

Guernsey Financial Services Commission

**Discussion Paper on Proposals to Create a Single Fiduciary
Handbook and Revise Pension Rules**

Issued 5 March 2019

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Responses to this Discussion Paper are sought by 30 April 2019.

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

Introduction

Purpose of the Discussion Paper

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

Consistent with the Commission's objectives, the proposals in this Discussion Paper are designed to enhance the levels of confidence and security in the Bailiwick's regulatory and supervisory framework for fiduciary services and private pension provision thereby further augmenting its development as a financial centre.

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

Responses to this Discussion Paper will be considered by the Commission with a view to making more detailed policy proposals in the form of a Consultation Paper to be issued later in the year.

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

Background to the proposals

Fiduciaries

The Commission proposes a refresh of the policy framework underlying the Fiduciaries Law, primarily in the area of business conduct. This proposed change will ensure compliance with international standards while building on ongoing policy initiatives. This change will also introduce simplification and consolidation with the creation of a single Fiduciary Handbook (the "Fiduciary Handbook").

The Group of International Finance Centre Supervisors ("GIFCS"), of which the Commission is a member, issued the Standard on the Regulation of Trust and Corporate Service Providers¹ ("the GIFCS Standard" or "the Standard") in 2014. The Standard sets a minimum benchmark for the supervision of businesses administering international trusts and companies. All GIFCS members have committed to be 'largely compliant' with the Standard by 2019. Whilst a number of necessary related changes to the Fiduciaries Law, including the introduction of the concept of secondary licensees, are due to be addressed under the Revision of Laws Project ("RoL"), further

¹ <http://gifcs.org/images/GIFCSStandardonTCSPs.pdf>

enhancements to the underlying policy framework are also proposed. Such changes will include new provisions concerning client money, outsourcing, communication to clients (including advertisement) and terms of business.

At present firms licensed under the Fiduciaries Law are subject to relevant Codes of Practice (Codes of Practice for Corporate Service Providers (CSP), Trust Service Providers (TSP) and Foundation Service Providers (FSP), together, “the Codes”). It is proposed that these Codes will be repealed and the current provisions reframed and strengthened under a single Fiduciary Handbook. New provisions relating to the GIFCS Standard will also form part of this new Handbook.

It should be noted that in the event that a Fiduciary Handbook is introduced it will not remove the requirement for licensees to comply with the Handbook on Countering Financial Crime and Terrorist Financing.

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

Following the introduction of the Pension Rules in July 2017, the Commission invited comment from industry taking the opportunity to review the drafting in light of experience and observations post-implementation. A number of suggestions for amendments were received and Part 2 of this Discussion Paper summarises these responses and provides the Commission’s feedback.

Additionally, this Discussion Paper makes a significant proposal in respect of the structure of the regulatory framework for pension licensees. As licensed fiduciaries, firms subject to the Pension Rules are also subject to the Codes. Consequently such firms must comply with two sets of requirements which may overlap or lack consistency, increasing regulatory burden. The Commission proposes alleviating this burden and clarifying requirements through the consolidation of the conduct of business-related elements of the Pension Rules into the new single Fiduciary Handbook.

It should be noted that it is not proposed to repeal the Code of Practice - Company Directors.

Next Steps

The closing date for the Discussion Paper is 30 April 2019. The Commission will then consider all the comments received and engage with relevant industry representative bodies with the view to consulting on detailed proposals in due course.

Part 1 – Proposed amendments

Proposed scope and structure of the new framework

A single Fiduciary Handbook

It is proposed that a consolidated Fiduciary Handbook be introduced encompassing the current scope of the Codes of Practice for TSP, CSP and FSP and introducing new rules in line with the GIFCS Standard. It is viewed that a shift from codes to rules would provide greater clarity and certainty on the requirements placed on a fiduciary licensee. The current Codes of Practice would be repealed. This proposal provides a simpler regime with one key reference source for licensees, as opposed to the introduction of a number of disparate pieces of policy.

