity of guidance. The definition

is now more closely linked to the recognition of income from fiduciary activity on a firm's income statement. These changes are presented below, for ease of reference:

Consultation definition of "actively trade":

"actively trade" means 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;

New definition of "actively trade":

"actively trade" means to provide services, classed as regulated activity under the Law, to third parties for which a fee, commission, or other form of income is received directly by the licensee and recognised on its income statement.

Regarding the comment concerning the Trusts Law, the Commission remains respectful of the jurisdiction of the Court in relation to the Trusts Law. The Commission would like to highlight that the proposed rules concerning the prohibition of secondary fiduciary licensees from actively trading are expected to formalise the current practice whereby most joint licensees are passive and are not operating independently from a lead licensee. We believe that professional trustees are currently relying on s.24 of the Trusts Law (specifically s.24(a), (b) and (iii)) and the terms of the trusts when a lead licensee receives fee income from services provided by their joint licensees.

In addition to the above, some drafting changes have been made to rules and guidance in Part 1A to provide for consistency, as suggested by some respondents.

Requirement for a secondary fiduciary licensee to designate a single primary fiduciary licensee

The majority of respondents had no comment on the proposal. Three respondents questioned the rationale as to why a secondary fiduciary licensee is not permitted to act for more than one primary fiduciary licensee.

Commission response

Currently, each joint licensee is clearly nominated to one lead licensee. It is the Commission's view that this current practice should continue to apply. Designation as a secondary licensee, and the regulatory carve-outs associated with designation, are contingent on the clarity provided by the sharing of common staff, procedures and clients between the two licensees. Permitting a licensee to be designated as being secondary to multiple, separate primary fiduciary licensees would pose supervisory and practical challenges including the on-going reporting obligations of the secondary licensees. For these reasons the Commission's position remains unchanged from that proposed in the Consultation Paper.

Minor changes to the draft rules have been made to improve clarity and a table summarising the key characteristics of the new categories of licences has also now been added to the Guidance Note to Rule 1A.2. The new Guidance Note (showing changes to the Consultation Paper version of the guidance note) is presented below:

Guidance Note:

Key characteristics of the new categories can be summarised as follows:

	Primary fiduciary licence	Secondary fiduciary licence	Reference
Corporate director	Cannot have a corporate director on the board.	May have (and may be) a corporate director.	Section 4(2)(b) and 4(3)(b) of the Law.
Ownership	No specific requirements nor prohibition regarding ownership in the Law.	May only be granted to an entity which is a subsidiary of, or wholly beneficially owned by, a primary fiduciary licensee or the holding company of a primary fiduciary licensee.	Section 4(3)(a) of the Law.
"Actively trade"	No prohibition and therefore can actively trade.	Cannot actively trade.	Rule 1A.2.
Others	Common staff, procedures and clients.		The Financial Commission (Fees) Regulations continue to apply.

"Actively trade" Actively trading

Regardless of which entity charges the client for the service (the primary licensee or another group entity), it is expected that payment from the client would not be received directly by the secondary licensee.

It is the Commission's view that a secondary **fiduciary** licensee's role is to provide certain, specific, regulated fiduciary services to the clients of its primary **fiduciary** licensee only. A secondary **fiduciary** licensee is not expected to trade independently from its primary **fiduciary** licensee in respect of regulated fiduciary services, e.g. by providing fiduciary services to clients who are unrelated to the clients of the primary **fiduciary** licensee.

While a secondary fiduciary licensee must not actively trade, this does not preclude a secondary fiduciary licensee from being deemed to carry on its activities by way of business, as defined by section 59(3) of the Law. A secondary fiduciary licensee would be deemed to carry on its activities by way of business if any income, fee, emolument or other consideration in money or money's worth is received by the relevant primary fiduciary licensee in connection with the activities of the secondary fiduciary licensee.

For the avoidance of doubt, a secondary fiduciary licensee shall not be deemed to actively trade if it receives (i) reimbursement of its expenses or (ii) sums to make it whole in respect of any existing liabilities it may have.

The automatic re-categorisation of Joint Licensees into Secondary Licensees upon enactment of the 2020 Fiduciaries Law

Most respondents agreed with the proposed automatic re-categorisation of licences, as set out in the Consultation Paper, noting the efficiency and the reduced administrative burden on licensees. One respondent, while supportive of the proposals, raised the concern that the automatic re-categorisation of licences may create uncertainty for licensees as to whether they will become a primary or secondary fiduciary licensee upon the enactment of the 2020 Fiduciaries Law.

Commission response

On the commencement of the 2020 Fiduciaries Law on the 1 November 2021, all lead fiduciary licensees will be automatically converted to primary fiduciary

licensees as per section 60(1)(b)(i) of the Law. All joint licensees will be converted to secondary licensees as per section 61(1)(b) of the Law and rule 1A.1(1)(b) of the proposed Fiduciary Rules, 2021. The Commission will be sending a notice to all full fiduciary licensees (lead and joint licensees) confirming the future conversion of licences. It is expected that in most cases no action will be required by licensees. Only joint licensees which do not wish to be re-categorised as a secondary fiduciary licensee are required to advise the Commission. In such circumstances the licensee will be required to meet all the regulatory requirements applicable to a primary fiduciary licensee. If the Commission is not notified otherwise by a joint licensee, it will be deemed that the licensee agrees to the conversion for the purpose of section 61(1)(b) of the Law.

Proposals relating to the provisions for annual returns and the removal of restrictions on advertising by PFLs.

Respondents were supportive of the proposals in the consultation paper and accordingly the Fiduciary Rules, 2021 will repeal the Regulation of Fiduciaries (Annual Return) Regulations, 2017 and the Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations, 2012.

Other comments

The Fiduciary Rules, 2021 and their applications

Two respondents commented that certain rules in the Fiduciary Rules should not apply to secondary fiduciary licensees.

Commission response

The Commission has considered the comments and has taken the decision to retain the drafting as consulted upon. In reaching the decision, the Commission carefully reviewed the rules and deemed that they should continue to apply to secondary fiduciary licensees, where appropriate.

Under the current framework and following the enactment of the 2020 Fiduciaries Law, the lead (primary) and joint (secondary) fiduciary licensees are, and will remain, licensees under the Law. Despite having certain commonalities to their primary fiduciary licensee, a secondary fiduciary licensee is a separate legal entity from its primary and therefore should be subject to the Fiduciary Rules, where applicable.

Changes to other rules not related to the re-categorisation of licences, the annual return or the advertisement of PFLs

Three respondents suggested some changes to other provisions of the Fiduciary Rules, 2021 unrelated to the Revision of Laws process.

Commission response

The Commission notes the comments and suggestions, however, these are outside the scope of this consultation which is restricted to rule amendments arising from the revision to the Fiduciaries Law. The decision to keep the exercise limited, in this way, was made due to the large amount of work that had to be undertaken to ensure that, the Fiduciary Rules 2021, and all the other statutory instruments made under the revised regulatory laws, could be properly considered. Any new future specific proposals for policy revision would be better dealt with through a separate consultation.

Links:

- [Revised draft Fiduciary Rules and Guidance](#)
 - [Notice to licensees](#)
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Overview

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 paper^[1] 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 paper^[2] 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](#).

Related

➔ [Appendix 1 - Draft Fiduciary Rules and Guidance 2021](#)

➔ [Appendix 2 - Draft Fiduciary Rules and Guidance 2021 - tracked version](#)

➔ [Consultation Paper on the new Fiduciary Rules - pdf version](#)

Audiences

Consumer Financial Advisor Financial Services Business FinTech Lending, Credit & Finance Business
NRFSB Prescribed Business Lenders FSPID Team ExCo Banks All staff ExCo Pension Committee
NED Forum

THE FIDUCIARY RULES AND GUIDANCE, 2021:

ACTING WITH INTEGRITY

The Fiduciary Rules, made in accordance with The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2020 (“the Law”) are set out in this document.

Guidance, provided by Guernsey Financial Services Commission (“the Commission”) is set out in the blue boxes.

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PART 1 - INTRODUCTION

1.1 Application

- (1) These Rules replace -
 - (a) The Fiduciary Rules 2020¹; and
 - (b) The Regulation of Fiduciaries (Annual Return) Regulation, 2017².
- (2) The Commission may in its absolute discretion, by written notice to a licensed fiduciary, exclude or modify the application of any provision of these Rules.

Guidance Note: This document takes a two-level approach –

- the Rules set out the standards to be met by the licensed fiduciary; and
- guidance notes present suggested ways of showing compliance with the Rules.

Licensed fiduciaries may adopt alternative measures to those set out in the guidance so long as it is possible to demonstrate that such measures achieve compliance.

The text contained in shaded boxes contains guidance from the Commission and does not form part of the Rules.

¹ No. 12 of 2020.

² No. 27 of 2017.

PART 1A – PRIMARY AND SECONDARY LICENCES

1A.1 Conversion of primary fiduciary licences to secondary fiduciary licences

- (1) A primary licence may be converted to a secondary licence either –
 - (a) on the application, to the Commission, by the licensee; or
 - (b) by the Commission, with the agreement of the licensee.
- (2) Applications for conversion must include confirmation that the requirements of section 4 of the Law are met.

Guidance Note:

Where a secondary licence holder wishes to become a primary licensee a new licence application must be submitted to the Commission.

1A.2 Requirements of secondary fiduciary licensees

- (1) Secondary licence holders must be associated with a designated primary licensee, and the Commission must be notified of this designation-
 - (a) on application for a new secondary licence;
 - (b) on application for the conversion of an existing primary licence to a secondary licence; and
 - (c) immediately where the designated primary licensee changes.
- (2) Holders of secondary fiduciary licences are prohibited from undertaking any activities which fall within the definition of actively trading.

Guidance Note:

Actively trading

Regardless of which entity charges the client for the service (the primary licensee or another group entity), it is expected that payment from the client would not be received directly by the secondary licensee.

It is 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 not expected to trade independently from its primary licensee in respect of regulated fiduciary services, e.g. by providing fiduciary services to clients who are unrelated to the clients of the primary licensee.

PART 2 – CORPORATE GOVERNANCE AND EFFECTIVE MANAGEMENT

2.1 Corporate Governance

2.1.1 Application

- (1) Rule 2.1 applies to primary and secondary fiduciary licence holders.

2.1.2 Board and Senior Management

- (1) The Board and senior management, of a licensed fiduciary, must take all reasonable steps to ensure that all employees of the licensed fiduciary act so as to avoid material damage either to -
- (a) the licensee's reputation;
 - (b) the licensee's financial position; and
 - (c) the reputation of the Bailiwick as an international finance centre.
- (2) The Board of a licensed fiduciary –
- (a) must ensure that the licenced fiduciary –
 - (i) has in place effective and appropriate policies, procedures and controls to ensure compliance with these Rules and all other relevant legislation;
 - (ii) recruits, trains and supervises relevant personnel to ensure compliance with these Rules and all other relevant legislation; and
 - (iii) operates robust arrangements for meeting the requirements of these Rules and all other relevant legislation;
 - (b) retains responsibility for any functions it outsources at all times; and

- (c) must evaluate its compliance with the Code of Corporate Governance³.

2.2 Competence and effective management

- (1) A licensed fiduciary must comply with the Rules and, where applicable –
 - (a) understand and discharge fiduciary duties or other duties arising under the trust deeds and the legislation applicable to each trust; and
 - (b) understand and comply with its contractual and other legal obligations arising under any relevant client contracts or any relevant legislation.
- (2) A licensed fiduciary which holds a primary or a secondary fiduciary licence must –
 - (a) ensure that the responsibilities and authority of relevant personnel are clear and appropriate to his or her qualifications and experience;
 - (b) ensure that any person for whom it arranges to act as a director of a client company, a foundation official or a trustee understands their duties and is fit and proper to do so;
 - (c) record and monitor compliance with these Rules and all other relevant legislation;
 - (d) keep a breaches register which logs all instances of non-compliance with these Rules; and
 - (e) satisfy the minimum criteria for licensing.

³ Instrument made on 30 September 2011.

Guidance Note:

The personnel, and procedures followed, will be assessed by the Commission, with reference to the nature and scale of the business. The Commission will in each case consider the licensed fiduciary's resources and systems as a whole but, for example, may want to see evidence of -

- for a Trust Service Provider ("TSP"), an understanding on the part of the personnel of both the TSPs' duties to clients and the extent to which the TSP must exercise independent judgement in performing its functions;
- for a Corporate Service Provider ("CSP"), an understanding on the part of the personnel of the memorandum and articles of association or incorporation (or equivalent documents) of client companies and of both the CSPs' duties to client companies and the extent to which the CSP must exercise independent judgement in performing its functions;
- for a Pension Service Provider ("PSP"), an understanding on the part of the personnel of the governing documentation of client pension schemes and of both the PSPs' duties to clients and the extent to which the PSP must exercise independent judgement in performing its functions; and
- for a Foundation Service Provider ("FSP"), an understanding on the part of the personnel of the constitutional documentation of client foundations and of both the FSPs' duties to foundations and the extent to which the FSP must exercise independent judgement in performing its functions.

Where a licensed fiduciary, whether a personal fiduciary licensee, a primary fiduciary licensee or a secondary fiduciary licensee, acts as director of a company, compliance with rule 2.2(1) may involve obtaining necessary advice, for example, on the law of the jurisdiction in which the company is incorporated or carries on its activities.

Guidance Note:

Fit and Proper – is as defined in Schedule 1 of the Law and the “Fit and Proper Guidance” issued by the Commission (5th October 2018).

4-eyes Criterion

Paragraph 3 of Schedule 1 of the Law requires that the business of a primary or a secondary fiduciary licence holder is directed by at least two individuals (the “4-eyes criterion”). In addition to (1) and (2) of paragraph 3, it is expected that the individuals:

- will be either executive directors or persons granted powers by, and reporting immediately to, the Board. This is 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;
- have sufficient understanding and time available to discharge their duties effectively, taking into account the number and importance of their other commitments; and
- are of 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.

2.2.1 Records of the licensed fiduciary's own business

- (1) A licensed fiduciary, in relation to its own business, must ensure that all appropriate records are kept up to date, complete and accurate.

Guidance Note:

These records may include, but are not limited to, its –

- (a) business transactions;
- (b) financial position;
- (c) internal organisation;
- (d) risk management systems; and
- (e) Board and management minutes.

2.3 Conflict of interest

- (1) Subject to the terms of any constitutional documents and applicable laws, a licensed fiduciary must –

- (a) be impartial;
- (b) not unfairly place its interests above those of its clients; and
- (c) ensure fair treatment between clients.

