

GUIDELINES ON EXPECTED PRACTICE FOR TRUST SERVICE PROVIDERS

Introduction

The Financial Supervision Commission (“the Commission”) has concluded its first visits to Trust Service Providers. During these supervisory visits the Commission identified themes and expected practice points, and therefore it is issuing the guidelines in relation to trust services to assist its licenceholders. These guidelines are in no way intended to be a statement of law, as legal obligations must override guidance. They are general guidelines only in order to provide information to licenceholders on the areas of trustee and trust administration services that the Commission may review during the course of a supervisory visit and the practices expected in those areas.

If a licenceholder is in any doubt about its duties or responsibilities it should always refer to the appropriate law or seek independent legal advice.

Conduct of business

Rule 6.2 of the Financial Services Rule Book 2009 requires that all licenceholders must act with due skill, care and diligence in carrying on regulated activities.

To this end the Commission expects all licenceholders to be able to demonstrate that they have adequate systems and controls in place to enable them to fulfil their duties, responsibilities, obligations and the requirements imposed by trust law. The Commission also expects licenceholders to be able to demonstrate the effectiveness of those systems and controls.

In assessing the adequacy of licenceholders’ procedures the Commission’s Officers may review the following areas:

Client take on

In addition to compliance with Anti-Money Laundering and Countering the Financing of Terrorism legislation currently in force and demonstrating that Customer Due Diligence (CDD) has been undertaken as appropriate to the risk assessment of the business, the Commission expects a licenceholder to ensure at the outset of the business relationship that:

- The terms of the trust instrument (and any subsidiary documents) setting out the terms of the trust have been identified, read and fully understood as far as necessary to administer the trust;
- The trustee has determined who its co-trustees, protectors or enforcers are, if any;
- The trustee has established who the beneficial objects, including the objects of any dispositive powers, are (including the details of any assignment or charge of any beneficial interests) and has considered whether there is or may be anything about the beneficial objects, settlor or protector that might, in the circumstances, demand specific consideration by a trustee of the trust concerned;
- The trust property is clearly ascertained, its value and nature (and therefore the demands and risks of holding and managing it) are understood and all necessary formalities to secure the transfer of the trust property to or under the control of the trustee are observed;
- The trustees are familiar with the trust property and have made all appropriate arrangements for its management and security;
- Where the appointment is as trustee of an existing trust, that the new trustee has made reasonable enquiries to investigate any possible breaches that come to its notice; and

- The trustee should be aware of any tax issues affecting the particular trust.

Record keeping

The Commission (in the absence of reasonable cause) expects a professional trustee to keep, and be able to produce within a reasonable time on request, records which may include the following:

- Original trust documents, including subsidiary documents, which should be held in safe custody.
- Minute book to record the decisions of the trustee (see below).
- Details of the assets held in trust and any liabilities incurred as trustee.
- Accounts and tax records (see below).
- Copies of relevant correspondence.
- Details of settlor, beneficial objects and protector, including full CDD as appropriate in accordance with anti-money laundering legislation.
- Any legal and taxation advice taken.

The Commission recognises that, in the absence of trust terms to the contrary, trust law is not prescriptive in its requirements for trustee deliberations to be formally documented in minutes. However it expects to see that, when a professional trustee exercises or performs its discretion, powers or duties, this would normally be recorded in the books of the trust, or evidence of the independent decision making process of the trustee is made.

In establishing whether to minute a decision the Commission expects that licenceholders should take into consideration the advantages of clearly recorded decisions (especially fundamental decisions or decisions that affect the subsequent actions of a trustee, such as a distribution) and, on the other hand, the risks involved in not minuting the trustees' decision. If as a result of these considerations a trustee draws the conclusion that minutes need not be prepared the Commission expects the licenceholder to be able to provide evidence of the decision making process and the rationale behind the decision.

Management of trust property

Trustees are bound to hold trust property in their own name and under their direct control. Certain functions can, of course, be delegated under the trust instrument or legislation. The trustee of a trust may be empowered, for example, to delegate management, place assets in the name of a nominee and even act under third-party advice. The Commission expects to see evidence that trust property is secure and is subject to appropriate measures of control, that any management of trust property by any other parties on behalf of the trustees is subject to adequate supervision by the trustee and that any arrangements for such management are kept under review.

The Commission specifically expects to see evidence that investments are kept under review and that advice is taken when reviews are made, unless unnecessary or inappropriate.

Accounts

Trustees are accountable to beneficiaries. Therefore the Commission regards it as best practice that financial records are kept up to date and that accounts are prepared as appropriate to the trust. The Commission recognises that the trustee will not necessarily be able to produce full accounts on demand but it

should have arrangements in place that will enable it to do so within a reasonable time.