Q1: Do you agree with the proposal to create a single consolidated Fiduciary Handbook?			
Agree		Disagree	
Please comment on the reasoning for your reply.			

Pension services providers

It is further proposed that Chapters 2 to 9 of the Pension Rules (concerning Conduct of Business) would be repealed and absorbed within the consolidated Fiduciary Handbook. This would eliminate the existing, inefficient and burdensome two-tier regime whereby pension services providers have to comply with both the Code of Practice for TSPs and the Pension Rules. It is not anticipated that the Conduct of Business requirements of the Fiduciary Handbook would materially exceed the existing Codes. Consequently, revised Pension Rules would be issued, based on Chapter 10 of the Pension Rules, with enhancements made following feedback from industry (as discussed in Part 2 of this Paper).

Q2: Do you agree with the proposal to consolidate conduct of business-related Pension Rules within a new single Fiduciary Handbook?			
Agree		Disagree	
Please comment on the reasoning for your reply.			

Personal Fiduciary Licensees (“PFLs”)

It is recognised that while there are common duties, there are differences in how Full Fiduciary Licensees (“FFLs”) and PFLs operate. Under the current regulatory regime, the three Codes apply to both FFLs and PFLs depending on their respective business activity with certain provisions being of little or no applicability to PFLs owing to the more limited scope of their licence. If the Fiduciary Handbook were to be introduced, it would apply to both FFLs and PFLs in a similar

manner as the Codes apply today. The only exception proposed is that for PFLs acting as directors only the Code of Practice – Company Directors would continue to apply.

The Commission has given thought to an alternative approach whereby two separate Handbooks, one for FFLs and the other one for PFLs, might be issued. However, given the current relatively small number of holders of personal fiduciary licences, the Commission is of the view that publication of a dedicated PFL Handbook is not merited. It is proposed, however, that the Fiduciary Handbook would aim to make clear which rules are applicable to PFLs.

Q3: Do you think that having one Handbook which applies to both FFLs and PFLs is appropriate?			
Agree		Disagree	
Please comment on the reasoning for your reply.			

Specific provisions

Client Money Rules

The Commission carried out a Thematic Review on Client Money in 2016 and findings have been published on the Commission’s website². This Review found that the sector largely demonstrated good practice and strong controls but also highlighted a number of areas for improvement. The introduction of Client Money Rules will formalize existing good practice, address necessary improvements and move towards compliance with GIFCS Standard in this area³, thereby providing clients of licensed fiduciaries with a greater degree of protection in the event of firm failure, equivalent to that afforded to the customers of other financial institutions. The GIFCS Standard addresses appropriate segregation, reconciliation and control of Client Money.

Q4: Do you think that Client Money Rules should form part of the new Fiduciary Handbook?			
Agree		Disagree	
Please comment on the reasoning for your reply.			

It is envisaged that rules concerning client money would apply to licensed fiduciaries which hold or have control of client money. During the Thematic Review in 2016, a number of firms queried

² <https://www.gfsc.gg/sites/default/files/Fiduciary%20Client%20Money%20Report%20V4.pdf>

³ GIFCS standard E3 addresses Client Money Rules

the definitions of “Client” and “Client Money”, particularly as these might be applied in the case of trust services. The Commission proposes that the definition used in the Handbook of “Clients” would be consistent with that used in the Fiduciaries Law and the definition of “Client Money” would be consistent with that used in the Thematic Review questionnaire:

“Clients”, in relation to any person, means

- (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.

“Client Money” means money which a licensed fiduciary –

- holds or receives on behalf of a Client; or
- owes to a Client.

Q5: Do you agree with the proposed definitions?			
Agree		Disagree	
Please comment on the reasoning for your reply and provide alternative suggestions for the definition(s) if applicable.			