- (2) A licensed fiduciary must –

- (a) establish, implement and maintain an effective written conflicts of interest policy which is appropriate to the nature, scale and complexity of the business;

- (b) ensure that adequate procedures are implemented to either avoid any conflict of interest arising or, where conflicts do arise, manage or minimise them;
- (c) keep records of any conflicts of interest and how they are managed;
- (d) without prejudice to these Rules, the AML Handbook⁴, the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003⁵ and any other related legislation, not solicit, receive or accept bribes or gifts, inducements, rewards or advantage that are likely to conflict with the licensees' duty to any client;
- (e) not profit from holding Fiduciary Client Money.

Guidance Note:

1) Licensed fiduciaries are prohibited from receiving and retaining any commission or monetary or non-monetary benefits from the holding of Fiduciary Client Money. Benefits can be received but they must be passed on to clients, in a similar manner as to how fees/ charges incurred on client bank accounts are passed on to clients.

2) For the avoidance of doubt, the following does not amount to profiting:

- covering the costs such as time charged fee or software licence/ programme to run or manage pooled accounts;
- in the case of a pooled account, *de minimis* interest retained by the licensed fiduciary providing that the licensed fiduciary has considered and can evidence that such interest could not be cost-effectively distributed to the benefit of clients.

2.4 Account rules

2.4.1 Accounting records and accounting period of a licensed fiduciary

- (1) The accounting records of a licensed fiduciary must –

⁴ Handbook on Countering Financial Crime and Terrorist Financing, Guernsey Financial Services Commission.

⁵ Order in Council No.1 of 2004.

- (a) show and explain transactions;
 - (b) enable financial statements to be prepared; and
 - (c) present, with reasonable accuracy at any time, all assets, liabilities, income and expenditure.
- (2) The accounting period, of a licensed fiduciary, must be set and –
- (a) must not exceed 12 months, and
 - (b) must not be altered, without prior written permission from the Commission.

2.4.2 Reporting to the Commission

Personal Fiduciary Licence Holders

- (1) The Commission must be provided annually as part of the Annual Return, with particulars of the licensee's financial position, with regards to regulated activities.

Guidance Note:

The particulars referred to in rule 2.4.2(1) do not have to take the form of a financial statement. A statement of the income from, and any liabilities relating to, the personal fiduciary licence holder's regulated activities for the accounting period is sufficient.

Primary and Secondary Fiduciary Licence Holders

- (2) Licensees shall appoint an auditor and ensure that the appointment is maintained at all times.
- (3) The Commission must be provided with financial statements in relation to each accounting period and within four months of the end of that accounting period unless the Licensee is also licensed under another Regulatory Law and receives

written agreement from the Commission that reporting requirements under that Regulatory Law take precedence.

(4) Financial statements –

- (a) may be provided as consolidated group financial statements where the group comprises more than one licensed fiduciary;
 - (b) must present a true and fair view of the financial position at the end of that accounting period;
 - (c) must present a true and fair view of any profit and loss during that accounting period;
 - (d) must be prepared in accordance with United Kingdom accounting standards⁶, United States accounting standards⁷ or International Financial Reporting Standards⁸; and
 - (e) must be accompanied by an auditor's report prepared in accordance with the International Standards on Auditing issued by the Financial Reporting Council or the International Standards on Auditing issued by the International Auditing and Assurance Standards Board.
- (5) If, during the accounting period, the licensee has received any reports prepared by an internal or external auditor, an accountant or a consultant which address the breakdown of, or any material weakness in, internal control procedures then these reports must be provided with the financial statements.
- (6) Management letters received from external auditors must be submitted together with the financial statements.

⁶ As issued by the Financial Reporting Council.

⁷ As issued by the Financial Accounting Standards Board.

⁸ As issued by the International Accounting Standards Board.

2.4.3 Electronic filing

- (1) Returns filed, with the Commission, under rule 2.4 must be submitted in such electronic format as the Commission makes available.

2.4A Annual Return

- (1) The Annual Return must be submitted in such electronic format as the Commission makes available.
- (2) A person who held a primary licence at the end of the Annual Return Period must make an Annual Return, to the Commission, of their regulated activity and of the regulated activity for each of the secondary licensees for which it is the designated primary.
- (3) A person who held a personal fiduciary licence at the end of the Annual Return Period, must make an Annual Return, to the Commission, of their regulated activity.
- (4) An Annual Return must be made, to the Commission, within two calendar months of the end of the Annual Returns Period to which it relates.

2.5 Fiduciary Client Money

2.5.1 Application and definition

- (1) Rule 2.5 applies to licensed fiduciaries which hold or have control of Fiduciary Client Money.
- (2) "Fiduciary Client Money" means money which is –
 - (a) held or received on behalf of a client; or
 - (b) controlled by a licensed fiduciary

in accordance with the responsibilities the licensed fiduciary has accepted in the course of carrying on a regulated activity under the Law.

- (3) Where there is more than one licensed fiduciary controlling Fiduciary Client Money, a licensed fiduciary may, under written agreement, rely on another licensed fiduciary to take action in order to meet requirements under certain rules providing they are satisfied that the Rules have been complied with.

Guidance Note:

The Law defines "clients", in relation to any person, to mean –

- (a) persons who have entered into or may enter into agreements for the provision of services by that person when carrying on by way of business any regulated activities, or
- (b) persons who have received or may reasonably expect to receive the benefit of services provided or arranged or to be provided or arranged by that person when carrying on by way of business any regulated activities.

It should be noted that the definition of “clients” in the Law may differ from the common understanding of the term used by some TSPs and may include both settlors and beneficiaries.

2.5.2 Policies, procedures and controls

- (1) A licensed fiduciary must have in place policies, procedures and controls, appropriate to the nature and scale of its operations, which prevent the inappropriate use of Fiduciary Client Money.

2.5.3 Disclosure

- (1) A licensed fiduciary must, where relevant, inform any person with whom they propose to enter into a contract or agreement in respect of the provision of regulated activities of the terms upon which Fiduciary Client Money is held.

2.5.4 Operation of Bank Accounts

- (1) A licensed fiduciary must ensure that Fiduciary Client Money is held –
 - (a) in a Client Bank Account or a Client Entity Bank Account;
 - (b) separately from its own money; and
 - (c) separately from another client's money.
- (2) Rule 2.5.4(1)(c) does not apply to –
 - (a) multi-member pension schemes, including occupational pension schemes; and
 - (b) pooled accounts where specific requirements under rule 2.5.5 apply.
- (3) The title of the Client Bank Account shall sufficiently distinguish the account from any other account containing money that belongs to the licensed fiduciary.
- (4) Prior to holding or receiving any Fiduciary Client Money into a Client Bank Account, a licensed fiduciary must receive a written acknowledgement from the bank that –
 - (a) all money standing to the credit of the account is held by the licensee as a trustee; and
 - (b) the bank is not entitled to combine the account with any other account or exercise any right of set-off or counterclaim against money in the account in respect of a debt or other obligation owed to it by the licensee.

2.5.5 Pooled Accounts

- (1) A pooled account can be used to hold Fiduciary Client Money for one of the following reasons –
 - (a) operational efficacy;
 - (b) cash management or treasury services; or
 - (c) due to an exceptional circumstance where the licensed fiduciary is unable to segregate the money of one client from that of other clients.
- (2) For the purposes of rule 2.5.5(1)(c) the licensed fiduciary must inform the Commission of the circumstances preventing the money from being segregated.
- (3) When a pooled account is used to hold Fiduciary Client Money, the licensed fiduciary must ensure that this is clearly and specifically agreed with the client.
- (4) The licensed fiduciary must be able to promptly identify the individual balance due to each client from a pooled account.

Guidance Note:

Examples of how a pooled account may be used –

- to receive client funds immediately prior to opening a Client Bank Account or a Client Entity Bank Account;
- for operational efficacy such as paying registry fees on behalf of a number of client companies, taking fees or making a payment by cheque where the Client Bank Account or Client Entity Bank Account does not have a cheque book or making limited or one-off distributions or onward investment at the end of a client relationship.

2.5.6

Withdrawal of Fiduciary Client Money

- (1) A licensed fiduciary must have procedures in place for ensuring that all withdrawals from a Client Bank Account or a Client Entity Bank Account are –
 - (a) subject to the appropriate level of authorisation and, at a minimum, dual authorisation; and
 - (b) in accordance with any constitutional documents.
- (2) A licensed fiduciary must not withdraw money from a Client Bank Account or a Client Entity Bank Account unless –
 - (a) it is not Fiduciary Client Money;
 - (b) it is properly payable by or on behalf of a client, or in respect of a client; or
 - (c) it is properly transferred to another Client Bank Account or a Client Entity Bank Account or into a bank account in the client's own name.
- (3) A licensed fiduciary must not withdraw Fiduciary Client Money to pay for outstanding fees unless permitted under the trust deed, the terms of business or with the agreement of the relevant client.

Guidance Note:

The relevant client referred to in rule 2.5.6(3) may be the settlor or the person whom the licensed fiduciary entered into a contract with, as the case may be.

2.5.7

Overdrawn

- (1) As far as possible a licensed fiduciary must ensure that –
 - (a) a pooled Client Bank Account does not become overdrawn;

- (b) a Client Bank Account, that is not pooled, does not become inadvertently overdrawn.

Guidance Note:

In the event that a Client Bank Account becomes overdrawn in breach of rule 2.5.7 (1)(a) or (b), the licensed fiduciary should seek to rectify the position as quickly as possible. The licensed fiduciary may use its own money in order to restore, in whole or in part, any money paid out of the Client Bank Account in contravention of the Rules or to restore the Client Bank Account out of an overdrawn position.

2.5.8 Reconciliation

- (1) A licensed fiduciary must ensure that a reconciliation is carried out between its records of Fiduciary Client Money and records or statements from a bank in which that Fiduciary Client Money is kept.
- (2) A licensed fiduciary shall determine the appropriate frequency of reconciliation and perform the reconciliation promptly.
- (3) A licensed fiduciary must maintain accurate and up to date records in relation to Fiduciary Client Money which enable it to promptly identify the balance due to each client and which are in a form that allows timely reconciliation.

- (4) When a discrepancy is identified, during reconciliation, a licensed fiduciary must investigate the reason for the discrepancy and take all reasonable steps to resolve it without delay.

Guidance Note:

In determining the appropriate frequency of reconciliation of a Client Bank Account or a Client Entity Bank Account, a licensed fiduciary should consider factors, including -

- volume, frequency and value of transactions;
- the nature and complexity of the business to which the transactions relate; and
- risks associated with the transactions.

Regular reconciliations are an important control and can minimise losses through early detection of problems.

The Commission expects, as a minimum and subject to consideration of the above factors, that the reconciliation should be carried out -

- (i) for a Client Bank Account
 - at least on a monthly basis for a pooled account;
 - at least annually for a non-pooled account, or more regularly on the basis of the volume and frequency of transaction;
- (ii) for a Client Entity Bank Account, at a minimum annually, or more regularly on the basis of the volume and frequency of transactions.

‘Discrepancy’ refers to the situation where records of Fiduciary Client Money, kept by the licensed fiduciary, do not match the statement received from the bank in which it is held.

2.5.9 Review of controls over Fiduciary Client Money

- (1) A licensed fiduciary must implement an annual independent review of the controls over Fiduciary Client Money. The review must –
- (a) verify the effectiveness of the controls with particular regard to the prevention of –
 - (i) loss;

- (ii) misuse; and
- (iii) misappropriation

of Fiduciary Client Money; and

- (b) be performed by an appropriate, independent person who may be an internal or external party.

- (2) The review under rule 2.5.9(1) does not include Client Entity Bank Accounts.

Guidance Note:

Where an internal party performs such a review they should be operationally independent from the individuals or functions responsible for the functioning of the control processes.

2.6 Record keeping

2.6.1 Application

- (1) Rule 2.6.2(1) does not apply to Pension Service Providers (“PSPs”). When carrying out pension business a PSP should refer to rule 2.6 of The Pension Scheme and Gratuity Scheme Rules, 2021 for record keeping requirements.

2.6.2 Adequate Records

- (1) A licensed fiduciary must ensure that adequate records relating to regulated activities are kept and preserved. Such records should include, but are not limited to, the following –
 - (a) in the case of a Trust Service Provider (“TSP”); records of all trusts including, but not limited to, details of the trust –
 - (i) property;

- (ii) material communications with clients, client companies and others;
 - (iii) accounting records;
 - (iv) tax records; and
 - (v) minutes of meetings held;
- (b) in the case of a Corporate Service Provider (“CSP”); records of all client corporate entities including, but not limited to, details of their –
- (i) managers, as defined in the Law;
 - (ii) jurisdictions of incorporation;
 - (iii) accounting records;
 - (iv) company registers;
 - (v) material communications with clients, client companies and others; and
 - (vi) proceedings of company meetings;
- (c) in the case of a foundation service provider (“FSP”); records of all foundations including, but not limited to, details of –
- (i) foundation officials;
 - (ii) places of registration;
 - (iii) accounting records;
 - (iv) registers;
 - (v) material communications with clients and others; and
 - (vi) proceedings at council meetings

so far as appropriate for the licensed fiduciary’s functions.

- (2) A licensed fiduciary must ensure that it has appropriate record keeping arrangements in accordance with its functions and in compliance with these Rules and any other applicable legislation. These arrangements must –
- (a) deliver effective information and document management ensuring that all relevant records are –
- (i) as up-to-date as is reasonable;
 - (ii) filed and arranged so as to permit prompt access to any particular record;
 - (iii) in a form capable of prompt reproduction into English; and
 - (iv) capable of being checked or audited so as to demonstrate compliance with any applicable laws, regulations and rules.

Guidance Note:

Rule 2.6.2(2)(a)(iii) requires that records held by a licensed fiduciary, relevant to the performance of its regulated activities, are capable of reproduction into English. It is not expected that all records held by a licensed fiduciary must be translated into English.

Personal Fiduciary Licensee

When carrying out regulated activities where there is another licensed fiduciary carrying out a similar role, a licensed fiduciary holding a personal licence may, upon written agreement, rely on another licensed fiduciary to keep and preserve the records as required under this rule providing that they are satisfied that the Rules are complied with.

Although a Personal Fiduciary Licensee may rely on another licensed fiduciary regarding record keeping it is, ultimately, the responsibility of the Personal Fiduciary Licensee to ensure compliance with this rule.

2.6.3 Data security

- (1) A licensed fiduciary must maintain adequate policies and procedures for the maintenance, security, privacy and preservation of all documents and records

belonging to the licensed fiduciary and its clients so that they are reasonably safeguarded against loss, unauthorised access, alteration or destruction.