Where the trust property includes company shares, and in particular where the trust has a controlling interest in the company, there should be clarity between the financial records of the company and the financial records of the trust and the accounting records should clearly evidence the transaction in each entity. For example, a loan from a trust to a company should be recorded on both the company and trust financial statements and the terms of the loan should be documented.

The trustee should also demonstrate an awareness of the tax issues affecting a particular trust, and, where necessary, keep appropriate records to enable proper compliance by the trustee, settlor and any beneficial objects.

Independence of trustee

Whilst it is not the role of the Commission, and the Commission would not seek, to review the decisions made by a professional trustee it is important that a trustee acts independently. The Commission therefore expects trustees to be able to demonstrate that they have acted independently and, for example, have not simply acted unquestioningly in accordance with the demands of a settlor. (See also 1.7 Conflicts of interest, below.)

The Commission therefore expects to see evidence that trustees can demonstrate an active as well as independent decision-making process, minuted where appropriate, and not simply unquestioning responses to requests from a settlor or beneficiary with no other activity or consideration being apparent.

The Commission also expects to see that a trustee would seek independent advice when appropriate, for example, seeking legal or tax advice where it needs to demonstrate attention to the interests of those interested under the

trust. Similarly the Commission expects a trustee to be able to demonstrate that, where power of investment lies with the trustee:

(1) any investment decisions are (subject to any suitable arrangements for delegated management) made by the trustee independently (and the trustee is not acting, for example, at the instigation of another party who is not entitled to proffer guidance or instructions under the trust instrument, without properly taking its own advice on the decisions to be made, unless unnecessary or inappropriate), and

(2) the trustee takes reasonable steps to procure that any decision-making process of a delegate of the trustee (such as an investment manager under a discretionary management agreement) is in accordance with policies dictated by the trustee.

The Commission understands that in some circumstances, such as where there are reserved powers, a trustee may be subject to external direction. Nevertheless, trustees will be expected to understand the extent of the authority of the person empowered to direct them and consider whether directions given to them are the proper ones to follow in the circumstances.

Nominee settlors

The use of nominee settlors, which can obscure the nature and source of trust property, is not regarded as good practice. However it is recognised that there may be exceptional circumstances where a nominee settlor can be properly used. These would be restricted situations that are genuine and legitimate where one person creates a trust and the bulk of the trust fund is added by someone else. This is different to a situation that is designed to obscure ownership or commit fraud. Where a nominee settlor has been used, the Commission expects CDD to be undertaken on the person contributing the corpus of the trust in accordance with the requirements of the current Anti-Money Laundering and Countering the Financing of Terrorism legislation and a proper reason for the use of the nominee settlor will be expected.

Conflict of interests

Trustees have an obligation to manage conflicts of interests between the trustees' personal interests (or obligations to third-parties) and the interests of the persons beneficially interested under a trust and, to an extent, between the competing interests of beneficial objects having different beneficial interests in the trust property.

In some cases, a trustee's decision may be void or voidable at the instance of a beneficial object unless it is permitted by the trust instrument and the trustee acts properly in continuing to act where the conflict or potential conflict continues to subsist. The Commission acknowledges that trustees might, as a result of the terms of the trust instrument, approved by those beneficially interested under the trust or an order of the court, be acting properly where they find themselves in a position of potential or actual conflict of interest. Nevertheless, the Commission expects a trustee to be able to demonstrate that it has acted honestly, reasonably and fairly to ensure that no actual improper prejudice arises. If this cannot be achieved, the trustee must consider what steps properly to take in order to relieve the conflict. Licenceholders also have an obligation under Rule 8.7 of the Financial Services Rulebook 2009 to establish, implement and maintain an effective conflict of interest policy which must identify circumstances which constitute or may give rise to a conflict of interests and specify procedures to be followed to manage such conflicts.

In addition, licenceholders are required under Rule 8.8 to maintain a conflict of interests register recording any conflicts of interest that have arisen and measures adopted to manage them.

Conclusion

The guidance above is intended to provide licenceholders with an overview of general guidelines as to what the Commission expects to see during

inspections in relation to the provision of trust and trust administration services and compliance with regulatory requirements.

The Commission recognises that trusts vary and considerations appropriate for one may not be applicable to another. The Commission's Officers are happy to discuss these variances with licenceholders during the course of supervisory visits.

The guidelines should be read in conjunction with appropriate legislation, including the Financial Services Rulebook 2009, the Proceeds of Crime (Money Laundering) Code 2010 and the Anti-Money Laundering and Countering the Financing of Terrorism Handbook.

Should you wish to discuss any matters relating to this paper, please contact your Relationship Manager at the Commission.

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October 2010