Outsourcing

Under the current regulatory regime, provisions concerning outsourcing by licensed fiduciaries are limited to paragraph 4.7 of the Code of Corporate Governance which relates to Board retention of the responsibility and accountability for all material outsourced functions. The Commission proposes introducing sector-specific outsourcing rules with the objective of consistency with the Code of Corporate Governance and approaches applicable to other sectors, and broad compliance with the GIFCS Standard⁴. It is intended that this proposal will assist licensed fiduciaries by providing greater clarity around the Commission’s expectations with respect to outsourcing and will reinforce existing standards of good practice and control observed by licensees.

In line with the objective of meeting a level largely compliant with the GIFCS Standard the Commission is minded to implement the standards in a pragmatic fashion and therefore it is suggested, for example, that no supervisory approval would be required in the case of a sub-outsourcing arrangement on the basis that the licensed fiduciary would continue to be responsible for monitoring outsourcing risk and regulatory compliance. Similarly, the Commission would expect notification only of significant outsourcing arrangements.

⁴ GIFCS Standard H. 3. - Outsourcing of Key Functions

Q6: Do you agree that Outsourcing Rules should form part of the Fiduciary Handbook as proposed?

Agree

Disagree

Please comment on the reasoning for your reply.

Q7: Do you have a view as to what would constitute a “significant outsourcing arrangement”?

Yes

No

Please comment on the reasoning for your reply.

Terms of Business

GIFCS Standard⁵ require written terms of business with persons for whom a firm has agreed to act and prescribes what should be included within the terms of business, including:

- a description of the services to be provided;
- the fees to be charged and the basis of the calculation of those fees;
- any exit fee and the basis upon which it is calculated;
- the means by which complaints about the firm’s services can be made; and
- termination notice terms.

Under the current regulatory regime, Principle 5 of the Codes of Practice - CSP and FSP provides for similar requirements. It is proposed that these provisions will be revised to ensure broad compliance with the GIFCS Standard and included in the new Fiduciary Handbook. In addition the scope of Terms of Business provisions will be extended to include licensees carrying on trust business.

Q8: Do you agree with the proposal for Terms of Business Rules?

Agree

Disagree

Please comment on the reasoning for your reply.

⁵ GIFCS Standard F. 5. - Terms of Business and F. 3. Interaction with Clients

Other proposed provisions

In addition to the provisions highlighted above it is proposed that the new Fiduciary Handbook will also address a number of other areas currently covered by the Codes and that some revision will be made to modernise these elements and bring them closer to compliance with the GIFCS Standard. These provisions include employee Screening & Training, Conflicts of Interest, Record Keeping, Complaints, Financial Resources and Insurance Arrangements.

Q9: Please provide any further comments you may wish to share with respect to the proposals in this Discussion paper

Please comment on the reasoning for your reply.

Part 2

Feedback received in relation to The Pension Licensees (Conduct of Business) & Domestic and International Pension Scheme and Gratuity Scheme Rules (No.2) 2017 (the “Pension Rules”)

Part 2 of this document is set out in a different format to Part 1 given that Part 2 addresses feedback already received in relation to the Pension Rules.

Background

The Commission in 2018 invited feedback in relation to the Pension Rules following engagement with the Guernsey Association of Pension Providers (“GAPP”) and engagement with other stakeholders.

The Commission would like to thank all who took the time to provide feedback in respect of the Pension Rules and to representatives of GAPP for their ongoing engagement in discussions regarding the content of the Pension Rules. The feedback received included suggestions for amendments to the Pension Rules and highlighted where areas of clarification might be required.

The current version of the Pension Rules was issued by the Commission on 25 August 2017 and the Pension Rules included a transitional period allowing licensees a period to review and, where necessary, enhance their policies, procedures and controls in order to ensure that they meet their obligations under the existing Pension Rules. The end of the transitional period was 30 September 2018.

This document provides the Commission’s response and proposed changes in light of feedback and our lessons learned since the Pension Rules were introduced.