- (2) Any policies and procedures must conform with the Data Protection (Bailiwick of Guernsey) Law, 2017⁹.

2.6.4 Retention of records

- (1) A licensed fiduciary must keep and preserve for a minimum of six years or for a period required under an applicable law, whichever is greater –
 - (a) records of its own business prepared in accordance with these Rules; and
 - (b) any documents relating to clients which were prepared in compliance with these Rules.
- (2) A licensed fiduciary which is ceasing to carry out regulated activities must have appropriate arrangements to retain all documents and records, prepared in accordance with these Rules, for a minimum period of six years following the surrender of the fiduciary licence. The Commission may extend this period by serving written notice prior to the end of the initial six year period.
- (3) Where a licensed fiduciary is aware of any matter which is subject to investigatory or disciplinary procedures, or appeals against such procedures, all documents which are, or may be, relevant to this matter must not be amended or destroyed without written consent from the Commission.

2.6.5 Outsourcing record maintenance

- (1) Where the licensed fiduciary outsources the maintenance of its own records, client records, or both, the licensed fiduciary must ensure it is satisfied that –
 - (a) the documents are kept secure and any operational risks are appropriately managed;
 - (b) the records are readily accessible;

⁹ No. VI of 2018.

- (c) all regulatory and confidentiality laws are complied with; and
- (d) the Commission is able to have reasonable access to the records at all reasonable times.

2.7 Outsourcing

2.7.1 Application

- (1) Rule 2.7 does not apply to a personal fiduciary licensee.

Guidance Note:

Rule 2.7 applies to a licensed fiduciary holding a primary or secondary fiduciary licence in respect of outsourcing irrespective of whether it is outsourced to persons within the same group or to third parties.

2.7.2 Board Responsibilities

- (1) A licensed fiduciary may outsource functions but the Board retains responsibility and accountability for the outsourced functions. Such responsibilities include –
 - (a) the maintenance of effective oversight of the outsourced functions; and
 - (b) ensuring that the licensed fiduciary continues to comply with these Rules and all other relevant legislation.

2.7.3 Risk assessment

- (1) The Board of a licensed fiduciary must be aware of and understand the risks arising from outsourcing its functions.

- (2) Where outsourcing is proposed a licensed fiduciary must carry out a risk assessment which includes, but is not limited to –
 - (a) risks associated with a breakdown in the provision of the outsourced services; and
 - (b) risks which could arise from the failure of the outsourced service provider.

2.7.4 Due diligence in selection and monitoring of outsourced service providers and outsourced service provider's performance

- (1) A licensed fiduciary must –
 - (a) exercise due diligence, on the outsourced service provider, to ensure that they can be satisfied that the outsourced service provider has the ability and capacity to undertake the provision of the service effectively;
 - (b) document the capability and suitability of the proposed provider of the outsourced service; and
 - (c) establish clear internal responsibility for monitoring the conduct of the outsourced services and for reporting to the Board.

2.7.5 Outsourcing agreements

- (1) A licensed fiduciary must ensure that there is a written outsourcing agreement in place for each outsourced activity.
- (2) The outsourcing agreement must –
 - (a) have appropriate content reflecting the risks, size and complexity of the outsourcing arrangements; and

(b) for significant outsourcing arrangements, include a contractual requirement for the outsourced service provider to –

(i) give the Commission the right to direct access to material which it holds in relation to the business of the licensed fiduciary; and

(ii) inform and obtain an agreement, from the licensed fiduciary, prior to sub-outsourcing any functions.

2.7.6 Contingency plan

- (1) The licensed fiduciary must ensure that there is, established and maintained, an appropriate contingency plan which enables alternative arrangements to be set up, with minimal disruption, in case of the failure of the outsourced service provider or any other breakdown in the provision of services.

Guidance Note:

In complying with rule 2.7.6 the licensed fiduciary must have in place a contingency plan so as to allow it to act promptly should a failure of an outsourced service provider or a breakdown of its services occur. It does not require the licensed fiduciary to purchase or hold unused capacity.

2.8 Employee screening and training

- (1) A licensed fiduciary shall maintain appropriate and effective procedures when hiring employees, or admitting any person as a partner, for the purpose of ensuring high standards of probity and competence. These procedures should be proportionate to the nature, risk profile and size of the business.
- (2) To ensure that individuals are of the required standard of competence and probity the licensed fiduciary must, at the minimum, give consideration to the collection and confirmation of the following during the recruitment process –

- (a) appropriate references;
 - (b) details of any regulatory action taken against the individual, in any jurisdiction;
 - (c) details of any action, taken against the individual, by any professional body;
 - (d) details of any criminal convictions, including the provision of a check of the individual's criminal record¹⁰; and
 - (e) details of employment history, qualifications and professional memberships.
- (3) A licensed fiduciary must ensure that individuals receive any training which is necessary for their roles and -
- (a) formulate plans for training and development; and
 - (b) keep training and development plans current and relevant.

¹⁰ In accordance with the Rehabilitation of Offenders (Bailiwick of Guernsey) Law 2002, Order in Council No. XIV of 2002.

PART 3 – CONDUCT OF BUSINESS

3.1 Integrity

- (1) As required by Schedule 1 of the Law, a licensed fiduciary must conduct its business with integrity.
- (2) A licensed fiduciary must not attempt to avoid or contract out of its responsibilities set out in these Rules.

3.2 Best interests of clients

- (1) All licensed fiduciaries must –
 - (a) act with due skill, care and diligence to fulfil the responsibilities undertaken;
 - (b) establish and maintain policies, procedures and controls to monitor and ensure there is always the requisite capacity and resources to provide the services agreed with its clients;
 - (c) when responsible for exercising discretion for or in relation to clients, take all reasonable steps to obtain sufficient information in order to exercise discretion, or any other power, in a proper manner;
 - (d) only exercise any power or discretion for a proper purpose;
 - (e) ensure that all decisions taken or transactions entered into, by or on behalf of the clients, are actioned in a timely manner and appropriately authorised and handled by persons with an appropriate level of knowledge, experience and status. This includes the establishment, transfer or closing of business relationships with its clients, where appropriate; and

- (f) maintain confidentiality except where disclosure of information is required or permitted by an applicable law, or authorised by the person to whom the duty of confidentiality is owed.

Guidance Note:

For example, policies and procedures as referred to in 3.2(1)(b) could include –

- the formation of a new business committee; or
- scheduled regular meetings to discuss new business;

Controls as referred to in 3.2(1)(b) could include –

- compliance monitoring programmes; or
- regular reviews of human resources / headcounts.

It is recognised that there will be differences in how this rule applies to a primary or secondary fiduciary licence holder and a personal fiduciary licence holder. As a personal fiduciary licensee is an individual, compliance with this rule, may consist of the personal fiduciary holder showing consideration of its own capacity prior to accepting a new instruction.

3.2.1 Additional rules applying to licensed fiduciaries acting as trustee

(1) A licensed fiduciary acting as a trustee must –

- (a) subject to its legal obligations to other persons or bodies, ensure that the interests of beneficiaries are paramount;
- (b) for a licensed fiduciary holding a primary or secondary fiduciary licence, ensure that any personnel who act as trustees understand their duties under the laws applicable to the trust;
- (c) subject to the terms of the trust and the provisions of the applicable trust law –
 - (i) upon establishing a trust, take all reasonable measures to ensure that settlors receive any necessary professional advice and that the trust is in accordance with their intentions;
 - (ii) identify beneficiaries and their respective interests correctly;

- (iii) be aware of beneficiaries' personal circumstances, including their current needs, residence and domicile, so far as those are relevant;
 - (iv) be impartial;
 - (v) ensure that the trust property is held by or vested in the trustee, or is otherwise under its control;
 - (vi) when acting as a trustee, so far as is reasonable, preserve and enhance the value of the trust property; and
 - (vii) invest, distribute or otherwise manage each trust's assets;
- (d) subject to the terms of the trust, manage the investment and custody of trust assets professionally and responsibly and must –
 - (i) exercise, so far as is required by the duties of the trustees in each case, professional oversight of any company owned by the trust;
 - (ii) consider appointing competent agents and managers, including an investment manager, an investment adviser, a property manager; and
 - (iii) have regard to any different interests of beneficiaries and of classes of beneficiaries;
- (e) where applicable, consult with other trustees;
- (f) consider the tax status of the trust;
- (g) where appropriate, file tax returns and provide information to the beneficiaries to enable them to file their own tax returns; and
- (h) consider and, where appropriate, effect the insurance of trust assets.

Guidance Note:

For the avoidance of doubt, in the case where pension schemes are written under trust, Pension Service Providers are subject to rule 3.2.1.

Appointment of asset managers

A licensed fiduciary must consider whether a relevant expert asset manager should be appointed.

Where an investment manager is appointed, TSPs should record the agreement, instructions, investment parameters and investment benchmarks and require and review regular reports on performance including a valuation and a schedule of assets bought and sold (at least quarterly unless that is inappropriate having regard to the nature of the assets).

If a property manager is appointed TSPs should record any agreements or instructions and require and review regular reports on maintenance of the property and valuation, as appropriate.

Where consideration has been given that no expert should be appointed, TSPs should consider whether regular valuations or other reports are required.

In consideration of a new or ongoing appointment of an expert asset manager a licensed fiduciary should assess whether such an appointment represents value for money. Assessing value for money might include:

- the quality of service provided by the asset manager, including a comparison of the services offered by other asset managers;
- the performance of the asset manager in carrying on the role; and
- the cost of the appointment of the asset manager, including a comparison of the market rates for the services performed;

Reservation of powers

Careful consideration should be given to the terms of the trust especially in the context of the granting, reservation or retention of powers which may adversely affect the validity of the trust.

Exercise of discretion

A TSP exercising discretion, when acting as trustee of a discretionary trust, should be in a position to demonstrate careful consideration in its decision-making and understanding of its actions.

3.2.2 Additional rules applying to primary and secondary fiduciary licensees acting as Corporate Service Providers and personal fiduciary licensees carrying out the regulated activity of acting as director

(1) A licensed fiduciary must –

- (a) subject to its legal obligations to other persons or bodies, consider the interests of client companies first;
- (b) where applicable, ensure that any of its personnel who act as officers of client companies understand their duties under the laws of the jurisdiction in which those client companies are incorporated;
- (c) where applicable, ensure that assets of the client company are in the name of that company or an appropriate nominee;
- (d) where appropriate file accurate returns with the relevant authorities;
- (e) where appropriate consider the tax status of the client company;
- (f) consider and, where appropriate, effect the insurance of assets of the client company; and
- (g) when acting as a director, take all reasonable measures to obtain information sufficient to make a decision regarding the company.

Guidance Note:

The Commission recognises that different types of services can be provided by a licensed fiduciary. Therefore, the term “where appropriate” or “where applicable” are used in rule 3.2.2(1) to reflect this.

In compliance with rule 3.2.2(1), a licensed fiduciary acting as a director of a company should –

- know the company’s business and finances and have full and up to date information on them;
- give continuing consideration to the company’s financial position before authorising any major expenditure or distribution or the declaration of a dividend; and
- ensure that adequate Board meetings are held.

3.2.3 Additional rules applying to licensed fiduciaries acting as Foundation Service Providers

- (1) A primary or secondary fiduciary licence holder, acting as an FSP, must ensure that any of its personnel who act as foundation officials understand their duties under the laws of the jurisdiction in which those foundations are registered or established.
- (2) Where a licensed fiduciary takes on the role of councillor it must –
 - (a) act in good faith when exercising its functions, subject to the terms of any constitutional documentation and its legal obligations to other persons or bodies;
 - (b) invest, distribute or otherwise manage each foundation’s assets in accordance with the applicable law and the foundation’s constitutional documents;
 - (c) manage the investment and custody of foundation assets professionally and responsibly;
 - (d) where appropriate, file accurate returns to the relevant authorities;
 - (e) where appropriate, consider the tax status of the foundation;
 - (f) promptly provide beneficiaries with information, which they are entitled to receive, about the foundation; and

- (g) consider and, where appropriate, effect the insurance of assets of the foundation.
- (3) Where a licensed fiduciary takes on the role of guardian of a foundation it must act in good faith, in the exercise of functions, in order to enforce the foundation's constitutional documents.

3.3 Advertisement and communications with clients

- (1) Without prejudice to the Prospectus Rules, a licensed fiduciary must ensure that its advertising and communications with clients and prospective clients –
 - (a) are clear, suitable, fair and not misleading; and
 - (b) do not contain any statement which is untrue.
- (2) A licensed fiduciary shall take all reasonable steps to ensure that advertisements and communications do not violate the laws of the Bailiwick of Guernsey and, if advertising outside the Bailiwick, the legislation in force in that country or territory.
- (3) The regulatory status of the licensed fiduciary is to be included on written communications, in relation to regulated activities, and is not to be used in a way which is misleading.
- (4) A licensed fiduciary should not signify in any way that an advertisement is approved by the Commission.
- (5) Subject to the terms of the trust, or contract and any applicable legislation a licensed fiduciary must promptly provide clients with information to which they are entitled or, if this is not possible, promptly explain why such information cannot be provided.

3.4 Terms of business in relation to the provision of regulated activities

- (1) A licensed fiduciary must inform any person with whom it proposes to enter into a contract or agreement in respect of the provision of regulated activities, in writing, of its terms of business and must retain a record of that person's agreement to those terms.
- (2) The agreement shall include, but is not limited to –
 - (a) a clear description of the services to be provided;
 - (b) in the case of a CSP, the scope of the licensed fiduciary's discretion, if any;
 - (c) the fees, including exit fees, to be charged including the nature and scale of the fees and the basis of the calculation of those fees;
 - (d) a record of who is responsible for requests for action and how these are to be given;
 - (e) the means by which complaints can be made;
 - (f) details of the licensee's complaints resolution procedures including, where applicable, contact details for the Channel Islands Financial Ombudsman ("CIFO") and a statement that the CIFO may be available to consider complaints which are not resolved through the licensee's complaints resolution procedure;
 - (g) a record of any provision for the termination of the agreement and the consequences of the termination; and
 - (h) a statement that the licensee is licensed by the Commission.

3.5 Interaction with clients

- (1) A licensed fiduciary must charge fees in accordance with the client agreement and in a fair and transparent manner.

- (2) A licensed fiduciary must ensure that the termination of a relationship is conducted in a professional manner and is on reasonable notice, unless good reason can be given.

