

Statutory Document No. 470/05



FIDUCIARY SERVICES ACTS 2000 and 2005

***FIDUCIARY SERVICES (CLIENTS' MONEY AND TRUST MONEY) REGULATORY
CODE 2005***

Approved by Tynwald 13 July 2005

Coming into operation 1 August 2005

In exercise of the powers conferred on the Financial Supervision Commission (“the Commission”) by section 6(1) of the Corporate Service Providers Act 2000^(a), and of all other enabling powers, and after consulting with such bodies as appear to be representative of the interests likely to be affected by it, the following Code is hereby made: -

Citation, commencement, interpretation and application

1. (1) This Code may be cited as the Fiduciary Services (Clients' Money and Trust Money) Regulatory Code 2005 and shall come into operation on 1 August 2005.

(2) In this Code: -

“the Act” means the Corporate Service Providers Act 2000 as amended by the Fiduciary Services Act 2005;

“bank” means a banking institution licensed under section 6 of the Banking Act 1998^(b); or a building society authorised under section 2 of the Building Societies Act 1986^(c) as applied by section 4A of that Act;

“Category 2 CSP” and Category 2 TSP have the meanings given in paragraph

^(a) 2000 c.13

^(b) 1998 c.4

^(c) 1986 c.7

3(4)(b) and (e) respectively of the Fiduciary Services (General Requirements) Regulatory Code 2005;

“client” means any person with whom a fiduciary agrees to provide by way of business, services which are regulated activities;

“client agreement” and “terms of business” have the meanings given in paragraph 5 of the Fiduciary Services (General Requirements) Regulatory Code 2005;

“client company” means any company for which a CSP provides services which are regulated activities;

“client company bank account” means any bank account held in the name of a client company;

“clients’ account” means any bank account, which is opened by and in the name of a fiduciary in accordance with paragraphs 7 and 8 for the holding of clients’ money;

“clients’ money” has the meaning given in paragraph 3;

“company” has the meaning given in section 27(1) of the Act;

“corporate service provider” means a fiduciary who engages in any CSP regulated activity;

“CSP” means a corporate service provider;

“CSP regulated activity” means any activity falling within any paragraph of Part 1 of Schedule 1 to the Act;

“fiduciary” has the meaning given in section 1(1) of the Act;

“money” means legal tender in the Island or elsewhere or anything, which may be directly converted into legal tender and includes notes and coins, cheques, drafts and electronic transfers;

“recognised bank” means

(a) if the funds are held in the Isle of Man, a bank;

or

(b) if funds are held in a country outside the Isle of Man,

(i) a banking institution that is licensed and supervised within the European Economic Area (EEA) or in a jurisdiction that is a member of the Organisation for Economic and Commercial Development (OECD); or

(ii) a branch or subsidiary of a banking institution that falls under (i) above; or

(iii) a banking institution that is authorised in, or is part of a banking group whose lead regulator is authorised in, a jurisdiction that applies regulatory standards equivalent to those applied in the Isle of Man to banks;

“transitional arrangements” has the meaning given in article 3 of the Fiduciary Services Act 2005 (Appointed Day) Order 2005^(d);

^(d) SD467/05

“trust” has the meaning given in section 27(1) of the Act;

“trust money” has the meaning given in paragraph 4;

“trust money account” means any bank account other than a clients’ account, which is opened by and in the name of a fiduciary in accordance with paragraph 8 for the holding of trust money;

“trust service provider” means a fiduciary who engages in any TSP regulated activity;

“TSP” means a trust service provider;

“TSP regulated activity” means any activity falling within any paragraph of Part 1A of Schedule 1 to the Act.

(3) Subject to sub-paragraphs (4) and (5), this Code applies to all fiduciaries.

(4) A holder of a Category 2 CSP or Category 2 TSP licence shall not hold clients’ money.

(5) This Code shall only apply to any TSP regulated activities undertaken by an applicant for a TSP licence, who is subject to the transitional arrangements, from 1 November 2005.

Guidance Note

The provisions of this Code relating to clients’ money do not apply to Category 2 CSP or TSP licenceholders, whose licences are restricted to regulated activities that do not include holding clients’ money. The provisions relating to trust money do, however, apply to a Category 2 TSP licenceholder, whose functions as a trustee are likely to involve the holding of trust money.

It should also be noted that this Code applies to all licensed CSPs but will not apply in respect of TSP regulated activity carried out by TSP licence applicants during the period in which all existing TSPs will be required to apply for a licence. (After that time it will be illegal to operate without a licence unless an application has been made or the activity is exempted and all licence applicants will be subject to the Code.)