Overall, no fundamental changes in policy are currently proposed. The majority of amendments proposed relate to refinement of drafting and definitions with the aim of increasing clarity and removing any perceived ambiguity or duplication.

Draft revised Pension Rules will be published along with the Consultation Paper on the Fiduciary Handbook planned for future publication.

It should be noted that if the proposals within Part 1 of this paper are adopted the structure of the existing Pension Rules will need to change to reflect the removal of Rules 2 to 9 and the associated definitions. For ease of reference, rule numbering reflecting that used in the current Pension Rules is used in the sections below.

For the avoidance of doubt, until such time as new Pension Rules come into force licensees must continue to comply with current Pension Rules.

Proposed amendments

Citation, Commencement and Application

Feedback was received seeking clarification on the scope of application of the Pension Rules. It is proposed that the wording of 1.1.3 be amended to confirm that the Pension Rules apply only to licensees conducting regulated activities in relation to *Pension Schemes* and *Gratuity Schemes*.

Interpretation

In light of Brexit it was suggested that the definition of the “Appropriate Financial Adviser” be amended to include reference to the United Kingdom, therefore it is proposed that part (b)(ii) of the definition be updated as follows:

- (ii) a financial adviser regulated to provide financial advice on pensions in Jersey, Isle of Man, United Kingdom or an EU member state;

The Commission received feedback that the current definition of “Defined Benefit Basis” has the potential to exclude certain schemes that do not meet the definition of “Defined Benefit” or the definition of “Defined Contribution”. It is proposed to update the definitions so that all schemes fall within the scope of either “Defined Benefit” or “Defined Contribution”.

It is proposed to amend the definition of the term “relevant benefits” used in the definition of “occupational pension scheme” as follows:

“**occupational pension scheme**” means a scheme established under irrevocable trust or under contract and sponsored by one or more participating *employers* who contribute to it, which has, or is capable of having, effect so as to provide only retirement benefits to or in respect of *employees* or former *employees* of the *participating employers*, or previously participating *employers*;

Consequently, it is proposed to include “participating employer” and “principal employer” as definitions within the Pension Rules as follows:

“**participating employer**” means an *employer* participating in a *Pension Scheme* or a *Gratuity Scheme* in which more than one *employer* participates;

“**principal employer**” means the *employer* which under the *Governing Documentation* is referred to as the principal employer or identified by reference to some other similar designation;

Following feedback, it is proposed to introduce a new definition of “regulated activities” removing the definitions of “gratuity scheme business” and “pension scheme business”, the new definition of “regulated activities” is proposed as follows:

“**regulated activities**” means any activity which is a regulated activity under Section 2(1)(e) of *the Law*;

Comments were received regarding the inclusion of repetition or recurrence within the definition of “significant complaint”. With the proposal to remove sections 2 to 9 of the Pension Rules with the creation of a Fiduciary Handbook the existing Rule 7 and reference to the definition of “significant complaint” would be repealed from the Pension Rules. The comments regarding repetition or recurrence will be taken into account following any decision regarding the implementation of any Fiduciary Handbook.

10.3 Governing Documentation

Respondents provided feedback that the definition of governing documentation should be reviewed. The Commission’s aim is that members have access to adequate information to make informed decisions. The Commission will further review the Rules with a view to achieving this aim.

10.4 Governance Procedures

Feedback sought clarification of the circumstances under which a Governance Committee might be appointed. It is proposed that the Pension Rules be amended to clarify that appointment of a Governance Committee is at the discretion of the licensee with no firm requirement under the Pension Rules. The requirement for a licensee to ensure it has appropriate *Internal Controls* in place in relation to each scheme would be retained.

10.5 Notification to Commission of Pension Schemes or Gratuity Schemes

Feedback received indicated that the notification requirement should address the circumstance where approval of a scheme by the Income Tax office does not take place on the same day as scheme establishment and it is proposed that the Rule will be amended accordingly.