3.6 Complaints

- (1) A licensed fiduciary must –
 - (a) have and comply with a written procedure for the effective consideration and fair, proper and timely handling of complaints;
 - (b) maintain a log of all complaints and their current status;
 - (c) as appropriate, explain the complaints handling process to clients;
 - (d) keep the complainant informed about the progress of the complaint including details of any actions being taken to resolve the complaint, except where this conflicts with or is prohibited under another law;
 - (e) inform the complainant that, in cases of significant complaints or where a complaint remains unresolved for longer than three months, the licensed fiduciary is under an obligation to inform the Commission of the complaint;
 - (f) advise the complainant when the complaint is considered closed;
 - (g) where the complaint is not upheld, clearly state the reason for rejecting the complaint; and
 - (h) on agreement with the complainant, ensure that the matter is settled as soon as possible.
- (2) Where the status of the complaint is closed, the licensed fiduciary should ensure that the following information is retained –
 - (a) the nature of the complaint;

(b) the reason for the closure of the complaint; and

(c) where applicable, details of any agreed compensation.

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PART 4 - PRUDENTIAL

4.1 Insurance arrangements

- (1) A licensed fiduciary must maintain professional indemnity insurance ("PII") cover which is commensurate with the size and nature of its business.
- (2) The minimum indemnity limit for any one claim, or for aggregate claims, must be the greater of –
 - (a) three times turnover from regulated activities; or
 - (b) £1,000,000where the turnover from regulated activities shall be taken from the previous year's audited financial statements or, for new businesses, estimated turnover for the first year.
- (3) Any excess must not exceed 3% of turnover from regulated activities.
- (4) For a licensed fiduciary, which holds a primary or secondary fiduciary licence, the Commission will consider arrangements under group policies or, where its parent or ultimate parent is of sufficient stature, for self-insurance.
- (5) PII policies must include cover against –
 - (a) negligence, errors or omissions by the licensed fiduciary;
 - (b) any liability for the dishonest acts of employees which may fall on a primary or secondary fiduciary licence holder;
 - (c) liabilities of its employees who, in the course of their duties to the licensed fiduciary, perform functions in their own names; and
 - (d) liabilities which the licensed fiduciary might incur in any jurisdiction in which it carries on business.
- (6) Licensed fiduciaries must also ensure that they hold insurance policies which cover -

- (a) loss and theft of data; and
 - (b) liability for the replacement, restoration or reconstruction of data.
- (7) A licensed fiduciary must have adequate procedures in place to ensure compliance with all terms and conditions set out in its PII policy particularly in relation to the timely notification of events, to its insurer, which may lead to a claim on the policy.

Guidance Note:

For a licensed fiduciary which holds a personal fiduciary licence the insurance arrangement may be provided for by his or her client.

4.2 Financial resources

4.2.1 Application

- (1) Rule 4.2 applies to primary fiduciary licence holders except where the licensee also holds a licence issued under another of the Regulatory Laws.

Guidance Note:

A licensed fiduciary should maintain a sound financial position in order to be able to facilitate an orderly wind down or manage a distressed situation.

4.2.2 Capital base requirements

- (1) A licensee must maintain a minimum of £25,000 paid-up share capital.

4.2.3 Liquidity Requirements

- (1) A licensee must ensure that, at all times, it is able to meet its liabilities as they fall due.
- (2) A licensee must maintain liquid assets not less than 25% of annual expenditure.
- (3) The annual expenditure is the higher of –
 - (a) the total budgeted expenditure for the current year; or
 - (b) the expenditure as per the latest audited financial statements.
- (4) The following items can be deducted from the annual expenditure –
 - (a) depreciation and amortisation;
 - (b) bad debt expense;
 - (c) bonuses paid to employees, including directors, that are entirely discretionary in nature;
 - (d) exceptional costs which are incurred outside the day-to-day activities of the licensee and are not expected to recur and are agreed, in advance, with the Commission; and
 - (e) any other items as permitted by the Commission.
- (5) Liquid assets of a licensee shall be calculated as the sum of –
 - (a) current assets after deduction of any illiquid assets;
 - (b) deduction of current liabilities; and
 - (c) adjustments to allow for qualifying items.

Guidance Note:***Illiquid Assets***

Examples of current assets which are considered illiquid are included in the list below. The list is not exhaustive and therefore a licensee must exercise appropriate judgement when making the adjustment to ensure that assets which could be considered illiquid within a 90-day period are excluded in order to achieve the objective of the liquidity requirements.

1. Debtors which exceed 90 days from the invoice date.
2. Work In Progress which is not receivable within 90 days of the date of the calculation.
3. Any prepayments which relate to goods or services to be received or performed after 90 days of the date of the calculation.
4. Restricted cash and restricted cash equivalents.
5. Amounts due from related parties.

5.1 All amounts due from related parties are considered illiquid unless they are in the normal course of business and the outstanding balances are settled within 90 days. A loan to a related party is not typically considered liquid, even if it could be recovered within 90 days, as this would not be in the normal course of business; and

5.2 Amounts due from related parties cannot be netted-off against amounts due to related parties unless there is a legally enforceable netting agreement in place.

6. Any other items permitted by the Commission.

Qualifying Items

The following list contains items which may be used to adjust the liquid assets when calculating the liquidity requirement.

1. Deferred income – Where a licensee has received income which is billed in advance of it providing the services.
2. Any other items permitted by the Commission.

- (6) The amount of the excess on a licensee's PII ("the PI Excess") should be deducted when calculating liquid assets.
- (7) The amount to be added to the current liabilities in respect of PI Excess is calculated as the PI Excess multiplied by the number of likely excess payments in the forthcoming three month period, subject always to a minimum multiplier of one.

Guidance Note:

Calculation Example

Current Assets	x
Less: Illiquid Assets	<u>(x)</u>
A [Adjusted Current Assets]	x
Less: Current Liabilities	(x)
PI Insurance Excess	<u>(x)</u>
B [Liquid Assets]	x
Add: Any Qualifying Items	x
C [Liquid Assets (as adjusted)]	<u><u>x</u></u>
 Percentage of Liquid Assets to Annual Expenditure	 x
 Liquidity Requirements	 <u>(x)</u>
Liquidity Requirement Excess	<u><u>x</u></u>

4.2.4 Compliance

(1) A licensee must –

- (a) as a minimum calculate and document, every quarter, its compliance with the requirements of rule 4.2.3;
- (b) where the nature of the business requires, undertake the calculation in rule 4.2.3 more frequently than every quarter;
- (c) submit, to the Commission, annually together with the audited financial statements –

- (i) the ratio of the liquid assets to the annual expenditure;
 - (ii) the basis of the calculation; and
 - (iii) a statement by an auditor confirming that rule 4.2.3 is satisfied.
- (2) The Commission may increase the frequency of the calculation set out in rule 4.2.4 (1)(a) to monthly or other such period as it may determine if an event occurs which has, or may have, a material adverse effect on the licensee's financial resources.

4.2.5 Notification

- (1) A licensee must immediately notify the Commission if -
 - (a) the nominal value of its fully paid shares is less than the amount referred to in rule 4.2.2;
 - (b) its liquid assets fall, or are expected to fall below the required amount referred to in rule 4.2.3;
 - (c) it has a reason to believe that it will be unable to meet its liabilities as they fall due;and a full explanation of the circumstances must also be provided at that time.
- (2) If a licensee submits a notification to the Commission it must prepare a documented plan of action which must be made available to the Commission, on request.

Guidance Note:

The plan of action should include consideration of the financial position and actions taken by the Board or partners of the licensed fiduciary.

PART 5 – COOPERATION WITH THE COMMISSION

5.1 General provision

- (1) A licensed fiduciary must deal openly and honestly and cooperate with the Commission and any other regulatory authorities to whose supervision they are subject.

5.2 Notification by a licensed fiduciary

- (1) A licensed fiduciary must notify the Commission in writing as soon as is practicable but, in any case, within 14 days of becoming aware of the following –
 - (a) any significant changes to the information submitted as part of an application for a fiduciary licence;
 - (b) any matter that might reasonably be expected to affect its ability to –
 - (i) maintain the minimum criteria for licensing;
 - (ii) undertake its regulated activities; or
 - (iii) comply with the Rules;
 - (c) the agreement, or refusal, to grant any application made, either by the licensed fiduciary or any holding company or subsidiary, for authorisation to carry on any financial services business in any country or territory;
 - (d) the revocation, or the attachment of conditions to, an authorisation for the licensed fiduciary, its holding company or subsidiary, to carry on any financial services business in any country or territory;

- (e) the commencement of proceedings against a licensed fiduciary, its holding company or subsidiary, in any country or territory;
- (f) the appointment of anyone acting under any regulatory authority to investigate the affairs of the licensed fiduciary, its holding company or subsidiary;
- (g) the imposition of disciplinary measures, or sanctions, against the licensed fiduciary, its holding company or subsidiary, by any regulatory authority;
- (h) the conviction of the licensed fiduciary, its holding company or subsidiary, or any personnel of any offence, under any jurisdiction, relating to financial services, companies or insolvency laws where such offences involve fraud, dishonesty, money laundering or tax evasion;
- (i) with regard to outsourcing –
 - (i) any significant outsourcing arrangements entered into;
 - (ii) any material changes to significant outsourcing arrangements; and
 - (iii) where there is a failure of an outsourced service provider or other breakdown in the provision of outsourced services, which causes significant disruption to the licensed fiduciary's business;
- (j) with regard to PII –
 - (i) when a notification under a PII policy is made to its insurer; or
 - (ii) if there is any payment made, by the insurers, under the PII cover;
- (k) with regard to complaints –
 - (i) of any significant complaint made against the licensed fiduciary;
 - (ii) when the licensed fiduciary has been unable to resolve a complaint within three months of the date of the initial receipt of the complaint; or
 - (iii) when a complaint is upheld by the Channel Islands Financial Ombudsman;

- (l) the imposition of a sanction against the licensee following breach determination by the Data Protection Authority;
 - (m) the making, or the proposal for the making, of a compromise or arrangement with any creditors of the licensed fiduciary;
 - (n) the summoning of a meeting to consider a resolution to wind up a licensed fiduciary or any of its holding companies or subsidiaries;
 - (o) the presentation of any application for the commencement of insolvency proceedings including *désastre*, winding up or the appointment of a receiver, administrator or liquidator under the law of any country, or territory, in relation to the licensed fiduciary, or to a company which is a holding company or subsidiary of the licensed fiduciary;
 - (p) the making of an application to wind up, or to dissolve, any licensed fiduciary which is a partnership including limited partnerships and limited liability partnerships;
 - (q) changes to a notification of an approved supervised role;
 - (r) changes to a notification of a vetted supervised role; and
 - (s) changes to a notification of a notified supervised role.
- (2) Notifications made under rule 5.2(1)(o) and (p) above must be accompanied by a cessation of business plan setting out arrangements that the licensed fiduciary proposes to put in place in relation to its clients.

Guidance Note:

This list is not exhaustive and 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 subsection 109(2) of the Financial Services Business (Enforcement Powers)(Bailiwick of Guernsey) Law, 2021, or any provision of the Law.

PART 6 – GENERAL PROVISION

6.1 Interpretation

(1) Terms have their ordinary meaning unless specifically defined in the Law or in these Rules.

(2) The following definitions should be followed -

“4-eyes criterion” has the meaning given to it in paragraph 3 of Schedule 1 to the Law;

“actively trade” means 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;

Guidance Note:

For the purposes of these Rules the term ‘third parties’, within the definition of “actively trade” is intended to include trusts.

“the AML Handbook” means the Handbook on Countering Financial Crime and Terrorist Financing;

“annual expenditure” means total revenue of any type less profit before appropriations. In the case of a loss, the amount of the loss shall be added to the total revenue. Taxation forms a part of the annual expenditure;

“Annual Return Period” means the period of one year commencing on 1st July, in each and every year and ending on the 30th June each and every following year;

“Approved Bank” means an institution which is -

(a) licensed under the Banking Supervision (Bailiwick of Guernsey) Law 2020;

(b) registered under the Banking Business (Jersey) Law 1991¹¹;

¹¹ Chapter 13.075.

- (c) licensed under the Isle of Man Financial Services Act 2008¹² to carry on a regulated activity falling within Class 1 (deposit-taking businesses);
- (d) authorised under the Financial Service and Markets Act 2000¹³ of the United Kingdom to carry on the regulated activity of deposit taking;
- (e) a building society, registered and incorporated under the Building Societies Act 1986¹⁴ of the United Kingdom, which operates a deposit-taking business without restriction;
- (f) a bank which is supervised by the central bank or other banking regulator of a member state of the Organisation for Economic Cooperation and Development (“OECD”);
- (g) a credit institution established in a European Union (“EU”) or European Economic Area (“EEA”) state and duly authorised by the relevant home state regulator; or
- (h) any other bank where the licensee is satisfied with its capital adequacy and that the applicable laws and regulations governing such bank provides a similar level of protection of client money to institutions listed above;

Guidance Note:

For (h), the licensee should ensure that the bank meets the following criteria:

- 1) is subject to regulation by a national banking regulator;
- 2) is required to provide audited accounts annually;
- 3) has minimum net assets of £5 million (or its equivalent in any other currency at the relevant time) and has a surplus of revenue over expenditure for the last 2 financial years; and
- 4) has an annual audit report which is not materially qualified.

“**Board**” has the meaning given to it by section 133 of the Companies (Guernsey) Law, 2008¹⁵ or, in the case of an unincorporated entity, the committee or managing board of a partnership or other similar governing body;

¹² AT 8 of 2008.

¹³ 2000 c. 8.

¹⁴ 1986 c. 83.

¹⁵ Order In Council No. VIII of 2008.