This Code is designed to ensure that-

- *a fiduciary deals fairly and honestly with clients’ money; and*
- *so far as possible, a TSP keeps the funds of different trusts separate from each other and from the TSP’s own funds.*

Where a fiduciary is also a bank, the obligations under this Code apply to the bank in relation to its fiduciary operation only and are distinct from the obligations the bank has as a deposit-taker under the Banking Act 1998, notwithstanding that the bank may be both a depositor of clients’ money or trust money and the taker of the deposit. When a bank acts as a fiduciary, as the deposit-taker, it would have the same relationship to its own bank accounts designated in accordance with paragraph 8, as it has to the bank accounts of any other depositor.

General

2. This Code is not (except where expressly stated otherwise) intended to alter a fiduciary's obligations to any person under company or trust law and should be construed accordingly.

Definition of clients' money

3. (1) Clients' money is money of any currency which, in the course of carrying on fiduciary business, a fiduciary holds or receives within the meaning given in sub-paragraph (2), and may include money which a fiduciary holds or receives on behalf of a client company, or which forms, or is intended to form, part of the assets of a trust.

(2) A fiduciary holds or receives money if it enters, or expects to enter, into an agreement with a client or a client company to hold such moneys, and holds or receives (in the Island or elsewhere) in terms of that agreement any money which is not immediately due and payable to the fiduciary for its own account.

(3) Money ceases to be clients' money if it is paid: -

(a) to a client or a client company; or

(b) into a bank account or other account in the name of a client or client company (not being an account which is also in the name of the fiduciary); or

(c) to a third party at the direction of a client or a client company or other party for whom the money is held; or

(d) to the fiduciary in accordance with paragraph 9(2);

(e) to a trustee with the intention that it shall constitute part or all of the assets of a trust; or

(f) into a trust money account.

(4) Money held in a client company bank account and money held in a trust money account is not clients' money for the purpose of this Code

Guidance Note

Moneys invoiced and received by a fiduciary from a client as payment in advance for the provision of its services to the client (e.g., Fees/Standing Charges) are not clients' money within the meaning of this Code if they are due and payable to the fiduciary at the time of receipt. However, moneys invoiced and received by a fiduciary from a client, whether as a disbursement or otherwise, which are or will be due to a third party who is a creditor of the client or client company (e.g., government taxes/filing fees) are clients' money and should be held in a clients' account until due and payable.

If a fiduciary receives money for the purpose of setting up or contributing to the assets of a trust, the fiduciary may hold that money as clients' money until such time as the trust is established. Thereafter, it is considered best practice to hold the trust money in a segregated trust money

account established for that trust. However, provided that adequate systems, procedures and records are maintained to ensure that any trust money held in a clients' account can be properly identified and accounted for at all times, trust money may in some circumstances be held in a clients' account. Such an arrangement may be appropriate where, for example, a fiduciary holds several small amounts of money which form the assets of a number of trusts and opening a separate trust money account for each such trust would incur disproportionate bank charges which may rapidly erode the balances held.

Once the fiduciary pays clients' money in accordance with sub-paragraph (3), the fiduciary discharges its liability to the client in respect of that money.

Cheques and other payment orders containing both client's money and other money should, if possible, be made payable to the fiduciary's clients' account to comply with paragraph 9(1).

Definition of trust money

4. Trust money is money of any currency forming part or all of the assets of a specified trust, which a fiduciary receives, as trustee of that trust or as agent or nominee of the trustee.

Guidance Note

The term "trust money" is used in this code to refer to trust assets that are held in cash by the fiduciary as trustee of a trust or as agent or nominee of a trustee.

Clients' money to be held on trust

5. Clients' money shall be held on trust for the client, client company or trust entitled to it, as the case may be.

Duty to segregate (clients' money and trust money)

6. (1) A fiduciary shall without unreasonable delay pay all clients' money received by it for or from a client or client company into one or more specially created clients' accounts, any such account being segregated from any other account which is not a clients' account.

(2) A fiduciary shall without unreasonable delay pay all trust money into a segregated and specifically designated trust money account or, where circumstances make it impractical to set up separate accounts for individual trusts, into a clients' account.

Guidance Note

A trust money account is a segregated account, which relates to a specific trust only and is not a pooled account relating to a number of different trusts or a pooled clients' account.

It is considered best industry practice for a fiduciary to hold trust money in a segregated trust money account established for that trust. However, provided that adequate systems, procedures

and records are maintained to ensure that any trust money not held in a segregated account can be properly identified and accounted for at all times, trust money may be held in a clients' account if circumstances make it impractical to set up a separate trust money account for each of the trusts.