10.6 Reporting to the Commission

With the objective of minimising impact on *Licensees* while ensuring adequacy of regulatory data, the Commission has introduced a quarterly scheme return and extended the submission period in respect of the annual return from 3 months to 6 months. It is proposed that the Pension Rules will be revised to reflect these changes in practice.

10.8 Documentation

Whilst relatively little feedback was received relating to 10.8 the Commission is proposing to amend the title of this section to “Scheme Documentation”. It is further proposed to make minor amendments to reflect that financial statements be prepared “where appropriate” under the existing 10.8.1(c).

It is also proposed to include provisions to allow the *licensee* to make the documentation available by electronic means, whether directly by the *licensee* or via a third party. (The provision of information via electronic means was a recurring theme in feedback and the Commission proposes to amend the Pension Rules to facilitate such provision, specifically in Rules 10.9, 10.10 and 10.12.)

10.9 Service Providers

Following feedback it is proposed to broaden this rule to require a licensee to take all reasonable steps to assess on appointment, and periodically review, the suitability, competence and performance of a third party-appointed *Service Provider* and, where found unsuitable to take appropriate steps to inform the person holding the power of removal.

10.10 Treatment of Members and Other Beneficiaries

It is proposed to rename this section of the Pension Rules to “Information for New Members” which represents a more accurate reflection of the requirements of this section of the Pension Rules rather than the current “Treatment of Members and Other Beneficiaries”.

10.11 Contributions

Feedback sought further clarity on references to “amounts” and “timings” in this Rule. Additionally respondents suggested that the Rule should be enhanced to reflect the circumstance where the employer provides contribution schedule-related information. Additionally respondents highlighted areas of potential duplication across the Rule. Appropriate amendment of this Rule is under consideration with a view to improving definitions, taking into account employer provision of information and removing any potential duplication.

10.12 Charges

It was pleasing to note that respondents were on the whole in agreement with and cognisant of the importance of disclosure to members of *Pension Schemes* or *Gratuity Schemes* of the level of fees payable. Feedback indicated there were circumstances where it is not practical to provide members with details of every *Member Borne Charge*. It is proposed to update the Rule to make allowance in limited cases.

10.13 Benefits

Rule 10.13.1 explains the nature and timing of pre-retirement information that a licensee must provide to members of defined contribution schemes. Feedback questioned the requirement to provide a “nil” contributions statement on an annual basis arguing that that this may have limited value for certain closed arrangements or in the case of deferred members. Also the requirement to provide annual investment performance information was questioned in the case of complex, hard to value instruments.

The Commission is of the view that the provision of information to the member is important and any potential weakening of the requirement must be carefully considered. Inability to track performance of investment return in some circumstances may be an indicator of inappropriate investment. Also, in some circumstances, a “nil” contribution return may act as a valuable check. The Commission will continue to consider appropriate drafting of this Rule.

Another area queried was the requirement to provide details of the complaints resolution procedure annually, as this was viewed as potentially onerous. The Commission proposes that an amendment is made on the basis that the member is notified of changes to the complaints procedure and has access to the full procedure if required.

Rule 10.13.2 relates to the provision of pre-retirement information to a member of a defined benefit scheme. Following feedback it is proposed that the Rule will be amended to clarify

that individual information elements may be provided where not all elements specified under the Rule are requested. Additionally, further clarification around illustrative estimates of benefits was sought by respondents. Appropriate clarification of the Rule remains under consideration.

10.14 Transfers

Respondents made reference to the existing Rule 10.14.2(a) and the provision of a valuation “no later than 21 days from the date that such information was requested by the transferor” and noted that a 21 day period may not be practical for Defined Benefit schemes and where there are complex underlying investments. It is therefore proposed to amend this Rule to require valuation provision as soon as reasonably practicable.

There was further comment regarding the existing Rule 10.14.3 and the de minimis exception where advice is not required where a transfer does not exceed £30,000. Respondents noted that there was a preference to increase the value of the de minimis to £50,000. The Commission is minded to increase the de minimis value to £50,000 and has also sought feedback regarding the de minimis being based on a deferred pension value rather than based on a transfer amount. Feedback was mixed and therefore this is still under consideration.