“Client Bank Account” means an account held by a licensed fiduciary at an approved bank which holds, or is intended to hold, money on behalf of one or more clients;

“Client Company” means a body to or for which a Corporate Service Provider has agreed to provide services constituting company administration business;

“Client Entity Bank Account” means an account at an approved bank, in the name of the client or a client-related entity and which is not in the name of a licensed fiduciary;

“company administration business” means the activities described in subsection 2(1)(b)(i) and (ii) 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;

“complaint” means any oral or written expression of dissatisfaction, whether justified or not, from or on behalf of a person about the provision, or failure to provide a financial service in respect of regulated activities which alleges that the complainant has suffered, or may suffer, financial loss, material distress or material inconvenience;

“Corporate Service Provider (“CSP”) means a person carrying on company administration business;

“current liabilities” means the liabilities which are payable within one year;

“foundation business” means the activities described in subsection 2(1)(d) of the Law when carried on by way of business and not exempt from regulation under section 3 of the Law;

“Foundation Service Provider (“FSP”) means a person, whether a corporate or a natural person, carrying on foundation business;

“the AML Handbook” means the Handbook on Countering Financial Crime and Terrorist Financing;

“Outsourcing” means an arrangement, of any form, between a licensed fiduciary, which holds a primary or secondary fiduciary licence, and an outsourced service provider, by which the outsourced service provider performs an activity that would otherwise be undertaken by the licensed fiduciary;

“pension business” means the activities described in subsection 2(1)(e) of the Law when carried on by way of business and not exempt from regulation under section 3 of the Law;

“Pension Service Provider (“PSP”) means a person carrying on pension business;

“regulated activities” means 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;

“significant complaint” means a complaint alleging a breach of the Law, *mala fides*, malpractice or impropriety, or repetition or recurrence of a matter previously complained of (whether significant or otherwise);

“significant outsourcing arrangements” means an outsourcing arrangement which in the event of a service failure or security breach has the potential to –

- (a) materially impact the licensed fiduciary’s business operations, reputation or profitability; or
- (b) materially impact the licensed fiduciary’s ability to manage risk and comply with applicable laws and regulations; or
- (c) involves any unauthorised access or disclosure, loss or theft of client’ information;

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

“Trust Service Provider (“TSP”) means a person, whether a corporate or a natural person, carrying on trust business.

(3) The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016¹⁶ applies to the interpretation of these Rules.

¹⁶ Order in Council No. V of 2018.

(4) A reference in the Rules to an enactment should be taken to include any amendments, re-enactments with or without modification, extensions and applications.

DRAFT

PART 7 –REVOCATIONS, CITATION AND COMMENCEMENT

7.1. Revocations

7.1.1 Revocation of The Fiduciary Rules, 2020

The Fiduciary Rules, 2020 are revoked.

7.1.2 Revocation of The Regulation of Fiduciaries (Annual Return) Regulations, 2017

The Regulation of Fiduciaries (Annual Return) Regulations, 2017 are revoked.

7.1.3 Revocation of The Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations, 2012

The Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations, 2012 are revoked.

7.2 Citation and commencement

- (1) These rules may be cited as The Fiduciary Rules 2021.
- (2) These rules shall come into force on ****.

THE FIDUCIARY RULES AND GUIDANCE, ~~2020~~2021 :

ACTING WITH INTEGRITY

~~The Guernsey Financial Services Commission~~ (“the Commission”), in exercise of the powers conferred on it by sections 31A, 31B and 31C of the ~~The Fiduciary Rules, made in accordance with The~~ Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, ~~2000~~¹2020 (“the Law”), ~~makes the following Rules.”)~~ are set out in this document.

~~This consolidated edition includes the Commission’s guidance notes.~~ Guidance, provided by the Guernsey Financial Services Commission (“the Commission”) is set out in the blue boxes.

¹ ~~Ordres en Conseil No. 1 of 2001.~~

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PART 1 - INTRODUCTION

1.1 Commencement

- (1) ~~The Fiduciary Rules 2020 ("Rules") shall come into operation on 31 December 2020.~~

1.21.1 Application

- (1) These Rules replace -

~~(a) Code of Practice Corporate Service Providers²;~~

~~(b) Code of Practice Foundation Service Providers³;~~

~~(c) Code of Practice Trust Service Providers⁴;~~

~~(d) Code of Practice Company Directors⁵;~~

~~(a) The Fiduciary Rules 2020⁶; and~~

~~(e) The Regulation of Fiduciaries (~~Accounts~~) Rules, 2001⁷;~~

~~(f) The Financial Resources Requirements Rules, 2018⁸; and~~

~~(g)(b) Rules 1 to 9 of the Pension Licensees (Conduct of Business) & Domestic and International Pension Scheme and Gratuity Scheme Rules (No. 2) Annual Return) Regulation, 2017⁹.~~

² Made on July 2009.

³ Made on 26 July 2013.

⁴ Made on 3 July 2009.

⁵ Made on 3 July 2009.

⁶ No. 12 of 2020.

⁷ Made on 20 March 2001.

⁸ Version 1.0.

⁹ No. 5727 of 2017.

- (2) The Commission may in its absolute discretion, by written notice to a licensed fiduciary, exclude or modify the application of any provision of these Rules.

Guidance Note: This document takes a two-level approach –

- the Rules set out the standards to be met by the licensed fiduciary; and
- guidance notes present suggested ways of showing compliance with the Rules.

Licensed fiduciaries may adopt alternative measures to those set out in the guidance so long as it is possible to demonstrate that such measures achieve compliance.

The text contained in shaded boxes contains guidance from the Commission and does not form part of the Rules.

PART 1A – PRIMARY AND SECONDARY LICENCES

1A.1 Conversion of primary fiduciary licences to secondary fiduciary licences

(1) A primary licence may be converted to a secondary licence either –

(a) on the application, to the Commission, by the licensee; or

(b) by the Commission, with the agreement of the licensee.

(2) Applications for conversion must include confirmation that the requirements of section 4 of the Law are met.

Guidance Note:

Where a secondary licence holder wishes to become a primary licensee a new licence application must be submitted to the Commission.

1A.2 Requirements of secondary fiduciary licensees

(1) Secondary licence holders must be associated with a designated primary licensee, and the Commission must be notified of this designation-

(a) on application for a new secondary licence;

(b) on application for the conversion of an existing primary licence to a secondary licence; and

(c) immediately where the designated primary licensee changes.

(2) Holders of secondary fiduciary licences are prohibited from undertaking any activities which fall within the definition of actively trading.

Guidance Note:

Actively trading

Regardless of which entity charges the client for the service (the primary licensee or another group entity), it is expected that payment from the client would not be received directly by the secondary licensee.

It is 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 not expected to trade independently from its primary licensee in respect of regulated fiduciary services, e.g. by providing fiduciary services to clients who are unrelated to the clients of the primary licensee.

PART 2 – CORPORATE GOVERNANCE AND EFFECTIVE MANAGEMENT

2.1 Corporate Governance

2.1.1 Application

- (1) Rule 2.1 applies to ~~full~~primary and secondary fiduciary licence holders.

2.1.2 Board and Senior Management

- (1) The Board and senior management, of a licensed fiduciary, must take all reasonable steps to ensure that all employees of the licensed fiduciary act so as to avoid material damage either to -
- (a) the licensee's reputation;
 - (b) the licensee's financial position; and
 - (c) the reputation of the Bailiwick as an international finance centre.
- (2) The Board of a licensed fiduciary –
- (a) must ensure that the licenced fiduciary –
 - (i) has in place effective and appropriate policies, procedures and controls to ensure compliance with these Rules and all other relevant legislation;
 - (ii) recruits, trains and supervises relevant personnel to ensure compliance with these Rules and all other relevant legislation; and
 - (iii) operates robust arrangements for meeting the requirements of these Rules and all other relevant legislation;
 - (b) retains responsibility for any functions it outsources at all times; and

- (c) must evaluate its compliance with the Code of Corporate Governance¹⁰.

2.2 Competence and effective management

- (1) A licensed fiduciary must comply with the Rules and, where applicable –
- (a) understand and discharge fiduciary duties or other duties arising under the trust deeds and the legislation applicable to each trust; and
 - (b) understand and comply with its contractual and other legal obligations arising under any relevant client contracts or any relevant legislation.
- (2) A licensed fiduciary which holds a ~~full~~primary or a secondary fiduciary licence must –
- (a) ensure that the responsibilities and authority of relevant personnel are clear and appropriate to his or her qualifications and experience;
 - (b) ensure that any person for whom it arranges to act as a director of a client company, a foundation official or a trustee understands ~~his or her~~their duties and is fit and proper to do so;
 - (c) record and monitor compliance with these Rules and all other relevant legislation;
 - (d) keep a breaches register which logs all instances of non-compliance with these Rules; and
 - (e) satisfy the minimum criteria for licensing.

¹⁰ Instrument made on 30 September 2011.

Guidance Note:

The personnel, and procedures followed, will be assessed by the Commission, with reference to the nature and scale of the business. The Commission will in each case consider the licensed fiduciary's resources and systems as a whole but, for example, may want to see evidence of -

- for a Trust Service Provider ("TSP"), an understanding on the part of the personnel of both the TSPs' duties to clients and the extent to which the TSP must exercise independent judgement in performing its functions;
- for a Corporate Service Provider ("CSP"), an understanding on the part of the personnel of the memorandum and articles of association or incorporation (or equivalent documents) of client companies and of both the CSPs' duties to client companies and the extent to which the CSP must exercise independent judgement in performing its functions;
- for a Pension Service Provider ("PSP"), an understanding on the part of the personnel of the governing documentation of client pension schemes and of both the PSPs' duties to clients and the extent to which the PSP must exercise independent judgement in performing its functions; and
- for a Foundation Service Provider ("FSP"), an understanding on the part of the personnel of the constitutional documentation of client foundations and of both the FSPs' duties to foundations and the extent to which the FSP must exercise independent judgement in performing its functions.

Where a licensed fiduciary, whether a personal fiduciary licensee (~~"PFL"~~) or full, a primary fiduciary licensee ("FFL"), or a secondary fiduciary licensee, acts as director of a company, compliance with rule 2.2(1) may involve obtaining necessary advice, for example, on the law of the jurisdiction in which the company is incorporated or carries on its activities.

Guidance Note:

Fit and Proper – is as defined in Schedule 1 of the Law and the “Fit and Proper Guidance” issued by the Commission (5th October 2018).

4-eyes Criterion

Paragraph 43 of Schedule 1 of the Law requires that the business of a ~~full~~primary or a secondary fiduciary licence holder is directed by at least two individuals (the “4-eyes criterion”). In addition to (1) and (2) of paragraph 43, it is expected that the individuals:

- will be either executive directors or persons granted powers by, and reporting immediately to, the Board. This is 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;
- have sufficient understanding and time available to discharge their duties effectively, taking into account the number and importance of their other commitments; and
- are of 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.

2.2.1 Records of the licensed fiduciary's own business

- (1) A licensed fiduciary, in relation to its own business, must ensure that all appropriate records are kept up to date, complete and accurate.

Guidance Note:

These records may include, but are not limited to, its –

- (a) business transactions;
- (b) financial position;
- (c) internal organisation;
- (d) risk management systems; and
- (e) Board and management minutes.

2.3 Conflict of interest

- (1) Subject to the terms of any constitutional documents and applicable laws, a licensed fiduciary must –

- (a) be impartial;
- (b) not unfairly place its interests above those of its clients; and
- (c) ensure fair treatment between clients.

- (2) A licensed fiduciary must –

- (a) establish, implement and maintain an effective written conflicts of interest policy which is appropriate to the nature, scale and complexity of the business;

- (b) ensure that adequate procedures are implemented to either avoid any conflict of interest arising or, where conflicts do arise, manage or minimise them;
- (c) keep records of any conflicts of interest and how they are managed;
- (d) without prejudice to these Rules, the AML Handbook¹¹, the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003¹² and any other related legislation, not solicit, receive or accept bribes or gifts, inducements, rewards or advantage that are likely to conflict with the licensees' duty to any client;
- (e) not profit from holding Fiduciary Client Money.

Guidance Note:

1) Licensed fiduciaries are prohibited from receiving and retaining any commission or monetary or non-monetary benefits from the holding of Fiduciary Client Money. Benefits can be received but they must be passed on to clients, in a similar manner as to how fees/ charges incurred on client bank accounts are passed on to clients.

2) For the avoidance of doubt, the following does not amount to profiting:

- covering the costs such as time charged fee or software licence/ programme to run or manage pooled accounts;
- in the case of a pooled account, *de minimis* interest retained by the licensed fiduciary providing that the licensed fiduciary has considered and can evidence that such interest could not be cost-effectively distributed to the benefit of clients.

2.4 Account rules

2.4.1 Accounting records and accounting period of a licensed fiduciary

- (1) The accounting records of a licensed fiduciary must –

¹¹ Handbook on Countering Financial Crime and Terrorist Financing, Guernsey Financial Services Commission, 11th March 2019.

¹² Order in Council No.1 of 2004.

- (a) show and explain transactions;
 - (b) enable financial statements to be prepared; and
 - (c) present, with reasonable accuracy at any time, all assets, liabilities, income and expenditure.
- (2) The accounting period, of a licensed fiduciary, must be set and –
- (a) must not exceed 12 months, and
 - (b) must not be altered, without prior written permission from the Commission.

2.4.2 Reporting to the Commission

Personal Fiduciary Licence Holders

- (1) The Commission must be provided annually as part of the Annual Return, with particulars of the licensee's financial position, with regards to regulated activities, ~~in relation to each accounting period and within four months of the end of that accounting period.~~

Guidance Note:

The particulars referred to in rule 2.4.2(1) do not have to take the form of a financial statement. A statement of the income from, and any liabilities relating to, the personal fiduciary licence holder's regulated activities for the accounting period is sufficient.

~~Full~~Primary and Secondary Fiduciary Licence Holders

- (2) Licensees shall appoint an auditor and ensure that the appointment is maintained at all times.
- (3) The Commission must be provided with financial statements in relation to each accounting period and within four months of the end of that accounting period unless the Licensee is also licensed under another Regulatory Law and receives

written agreement from the Commission that reporting requirements under that Regulatory Law take precedence.

(4) Financial statements –

- (a) may be provided as consolidated group financial statements where the group comprises more than one licensed fiduciary;
 - (b) must present a true and fair view of the financial position at the end of that accounting period;
 - (c) must present a true and fair view of any profit and loss during that accounting period;
 - (d) must be prepared in accordance with United Kingdom accounting standards¹³, United States accounting standards¹⁴ or International Financial Reporting Standards¹⁵; and
 - (e) must be accompanied by an auditor's report prepared in accordance with the International Standards on Auditing issued by the Financial Reporting Council or the International Standards on Auditing issued by the International Auditing and Assurance Standards Board.
- (5) If, during the accounting period, the licensee has received any reports prepared by an internal or external auditor, an accountant or a consultant which address the breakdown of, or any material weakness in, internal control procedures then these reports must be provided with the financial statements.
- (6) Management letters received from external auditors must be submitted together with the financial statements.

¹³ As issued by the Financial Reporting Council.

¹⁴ As issued by the Financial Accounting Standards Board.

¹⁵ As issued by the International Accounting Standards Board.

2.4.3 Electronic filing

- (1) Returns filed, with the Commission, under rule 2.4 must be submitted in such electronic format as the Commission makes available.

2.4A Annual Return

- (1) The Annual Return must be submitted in such electronic format as the Commission makes available.
- (2) A person who held a primary licence at the end of the Annual Return Period must make an Annual Return, to the Commission, of their regulated activity and of the regulated activity for each of the secondary licensees for which it is the designated primary.
- (3) A person who held a personal fiduciary licence at the end of the Annual Return Period, must make an Annual Return, to the Commission, of their regulated activity.
- (4) An Annual Return must be made, to the Commission, within two calendar months of the end of the Annual Returns Period to which it relates.

2.5 Fiduciary Client Money

2.5.1 Application and definition

- (1) Rule 2.5 applies to licensed fiduciaries which hold or have control of Fiduciary Client Money.
- (2) "Fiduciary Client Money" means money which is –
 - (a) held or received on behalf of a client; or
 - (b) controlled by a licensed fiduciary

in accordance with the responsibilities the licensed fiduciary has accepted in the course of carrying on a regulated activity under the Law.

- (3) Where there is more than one licensed fiduciary controlling Fiduciary Client Money, a licensed fiduciary may, under written agreement, rely on another licensed fiduciary to take action in order to meet requirements under certain rules providing they are satisfied that the Rules have been complied with.

Guidance Note:

The Law defines "clients", in relation to any person, to mean –

- (a) persons who have entered into or may enter into agreements for the provision of services by that person when carrying on by way of business any regulated activities, or
- (b) persons who have received or may reasonably expect to receive the benefit of services provided or arranged or to be provided or arranged by that person when carrying on by way of business any regulated activities.

It should be noted that the definition of “clients” in the Law may differ from the common understanding of the term used by some TSPs and may include both settlors and beneficiaries.

2.5.2 Policies, procedures and controls

- (1) A licensed fiduciary must have in place policies, procedures and controls, appropriate to the nature and scale of its operations, which prevent the inappropriate use of Fiduciary Client Money.

2.5.3 Disclosure

- (1) A licensed fiduciary must, where relevant, inform any person with whom they propose to enter into a contract or agreement in respect of the provision of regulated activities of the terms upon which Fiduciary Client Money is held.

2.5.4 Operation of Bank Accounts

- (1) A licensed fiduciary must ensure that Fiduciary Client Money is held –
 - (a) in a Client Bank Account or a Client Entity Bank Account;
 - (b) separately from its own money; and
 - (c) separately from another client's money.
- (2) Rule 2.5.4(1)(c) does not apply to –
 - (a) multi-member pension schemes, including occupational pension schemes; and
 - (b) pooled accounts where specific requirements under rule 2.5.5 apply.
- (3) The title of the Client Bank Account shall sufficiently distinguish the account from any other account containing money that belongs to the licensed fiduciary.
- (4) Prior to holding or receiving any Fiduciary Client Money into a Client Bank Account, a licensed fiduciary must receive a written acknowledgement from the bank that –
 - (a) all money standing to the credit of the account is held by the licensee as a trustee; and
 - (b) the bank is not entitled to combine the account with any other account or exercise any right of set-off or counterclaim against money in the account in respect of a debt or other obligation owed to it by the licensee.

2.5.5 Pooled Accounts

- (1) A pooled account can be used to hold Fiduciary Client Money for one of the following reasons –
 - (a) operational efficacy;
 - (b) cash management or treasury services; or
 - (c) due to an exceptional circumstance where the licensed fiduciary is unable to segregate the money of one client from that of other clients.
- (2) For the purposes of rule 2.5.5(1)(c) the licensed fiduciary must inform the Commission of the circumstances preventing the money from being segregated.
- (3) When a pooled account is used to hold Fiduciary Client Money, the licensed fiduciary must ensure that this is clearly and specifically agreed with the client.
- (4) The licensed fiduciary must be able to promptly identify the individual balance due to each client from a pooled account.

Guidance Note:

Examples of how a pooled account may be used –

- to receive client funds immediately prior to opening a Client Bank Account or a Client Entity Bank Account;
- for operational efficacy such as paying registry fees on behalf of a number of client companies, taking fees or making a payment by cheque where the Client Bank Account or Client Entity Bank Account does not have a cheque book or making limited or one-off distributions or onward investment at the end of a client relationship.

2.5.6

Withdrawal of Fiduciary Client Money

- (1) A licensed fiduciary must have procedures in place for ensuring that all withdrawals from a Client Bank Account or a Client Entity Bank Account are –
 - (a) subject to the appropriate level of authorisation and, at a minimum, dual authorisation; and
 - (b) in accordance with any constitutional documents.
- (2) A licensed fiduciary must not withdraw money from a Client Bank Account or a Client Entity Bank Account unless –
 - (a) it is not Fiduciary Client Money;
 - (b) it is properly payable by or on behalf of a client, or in respect of a client; or
 - (c) it is properly transferred to another Client Bank Account or a Client Entity Bank Account or into a bank account in the client's own name.
- (3) A licensed fiduciary must not withdraw Fiduciary Client Money to pay for outstanding fees unless permitted under the trust deed, the terms of business or with the agreement of the relevant client.

Guidance Note:

The relevant client referred to in rule 2.5.6(3) may be the settlor or the person whom the licensed fiduciary entered into a contract with, as the case may be.

2.5.7

Overdrawn

- (1) As far as possible a licensed fiduciary must ensure that –
 - (a) a pooled Client Bank Account does not become overdrawn;

- (b) a Client Bank Account, that is not pooled, does not become inadvertently overdrawn.

Guidance Note:

In the event that a Client Bank Account becomes overdrawn in breach of rule 2.5.7 (1)(a) or (b), the licensed fiduciary should seek to rectify the position as quickly as possible. The licensed fiduciary may use its own money in order to restore, in whole or in part, any money paid out of the Client Bank Account in contravention of the Rules or to restore the Client Bank Account out of an overdrawn position.

2.5.8 Reconciliation

- (1) A licensed fiduciary must ensure that a reconciliation is carried out between its records of Fiduciary Client Money and records or statements from a bank in which that Fiduciary Client Money is kept.
- (2) A licensed fiduciary shall determine the appropriate frequency of reconciliation and perform the reconciliation promptly.
- (3) A licensed fiduciary must maintain accurate and up to date records in relation to Fiduciary Client Money which enable it to promptly identify the balance due to each client and which are in a form that allows timely reconciliation.

- (4) When a discrepancy is identified, during reconciliation, a licensed fiduciary must investigate the reason for the discrepancy and take all reasonable steps to resolve it without delay.

Guidance Note:

In determining the appropriate frequency of reconciliation of a Client Bank Account or a Client Entity Bank Account, a licensed fiduciary should consider factors, including -

- volume, frequency and value of transactions;
- the nature and complexity of the business to which the transactions relate; and
- risks associated with the transactions.

Regular reconciliations are an important control and can minimise losses through early detection of problems.

The Commission expects, as a minimum and subject to consideration of the above factors, that the reconciliation should be carried out -

- (i) for a Client Bank Account
 - at least on a monthly basis for a pooled account;
 - at least annually for a non-pooled account, or more regularly on the basis of the volume and frequency of transaction;
- (ii) for a Client Entity Bank Account, at a minimum annually, or more regularly on the basis of the volume and frequency of transactions.

‘Discrepancy’ refers to the situation where records of Fiduciary Client Money, kept by the licensed fiduciary, do not match the statement received from the bank in which it is held.

2.5.9 Review of controls over Fiduciary Client Money

- (1) A licensed fiduciary must implement an annual independent review of the controls over Fiduciary Client Money. The review must –
- (a) verify the effectiveness of the controls with particular regard to the prevention of –
 - (i) loss;

- (ii) misuse; and
- (iii) misappropriation

of Fiduciary Client Money; and

- (b) be performed by an appropriate, independent person who may be an internal or external party.

- (2) The review under rule 2.5.9(1) does not include Client Entity Bank Accounts.

Guidance Note:

Where an internal party performs such a review they should be operationally independent from the individuals or functions responsible for the functioning of the control processes.

2.6 Record keeping

2.6.1 Application

- (1) Rule 2.6.2(1) does not apply to Pension Service Providers (“PSPs”). When carrying out pension business a PSP should refer to rule 2.6 of The Pension Scheme and Gratuity Scheme Rules, ~~2020~~2021 for record keeping requirements.

2.6.2 Adequate Records

- (1) A licensed fiduciary must ensure that adequate records relating to regulated activities are kept and preserved. Such records should include, but are not limited to, the following –
 - (a) in the case of a Trust Service Provider (“TSP”); records of all trusts including, but not limited to, details of the trust –
 - (i) property;

(ii) material communications with clients, client companies and others;

(iii) accounting records;

(iv) tax records; and

(v) minutes of meetings held;

(b) in the case of a Corporate Service Provider ("CSP"); records of all client corporate entities including, but not limited to, details of their –

(i) managers, as defined in the Law;

(ii) jurisdictions of incorporation;

(iii) accounting records;

(iv) company registers;

(v) material communications with clients, client companies and others; and

(vi) proceedings of company meetings;

(c) in the case of a Foundation Service Provider ("FSP"); records of all foundations including, but not limited to, details of –

(i) foundation officials;

(ii) places of registration;

(iii) accounting records;

(iv) registers;

(v) material communications with clients and others; and

(vi) proceedings at council meetings

so far as appropriate for the licensed fiduciary's functions.

(2) A licensed fiduciary must ensure that it has appropriate record keeping arrangements in accordance with its functions and in compliance with these Rules and any other applicable legislation. These arrangements must –

(a) deliver effective information and document management ensuring that all relevant records are –

(i) as up-to-date as is reasonable;

(ii) filed and arranged so as to permit prompt access to any particular record;

(iii) in a form capable of prompt reproduction into English; and

(iv) capable of being checked or audited so as to demonstrate compliance with any applicable laws, regulations and rules.

Guidance Note:

Rule 2.6.2(2)(a)(iii) requires that records held by a licensed fiduciary, relevant to the performance of its regulated activities, are capable of reproduction into English. It is not expected that all records held by a licensed fiduciary must be translated into English.

Personal Fiduciary Licensee

When carrying out regulated activities where there is another licensed fiduciary carrying out a similar role, a licensed fiduciary holding a personal licence may, upon written agreement, rely on another licensed fiduciary to keep and preserve the records as required under this rule providing that they are satisfied that the Rules are complied with.

Although a Personal Fiduciary Licensee may rely on another licensed fiduciary regarding record keeping it is, ultimately, the responsibility of the Personal Fiduciary Licensee to ensure compliance with this rule.

2.6.3 Data security

(1) A licensed fiduciary must maintain adequate policies and procedures for the maintenance, security, privacy and preservation of all documents and records

belonging to the licensed fiduciary and its clients so that they are reasonably safeguarded against loss, unauthorised access, alteration or destruction.

- (2) Any policies and procedures must conform with the Data Protection (Bailiwick of Guernsey) Law, 2017¹⁶.

2.6.4 Retention of records

- (1) A licensed fiduciary must keep and preserve for a minimum of six years or for a period required under an applicable law, whichever is greater –
 - (a) records of its own business prepared in accordance with these Rules; and
 - (b) any documents relating to clients which were prepared in compliance with these Rules.
- (2) A licensed fiduciary which is ceasing to carry out regulated activities must have appropriate arrangements to retain all documents and records, prepared in accordance with these Rules, for a minimum period of six years following the surrender of the fiduciary licence. The Commission may extend this period by serving written notice prior to the end of the initial six year period.
- (3) Where a licensed fiduciary is aware of any matter which is subject to investigatory or disciplinary procedures, or appeals against such procedures, all documents which are, or may be, relevant to this matter must not be amended or destroyed without written consent from the Commission.

2.6.5 Outsourcing record maintenance

- (1) Where the licensed fiduciary outsources the maintenance of its own records, client records, or both, the licensed fiduciary must ensure it is satisfied that –
 - (a) the documents are kept secure and any operational risks are appropriately managed;
 - (b) the records are readily accessible;

¹⁶ No. VI of 2018.

- (c) all regulatory and confidentiality laws are complied with; and
- (d) the Commission is able to have reasonable access to the records at all reasonable times.

2.7 Outsourcing

2.7.1 Application

- (1) Rule 2.7 does not apply to a personal fiduciary licensee.

Guidance Note:

Rule 2.7 applies to a licensed fiduciary holding a ~~full~~primary or secondary fiduciary licence in respect of outsourcing irrespective of whether it is outsourced to persons within the same group or to third parties.

2.7.2 Board Responsibilities

- (1) A licensed fiduciary may outsource functions but the Board retains responsibility and accountability for the outsourced functions. Such responsibilities include –
 - (a) the maintenance of effective oversight of the outsourced functions; and
 - (b) ensuring that the licensed fiduciary continues to comply with these Rules and all other relevant legislation.

2.7.3 Risk assessment

- (1) The Board of a licensed fiduciary must be aware of and understand the risks arising from outsourcing its functions.

(2) Where outsourcing is proposed a licensed fiduciary must carry out a risk assessment which includes, but is not limited to –

(a) risks associated with a breakdown in the provision of the outsourced services; and

(b) risks which could arise from the failure of the outsourced service provider.

2.7.4 Due diligence in selection and monitoring of outsourced service providers and outsourced service provider's performance

(1) A licensed fiduciary must –

(a) exercise due diligence, on the outsourced service provider, to ensure that they can be satisfied that the outsourced service provider has the ability and capacity to undertake the provision of the service effectively;

(b) document the capability and suitability of the proposed provider of the outsourced service; and

(c) establish clear internal responsibility for monitoring the conduct of the outsourced services and for reporting to the Board.

2.7.5 Outsourcing agreements

(1) A licensed fiduciary must ensure that there is a written outsourcing agreement in place for each outsourced activity.

(2) The outsourcing agreement must –

(a) have appropriate content reflecting the risks, size and complexity of the outsourcing arrangements; and

(b) for significant outsourcing arrangements, include a contractual requirement for the outsourced service provider to –

(i) give the Commission the right to direct access to material which it holds in relation to the business of the licensed fiduciary; and

(ii) inform and obtain an agreement, from the licensed fiduciary, prior to sub-outsourcing any functions.

2.7.6 Contingency plan

- (1) The licensed fiduciary must ensure that there is, established and maintained, an appropriate contingency plan which enables alternative arrangements to be set up, with minimal disruption, in case of the failure of the outsourced service provider or any other breakdown in the provision of services.

Guidance Note:

In complying with rule 2.7.6 the licensed fiduciary must have in place a contingency plan so as to allow it to act promptly should a failure of an outsourced service provider or a breakdown of its services occur. It does not require the licensed fiduciary to purchase or hold unused capacity.