10.15 Statement of Investment Principles

Feedback has been received relating to the provision of a “Statement of Investment Principles” and whether or not it is appropriate to apply these to “member directed schemes”. The Commission is proposing to exclude “member directed schemes” from the requirements regarding the preparation of a “Statement of Investment Principles”.

10.16 Investment Direction

Feedback was received seeking clarification that this Rule permits different investment direction types to apply to different parts of a scheme. It is proposed that such clarification will be made to the Pension Rules.

A respondent queried the inclusion of a requirement under Rule 10.16.3 for a licensee to tell a member upon joining a scheme that the licensee, a service provider or a third party "*still retains responsibility for the professional conduct of the investment management activity*" even in the case of a Member Directed self-investment approach, where such responsibility may be placed on the Member. The Commission proposes appropriate amendment to the Rule to ensure accurate disclosure is made to the member.

Areas of Clarification

Interpretation

“Appropriate Financial Adviser” – the definition as drafted makes reference to “personal or group” Pension Schemes or Gratuity Schemes. A question was raised regarding the use of the word “group” in this context and queried whether this should mean an “occupational pension scheme”. In this context a “group” pension scheme or gratuity scheme might be an “occupational pension scheme” but it might also be a multi-member pension scheme or gratuity scheme.

“occupational pension scheme” – clarification has been sought that this term would include employer sponsored RATS. The Commission considers that an employer sponsored RATS would be included in the definition of an “occupational pension scheme”.

General Principles

Comments were received that within item 3 of the General Principles titled “*Reporting to the Commission*” the term “material scheme information” is not defined. The Commission would consider “material scheme information” to include, but not be limited to: the information required as part of the initial scheme notification, the quarterly scheme reporting, the annual scheme reporting and any notification arising from the transfer or closure of a pension scheme or gratuity schemes.

5. “Documentation” and 7. “Treatment of Members and Other Beneficiaries”

A comment was received noting that the above Rules require disclosure of information to members and that such information and documentation has to be readily available and must be clear and transparent. The observation was made that under the Trust Law, trustees do not have to provide all trust documentation or information to members. For example, there are express carve-outs under the Trust Law as to limitations on what trustees are obliged to disclose. The argument was made that Rules as they relate to disclosure of information should be made subject to the provisions of the Trust Law so that the duty to provide information and documentation should at all times be subject to the terms of the Law. The Commission is aware of the requirements of the Trust Law and the Commission’s expectation would be that a Trustee act subject to the terms of the Law and in the best interests of the beneficiary. When not making documentation available the Commission would expect there to be a record of deliberations as to how the trustees have acted in the best interests of the member in not doing so.

10.5 Notification to Commission of Pension Schemes or Gratuity Schemes

One respondent queried the nature of the “key details” of the scheme required to be notified to the Commission and the period for reporting changes to this information. The “key details” referred to in the existing Rule 10.5.1 may be found in the Form 233 – New Pension Scheme or Gratuity Scheme available via the Online Submission Portal.

The Commission would expect to be notified if there is any change to the scheme name, the *Pension Scheme* or *Gratuity Scheme* classification, the *Pension Scheme* or *Gratuity Scheme* Investment Direction, the *Pension Scheme* or *Gratuity Scheme* end date for the Scheme Year and the number of other licensed fiduciaries operating under section 2(1)(e).

Next steps and further feedback

The Commission welcomes the embedding of Pension Rules in the Bailiwick and considers this an ongoing process. Stakeholders’ feedback is addressed in this paper and interested parties will be given further opportunity to comment when a complete revised draft version of the Pension Rules is published as part of any future consultation on the Fiduciary Handbook.

Q10: Please provide any further comments you may wish to share with respect to the proposals in Part 2

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