2.8 Employee screening and training

- (1) A licensed fiduciary shall maintain appropriate and effective procedures when hiring employees, or admitting any person as a partner, for the purpose of ensuring high standards of probity and competence. These procedures should be proportionate to the nature, risk profile and size of the business.
- (2) To ensure that individuals are of the required standard of competence and probity the licensed fiduciary must, at the minimum, give consideration to the collection and confirmation of the following during the recruitment process –

- |
- (a) appropriate references;
 - (b) details of any regulatory action taken against the individual, in any jurisdiction;
 - (c) details of any action, taken against the individual, by any professional body;
 - (d) details of any criminal convictions, including the provision of a check of the individual's criminal record¹⁷; and
 - (e) details of employment history, qualifications and professional memberships.
- (3) A licensed fiduciary must ensure that individuals receive any training which is necessary for their roles and -
- (a) formulate plans for training and development; and
 - (b) keep training and development plans current and relevant.

¹⁷ In accordance with the Rehabilitation of Offenders (Bailiwick of Guernsey) Law 2002, Order in Council No. XIV of 2002.

PART 3 – CONDUCT OF BUSINESS

3.1 Integrity

- (1) As required by Schedule 1 of the Law, a licensed fiduciary must conduct its business with integrity.
- (2) A licensed fiduciary must not attempt to avoid or contract out of its responsibilities set out in these Rules.

3.2 Best interests of clients

- (1) All licensed fiduciaries must –
 - (a) act with due skill, care and diligence to fulfil the responsibilities undertaken;
 - (b) establish and maintain policies, procedures and controls to monitor and ensure there is always the requisite capacity and resources to provide the services agreed with its clients;
 - (c) when responsible for exercising discretion for or in relation to clients, take all reasonable steps to obtain sufficient information in order to exercise discretion, or any other power, in a proper manner;
 - (d) only exercise any power or discretion for a proper purpose;
 - (e) ensure that all decisions taken or transactions entered into, by or on behalf of the clients, are actioned in a timely manner and appropriately authorised and handled by persons with an appropriate level of knowledge, experience and status. This includes the establishment, transfer or closing of business relationships with its clients, where appropriate; and

- (f) maintain confidentiality except where disclosure of information is required or permitted by an applicable law, or authorised by the person to whom the duty of confidentiality is owed.

Guidance Note:

For example, policies and procedures as referred to in 3.2(1)(b) could include –

- the formation of a new business committee; or
- scheduled regular meetings to discuss new business;

Controls as referred to in 3.2(1)(b) could include –

- compliance monitoring programmes; or
- regular reviews of human resources / headcounts.

It is recognised that there will be differences in how this rule applies to a ~~full~~primary or secondary fiduciary licence holder and a personal fiduciary licence holder. As a ~~PFL~~personal fiduciary licensee is an individual, compliance with this rule, may consist of the personal fiduciary licensee showing consideration of its own capacity prior to accepting a new instruction.

3.2.1 Additional rules applying to licensed fiduciaries acting as trustee

(1) A licensed fiduciary acting as a trustee must –

- (a) subject to its legal obligations to other persons or bodies, ensure that the interests of beneficiaries are paramount;
- (b) for a licensed fiduciary holding a ~~full~~primary or secondary fiduciary licence, ensure that any personnel who act as trustees understand their duties under the laws applicable to the trust;
- (c) subject to the terms of the trust and the provisions of the applicable trust law –
 - (i) upon establishing a trust, take all reasonable measures to ensure that settlors receive any necessary professional advice and that the trust is in accordance with their intentions;
 - (ii) identify beneficiaries and their respective interests correctly;

- (iii) be aware of beneficiaries' personal circumstances, including their current needs, residence and domicile, so far as those are relevant;
 - (iv) be impartial;
 - (v) ensure that the trust property is held by or vested in the trustee, or is otherwise under its control;
 - (vi) when acting as a trustee, so far as is reasonable, preserve and enhance the value of the trust property; and
 - (vii) invest, distribute or otherwise manage each trust's assets;
- (d) subject to the terms of the trust, manage the investment and custody of trust assets professionally and responsibly and must –
 - (i) exercise, so far as is required by the duties of the trustees in each case, professional oversight of any company owned by the trust;
 - (ii) consider appointing competent agents and managers, including an investment manager, an investment adviser, a property manager; and
 - (iii) have regard to any different interests of beneficiaries and of classes of beneficiaries;
- (e) where applicable, consult with other trustees;
- (f) consider the tax status of the trust;
- (g) where appropriate, file tax returns and provide information to the beneficiaries to enable them to file their own tax returns; and
- (h) consider and, where appropriate, effect the insurance of trust assets.

Guidance Note:

For the avoidance of doubt, in the case where pension schemes are written under trust, Pension Service Providers are subject to rule 3.2.1.

Appointment of asset managers

A licensed fiduciary must consider whether a relevant expert asset manager should be appointed.

Where an investment manager is appointed, TSPs should record the agreement, instructions, investment parameters and investment benchmarks and require and review regular reports on performance including a valuation and a schedule of assets bought and sold (at least quarterly unless that is inappropriate having regard to the nature of the assets).

If a property manager is appointed TSPs should record any agreements or instructions and require and review regular reports on maintenance of the property and valuation, as appropriate.

Where consideration has been given that no expert should be appointed, TSPs should consider whether regular valuations or other reports are required.

In consideration of a new or ongoing appointment of an expert asset manager a licensed fiduciary should assess whether such an appointment represents value for money. Assessing value for money might include:

- the quality of service provided by the asset manager, including a comparison of the services offered by other asset managers;
- the performance of the asset manager in carrying on the role; and
- the cost of the appointment of the asset manager, including a comparison of the market rates for the services performed;

Reservation of powers

Careful consideration should be given to the terms of the trust especially in the context of the granting, reservation or retention of powers which may adversely affect the validity of the trust.

Exercise of discretion

A TSP exercising discretion, when acting as trustee of a discretionary trust, should be in a position to demonstrate careful consideration in its decision-making and understanding of its actions.

3.2.2 Additional rules applying to ~~full~~primary and secondary fiduciary licensees acting as Corporate Service Providers and personal fiduciary licensees carrying out the regulated activity of acting as director

(1) A licensed fiduciary must –

- (a) subject to its legal obligations to other persons or bodies, consider the interests of client companies first;
- (b) where applicable, ensure that any of its personnel who act as officers of client companies understand their duties under the laws of the jurisdiction in which those client companies are incorporated;
- (c) where applicable, ensure that assets of the client company are in the name of that company or an appropriate nominee;
- (d) where appropriate file accurate returns with the relevant authorities;
- (e) where appropriate consider the tax status of the client company;
- (f) consider and, where appropriate, effect the insurance of assets of the client company; and
- (g) when acting as a director, take all reasonable measures to obtain information sufficient to make a decision regarding the company.

Guidance Note:

The Commission recognises that different types of services can be provided by a licensed fiduciary. Therefore, the term “where appropriate” or “where applicable” are used in rule 3.2.2(1) to reflect this.

In compliance with rule 3.2.2(1), a licensed fiduciary acting as a director of a company should –

- know the company’s business and finances and have full and up to date information on them;
- give continuing consideration to the company’s financial position before authorising any major expenditure or distribution or the declaration of a dividend; and
- ensure that adequate Board meetings are held.

3.2.3 Additional rules applying to licensed fiduciaries acting as Foundation Service Providers

- (1) A ~~full~~primary or secondary fiduciary licence holder, acting as an FSP, must ensure that any of its- personnel who act as foundation officials understand their duties under the laws of the jurisdiction in which those foundations are registered or established.
- (2) Where a licensed fiduciary takes on the role of councillor it must –
 - (a) act in good faith when exercising its functions, subject to the terms of any constitutional documentation and its legal obligations to other persons or bodies;
 - (b) invest, distribute or otherwise manage each foundation’s assets in accordance with the applicable law and the foundation’s constitutional documents;
 - (c) manage the investment and custody of foundation assets professionally and responsibly;
 - (d) where appropriate, file accurate returns to the relevant authorities;
 - (e) where appropriate, consider the tax status of the foundation;
 - (f) promptly provide beneficiaries with information, which they are entitled to receive, about the foundation; and

- (g) consider and, where appropriate, effect the insurance of assets of the foundation.
- (3) Where a licensed fiduciary takes on the role of guardian of a foundation it must act in good faith, in the exercise of functions, in order to enforce the foundation's constitutional documents.

3.3 Advertisement and communications with clients

- (1) Without prejudice to ~~either the Prospectus Rules¹⁸ or the Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations, 2012¹⁹~~, a licensed fiduciary must ensure that its advertising and communications with clients and prospective clients –
- (a) are clear, suitable, fair and not misleading; and
- (b) do not contain any statement which is untrue.
- (2) A licensed fiduciary shall take all reasonable steps to ensure that advertisements and communications do not violate the laws of the Bailiwick of Guernsey and, if advertising outside the Bailiwick, the legislation in force in that country or territory.
- (3) The regulatory status of the licensed fiduciary is to be included on written communications, in relation to regulated activities, and is not to be used in a way which is misleading.
- (4) A licensed fiduciary should not signify in any way that an advertisement is approved by the Commission.
- (5) Subject to the terms of the trust, or contract and any applicable legislation a licensed fiduciary must promptly provide clients with information to which they are entitled or, if this is not possible, promptly explain why such information cannot be provided.

¹⁸ ~~Published by the Commission and available at:~~
~~https://www.gfsc.gg/sites/default/files/20180709%20Prospectus%20Rules_0.pdf~~.

¹⁹ ~~No. 28 of 2012.~~

Guidance Note:

~~Personal fiduciary licence holders should be aware of the Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations, 2012, which prohibit them from advertising.~~

~~The provisions under rule 3.3 apply, to personal fiduciary licence holders, only in relation to communications with clients.~~

3.4 Terms of business in relation to the provision of regulated activities

- (1) A licensed fiduciary must inform any person with whom it proposes to enter into a contract or agreement in respect of the provision of regulated activities, in writing, of its terms of business and must retain a record of that person's agreement to those terms.
- (2) The agreement shall include, but is not limited to –
 - (a) a clear description of the services to be provided;
 - (b) in the case of a CSP, the scope of the licensed fiduciary's discretion, if any;
 - (c) the fees, including exit fees, to be charged including the nature and scale of the fees and the basis of the calculation of those fees;
 - (d) a record of who is responsible for requests for action and how these are to be given;
 - (e) the means by which complaints can be made;
 - (f) details of the licensee's complaints resolution procedures including, where applicable, contact details for the Channel Islands Financial Ombudsman ("CIFO") and a statement that the CIFO may be available to consider complaints which are not resolved through the licensee's complaints resolution procedure;
 - (g) a record of any provision for the termination of the agreement and the consequences of the termination; and
 - (h) a statement that the licensee is licensed by the Commission.

3.5 Interaction with clients

- (1) A licensed fiduciary must charge fees in accordance with the client agreement and in a fair and transparent manner.
- (2) A licensed fiduciary must ensure that the termination of a relationship is conducted in a professional manner and is on reasonable notice, unless good reason can be given.

3.6 Complaints

- (1) A licensed fiduciary must –
 - (a) have and comply with a written procedure for the effective consideration and fair, proper and timely handling of complaints;
 - (b) maintain a log of all complaints and their current status;
 - (c) as appropriate, explain the complaints handling process to clients;
 - (d) keep the complainant informed about the progress of the complaint including details of any actions being taken to resolve the complaint, except where this conflicts with or is prohibited under another law;
 - (e) inform the complainant that, in cases of significant complaints or where a complaint remains unresolved for longer than three months, the licensed fiduciary is under an obligation to inform the Commission of the complaint;
 - (f) advise the complainant when the complaint is considered closed;
 - (g) where the complaint is not upheld, clearly state the reason for rejecting the complaint; and
 - (h) on agreement with the complainant, ensure that the matter is settled as soon as possible.
- (2) Where the status of the complaint is closed, the licensed fiduciary should ensure that the following information is retained –
 - (a) the nature of the complaint;

(b) the reason for the closure of the complaint; and

(c) where applicable, details of any agreed compensation.

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PART 4 - PRUDENTIAL

4.1 Insurance arrangements

- (1) A licensed fiduciary must maintain professional indemnity insurance ("PII") cover which is commensurate with the size and nature of its business.
- (2) The minimum indemnity limit for any one claim, or for aggregate claims, must be the greater of –
 - (a) three times turnover from regulated activities; or
 - (b) £1,000,000where the turnover from regulated activities shall be taken from the previous year's audited financial statements or, for new businesses, estimated turnover for the first year.
- (3) Any excess must not exceed 3% of turnover from regulated activities.
- (4) For a licensed fiduciary, which holds a ~~full~~primary or secondary fiduciary licence, the Commission will consider arrangements under group policies or, where its parent or ultimate parent is of sufficient stature, for self-insurance.
- (5) PII policies must include cover against –
 - (a) negligence, errors or omissions by the licensed fiduciary;
 - (b) any liability for the dishonest acts of employees which may fall on a ~~full~~primary or secondary fiduciary licence holder;
 - (c) liabilities of its employees who, in the course of their duties to the licensed fiduciary, perform functions in their own names; and
 - (d) liabilities which the licensed fiduciary might incur in any jurisdiction in which it carries on business.
- (6) Licensed fiduciaries must also ensure that they hold insurance policies which cover -

(a) loss and theft of data; and

(b) liability for the replacement, restoration or reconstruction of data.

- (7) A licensed fiduciary must have adequate procedures in place to ensure compliance with all terms and conditions set out in its PII policy particularly in relation to the timely notification of events, to its insurer, which may lead to a claim on the policy.

Guidance Note:

For a licensed fiduciary which holds a personal fiduciary licence the insurance arrangement may be provided for by his or her client.

4.2 Financial resources

4.2.1 –Application

~~(1)–(1)~~ Rule 4.2 applies to ~~full~~primary fiduciary licence holders except where—

~~(a)~~ the licensee also holds a licence issued under another of the Regulatory Laws;~~;~~

~~—or~~

~~(b) more than one full fiduciary licence is held by a group, in which case rule 4.2 only applies to the licensee nominated to the Commission as the lead licensee.~~

Guidance Note:

A licensed fiduciary should maintain a sound financial position in order to be able to facilitate an orderly wind down or manage a distressed situation.

4.2.2 Capital base requirements

(1) A licensee must maintain a minimum of £25,000 paid-up share capital.

4.2.3 Liquidity Requirements

- (1) A licensee must ensure that, at all times, it is able to meet its liabilities as they fall due.
- (2) A licensee must maintain liquid assets not less than 25% of annual expenditure.
- (3) The annual expenditure is the higher of –
 - (a) the total budgeted expenditure for the current year; or
 - (b) the expenditure as per the latest audited financial statements.
- (4) The following items can be deducted from the annual expenditure –
 - (a) depreciation and amortisation;
 - (b) bad debt expense;
 - (c) bonuses paid to employees, including directors, that are entirely discretionary in nature;
 - (d) exceptional costs which are incurred outside the day-to-day activities of the licensee and are not expected to recur and are agreed, in advance, with the Commission; and
 - (e) any other items as permitted by the Commission.
- (5) Liquid assets of a licensee shall be calculated as the sum of –
 - (a) current assets after deduction of any illiquid assets;
 - (b) deduction of current liabilities; and
 - (c) adjustments to allow for qualifying items.

Guidance Note:

Illiquid Assets

Examples of current assets which are considered illiquid are included in the list below. The list is not exhaustive and therefore a licensee must exercise appropriate judgement when making the adjustment to ensure that assets which could be considered illiquid within a 90-day period are excluded in order to achieve the objective of the liquidity requirements.

1. Debtors which exceed 90 days from the invoice date.
2. Work In Progress which is not receivable within 90 days of the date of the calculation.
3. Any prepayments which relate to goods or services to be received or performed after 90 days of the date of the calculation.
4. Restricted cash and restricted cash equivalents.
5. Amounts due from related parties.

5.1 All amounts due from related parties are considered illiquid unless they are in the normal course of business and the outstanding balances are settled within 90 days. A loan to a related party is not typically considered liquid, even if it could be recovered within 90 days, as this would not be in the normal course of business; and

5.2 Amounts due from related parties cannot be netted-off against amounts due to related parties unless there is a legally enforceable netting agreement in place.

6. Any other items permitted by the Commission.

Qualifying Items

The following list contains items which may be used to adjust the liquid assets when calculating the liquidity requirement.

1. Deferred income – Where a licensee has received income which is billed in advance of it providing the services.
2. Any other items permitted by the Commission.

- (6) The amount of the excess on a licensee's PII ("the PI Excess") should be deducted when calculating liquid assets.
- (7) The amount to be added to the current liabilities in respect of PI Excess is calculated as the PI Excess multiplied by the number of likely excess payments in the forthcoming three month period, subject always to a minimum multiplier of one.

Guidance Note:

Calculation Example

Current Assets	x
Less: Illiquid Assets	<u>(x)</u>
A [Adjusted Current Assets]	x
Less: Current Liabilities	(x)
PI Insurance Excess	<u>(x)</u>
B [Liquid Assets]	x
Add: Any Qualifying Items	x
C [Liquid Assets (as adjusted)]	<u><u>x</u></u>
Percentage of Liquid Assets to Annual Expenditure	x
Liquidity Requirements	<u>(x)</u>
Liquidity Requirement Excess	<u><u>x</u></u>

4.2.4 Compliance

(1) A licensee must –

- (a) as a minimum calculate and document, every quarter, its compliance with the requirements of rule 4.2.3;
- (b) where the nature of the business requires, undertake the calculation in rule 4.2.3 more frequently than every quarter;
- (c) submit, to the Commission, annually together with the audited financial statements –

- (i) the ratio of the liquid assets to the annual expenditure;
 - (ii) the basis of the calculation; and
 - (iii) a statement by an auditor confirming that rule 4.2.3 is satisfied.
- (2) The Commission may increase the frequency of the calculation set out in rule 4.2.4 (1)(a) to monthly or other such period as it may determine if an event occurs which has, or may have, a material adverse effect on the licensee's financial resources.

4.2.5 Notification

- (1) A licensee must immediately notify the Commission if -
 - (a) the nominal value of its fully paid shares is less than the amount referred to in rule 4.2.2;
 - (b) its liquid assets fall, or are expected to fall below the required amount referred to in rule 4.2.3;
 - (c) it has a reason to believe that it will be unable to meet its liabilities as they fall due;and a full explanation of the circumstances must also be provided at that time.
- (2) If a licensee submits a notification to the Commission it must prepare a documented plan of action which must be made available to the Commission, on request.

Guidance Note:

The plan of action should include consideration of the financial position and actions taken by the Board or partners of the licensed fiduciary.

PART 5 – COOPERATION WITH THE COMMISSION

5.1 General provision

- (1) A licensed fiduciary must deal openly and honestly and cooperate with the Commission and any other regulatory authorities to whose supervision they are subject.

5.2 Notification by a licensed fiduciary

- (1) A licensed fiduciary must notify the Commission in writing as soon as is practicable but, in any case, within 14 days of becoming aware of the following –
 - (a) any significant changes to the information submitted as part of an application for a fiduciary licence;
 - (b) any matter that might reasonably be expected to affect its ability to –
 - (i) maintain the minimum criteria for licensing;
 - (ii) undertake its regulated activities; or
 - (iii) comply with the Rules;
 - (c) the agreement, or refusal, to grant any application made, either by the licensed fiduciary or any holding company or subsidiary, for authorisation to carry on any financial services business in any country or territory;
 - (d) the revocation, or the attachment of conditions to, an authorisation for the licensed fiduciary, its holding company or subsidiary, to carry on any financial services business in any country or territory;

- (e) the commencement of proceedings against a licensed fiduciary, its holding company or subsidiary, in any country or territory;
- (f) the appointment of anyone acting under any regulatory authority to investigate the affairs of the licensed fiduciary, its holding company or subsidiary;
- (g) the imposition of disciplinary measures, or sanctions, against the licensed fiduciary, its holding company or subsidiary, by any regulatory authority;
- (h) the conviction of the licensed fiduciary, its holding company or subsidiary, or any personnel of any offence, under any jurisdiction, relating to financial services, companies or insolvency laws where such offences involve fraud, dishonesty, money laundering or tax evasion;
- (i) with regard to outsourcing –
 - (i) any significant outsourcing arrangements entered into;
 - (ii) any material changes to significant outsourcing arrangements; and
 - (iii) where there is a failure of an outsourced service provider or other breakdown in the provision of outsourced services, which causes significant disruption to the licensed fiduciary's business;
- (j) with regard to PII –
 - (i) when a notification under a PII policy is made to its insurer; or
 - (ii) if there is any payment made, by the insurers, under the PII cover;
- (k) with regard to complaints –
 - (i) of any significant complaint made against the licensed fiduciary;
 - (ii) when the licensed fiduciary has been unable to resolve a complaint within three months of the date of the initial receipt of the complaint; or
 - (iii) when a complaint is upheld by the Channel Islands Financial Ombudsman;

- (l) the imposition of a sanction against the licensee following breach determination by the Data Protection Authority;
 - (m) the making, or the proposal for the making, of a compromise or arrangement with any creditors of the licensed fiduciary;
 - (n) the summoning of a meeting to consider a resolution to wind up a licensed fiduciary or any of its holding companies or subsidiaries;
 - (o) the presentation of any application for the commencement of insolvency proceedings including *désastre*, winding up or the appointment of a receiver, administrator or liquidator under the law of any country, or territory, in relation to the licensed fiduciary, or to a company which is a holding company or subsidiary of the licensed fiduciary; ~~and~~
 - (p) the making of an application to wind up, or to dissolve, any licensed fiduciary which is a partnership including limited partnerships and limited liability partnerships;
 - (q) changes to a notification of an approved supervised role;
 - (r) changes to a notification of a vetted supervised role; and
 - (s) changes to a notification of a notified supervised role.
- (2) Notifications made under rule 5.2(1)(o) and (p) above must be accompanied by a cessation of business plan setting out arrangements that the licensed fiduciary proposes to put in place in relation to its clients.

Guidance Note:

This list is not exhaustive and 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 subsection 46109(2) of the Financial Services Business (Enforcement Powers)(Bailiwick of Guernsey) Law, 2021, or any provision of the Law.

PART 6 – GENERAL PROVISION

6.1 Interpretation

- (1) Terms have their ordinary meaning unless specifically defined in the Law or in these Rules.
- (2) The following definitions should be followed -

“4-eyes criterion” has the meaning given to it in paragraph 43 of Schedule 1 to the Law;

“actively trade” means 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;

Guidance Note:

For the purposes of these Rules the term ‘third parties’, within the definition of “actively trade” is intended to include trusts.

“the AML Handbook” means the Handbook on Countering Financial Crime and Terrorist Financing;

“annual expenditure” means total revenue of any type less profit before appropriations. In the case of a loss, the amount of the loss shall be added to the total revenue. Taxation forms a part of the annual expenditure;

“Annual Return Period” means the period of one year commencing on 1st July, in each and every year and ending on the 30th June each and every following year;

“Approved Bank” means an institution which is -

- (a) licensed under the Banking Supervision (Bailiwick of Guernsey) Law 1994²⁰2020;
- (b) registered under the Banking Business (Jersey) Law 1991²¹;

²⁰ ~~Ordres en Conseil No. XIII of 1994.~~

²¹ Chapter 13.075.

- (c) licensed under the Isle of Man Financial Services Act 2008²² to carry on a regulated activity falling within Class 1 (deposit-taking businesses);
- (d) authorised under the Financial Service and Markets Act 2000²³ of the United Kingdom to carry on the regulated activity of deposit taking;
- (e) a building society, registered and incorporated under the Building Societies Act 1986²⁴ of the United Kingdom, which operates a deposit-taking business without restriction;
- (f) a bank which is supervised by the central bank or other banking regulator of a member state of the Organisation for Economic Cooperation and Development (“OECD”);
- (g) a credit institution established in a European Union (“EU”) or European Economic Area (“EEA”) state and duly authorised by the relevant home state regulator; or
- (h) any other bank where the licensee is satisfied with its capital adequacy and that the applicable laws and regulations governing such bank provides a similar level of protection of client money to institutions listed above;

Guidance Note:

For (h), the licensee should ensure that the bank meets the following criteria:

- 1) is subject to regulation by a national banking regulator;
- 2) is required to provide audited accounts annually;
- 3) has minimum net assets of £5 million (or its equivalent in any other currency at the relevant time) and has a surplus of revenue over expenditure for the last 2 financial years; and
- 4) has an annual audit report which is not materially qualified.

“**Board**” has the meaning given to it by section 133 of the Companies (Guernsey) Law, 2008²⁵ or, in the case of an unincorporated entity, the committee or managing board of a partnership or other similar governing body;

²² AT 8 of 2008.

²³ 2000 c. 8.

²⁴ 1986 c. 83.

²⁵ Order In Council No. VIII of 2008.

“Client Bank Account” means an account held by a licensed fiduciary at an approved bank which holds, or is intended to hold, money on behalf of one or more clients;

“Client Company” means a body to or for which a Corporate Service Provider has agreed to provide services constituting company administration business;

“Client Entity Bank Account” means an account at an approved bank, in the name of the client or a client-related entity and which is not in the name of a licensed fiduciary;

“company administration business” means the activities described in subsection 2(1)(b)(i) and (ii) 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;

“complaint” means any oral or written expression of dissatisfaction, whether justified or not, from or on behalf of a person about the provision, or failure to provide a financial service in respect of regulated activities which alleges that the complainant has suffered, or may suffer, financial loss, material distress or material inconvenience;

“Corporate Service Provider (“CSP”) means a person carrying on company administration business;

“current liabilities” means the liabilities which are payable within one year;

“foundation business” means the activities described in subsection 2(1)(d) of the Law when carried on by way of business and not exempt from regulation under section 3 of the Law;

~~**“foundation official”** has the meaning given to it under subsection 2(1)(d) of the Law;~~

“Foundation Service Provider (“FSP”) means a person, whether a corporate or a natural person, carrying on foundation business;

~~**“the AML Handbook”** means the Handbook on Countering Financial Crime and Terrorist Financing;~~

~~“the Law” means The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law 2000²⁶;~~

“Outsourcing” means an arrangement, of any form, between a licensed fiduciary, which holds a ~~full~~primary or secondary fiduciary licence, and an outsourced service provider, by which the outsourced service provider performs an activity that would otherwise be undertaken by the licensed fiduciary;

“pension business” means the activities described in subsection 2(1)(e) of the Law when carried on by way of business and not exempt from regulation under section 3 of the Law;

“Pension Service Provider (“PSP”)” means a person carrying on pension business;

“regulated activities” means 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;

“significant complaint” means a complaint alleging a breach of the Law, *mala fides*, malpractice or impropriety, or repetition or recurrence of a matter previously complained of (whether significant or otherwise);

“significant outsourcing arrangements” means an outsourcing arrangement which in the event of a service failure or security breach has the potential to –

- (a) materially impact the licensed fiduciary’s business operations, reputation or profitability; or
- (b) materially impact the licensed fiduciary’s ability to manage risk and comply with applicable laws and regulations; or
- (c) involves any unauthorised access or disclosure, loss or theft of client’ information;

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

²⁶ ~~No. 1 of 2001 (Ordres en Conseil Vol. XLI, p. 13).~~

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“Trust Service Provider (“TSP”)” means a person, whether a corporate or a natural person, carrying on trust business.

(3) The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016²⁷ applies to the interpretation of these Rules.

(4) A reference in the Rules to an enactment should be taken to include any amendments, re-enactments with or without modification, extensions and applications.

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²⁷ Order in Council No. V of 2018.

PART 7 – ~~TRANSITIONAL ARRANGEMENTS, REVOCATIONS,~~ **CITATION AND COMMENCEMENT**

7.1. Transitional arrangements

- (1) ~~Licensees must complete amendments to their internal controls, to ensure compliance with the Rules by 31 December 2020.~~

7.1. Revocations

7.21.1 Revocation of The ~~Regulation of~~ Fiduciary (~~Accounts~~) Rules, ~~2001~~2020

The ~~Regulation of~~ Fiduciary (~~Accounts~~) Rules, ~~2001, as amended,~~2020 are revoked.

7.21.2 Revocation of The ~~Financial Resources Requirements Rules, 2018~~Regulation of Fiduciaries (Annual Return) Regulations, 2017

The ~~Financial Resources Requirements Rules, 2018, as amended,~~Regulation of Fiduciaries (Annual Return) Regulations, 2017 are revoked.

7.31.3 Revocation of The Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations, 2012

The Regulation of Fiduciaries (Fiduciary Advertisements and Annual Returns) Regulations, 2012 are revoked.

7.2 Citation and commencement

- (1) These rules may be cited as The Fiduciary Rules ~~2020~~2021.
- (2) These rules shall come into force on ~~31 December 2020.~~****.

Guernsey Financial Services Commission

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

April 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.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.

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?