Operational procedures – recognised bank (clients' money)

7. (1) A clients' account must be placed with a recognised bank.
- (2) A fiduciary must ensure that the recognised bank acknowledges to the fiduciary in writing (with a copy addressed to the Commission) that it understands that all money standing to the credit of the clients' account is held by the fiduciary as trustee and that the bank is not entitled to combine the account with any other account or to exercise any right of lien, set-off or counter-claim against money in that account in respect of any debt owed to it by the fiduciary.
- (3) Subject to sub-paragraph (4), where a clients' account is held with a recognised bank outside the Island, the fiduciary shall ensure that clients' money paid into such an account is protected by segregation under trust or otherwise by statute or other regulation, as effectively as it would be if it was held in a clients' account in the Island; and
- (4) Where the fiduciary cannot comply with sub-paragraph (3) in respect of any clients' account, the fiduciary shall advise in writing each client and client company whose money is held in such clients' account, that their money may not be protected as effectively as it would be if the fiduciary had complied with sub-paragraph (3), detailing the manner in which the fiduciary does not so comply.

Guidance Note

Where multiple clients' accounts or trust money accounts are established at the same bank, in or outside the Island, the Commission will only require one letter from that bank confirming that all accounts designated as clients' accounts will be treated in the same manner.

Operational procedures – account designation (clients' money and trust money)

8. A fiduciary must ensure that a clients' money account or a trust money account is designated to distinguish such an account from its own accounts and from other clients' and trust money accounts.

Guidance Note

Examples of suitable methods of designation may be -

- *incorporating in the title of a clients' account the words "clients' account", or in the case of a bank outside the Island, a description in an official language of the country in question equivalent to "clients' account"; or*
- *including in the title of a trust money account reference to the specific trust to which the account relates, for example, "as trustee of the [specify name] trust".*

Operational procedures – payments in and out (clients' account)

9. (1) Money, which is not clients' money, may not be paid into a clients' account unless -

- (a) it is required to open or maintain the account;
- (b) it is required to restore an amount withdrawn in error from the account;
- (c) it is mixed money comprising both clients' money and other money; or
- (d) subject to paragraph 6(2), it is trust money where circumstances make it impractical to set up a separate account for that specific trust; or
- (e) it is money due to the fiduciary.

Guidance Note

In general, a clients' account should only be used to hold clients' money. However, the Commission recognises that there might be circumstances in which a fiduciary's business would be unduly hampered by having to issue different instructions to a client relating, for example, to mixed moneys and moneys due to the fiduciary in payment of the fiduciary's fees and will allow such "mixed" moneys to be paid into a clients' account, provided those moneys are removed from the account without unreasonable delay.

A cheque or other payable order containing both clients' money and other money should first be paid into the clients' account. Any funds due to the fiduciary or payable to other parties may then be withdrawn in accordance with sub-paragraph (2) below. In these circumstances it is acceptable for a fiduciary to instruct its clients and other relevant parties to make such cheques, drafts and electronic transfers payable to the clients' account.

- (2) Money may be withdrawn from a clients' account only if it represents cleared funds and -
 - (a) it is not clients' money;
 - (b) it is part of a cheque or other payable order paid into a clients' account, which includes other money, and as soon as practicable after cleared funds in respect of that money are credited to the account, all moneys which are not clients' money are withdrawn from the account;
 - (c) it is properly required to make a payment on behalf of a client or client company; or
 - (d) it is for transfer to another clients' account, to a bank account in the client's or client company's own name or to a trust money account.

Operational procedures – controls/reconciliations (clients' money)

- 10. (1) A fiduciary must ensure that all transactions involving clients' money are appropriately documented.
- (2) A fiduciary shall account properly for clients' money and, in particular, shall ensure that:-

- (a) save in accordance with paragraph 9, clients' money and other money do not become intermingled;
- (b) it can at any time identify and reconcile how much clients' money is held on behalf of each client or trust;
- (c) money held for one client is not withdrawn or transferred to make payment to or on behalf of another client or its client company or another trust; and
- (d) no clients' account becomes overdrawn or is used to extend credit to a client or client company or a trust.

Guidance Note

If a fiduciary is obliged to make a payment for a client or a trust, to whose credit there is insufficient money in such a clients' account, it must not pay the amount from that account, but must make other arrangements for obtaining credit for that client or trust.

- (3) A fiduciary shall at least once a month:-
 - (a) reconcile the balance on each clients' account as recorded by the fiduciary on its own ledger, with the balance on that account as set out in the statement issued by the bank;
 - (b) reconcile the total of the balances on all clients' accounts as recorded by the bank, with the total of the corresponding credit balances in respect of each of its clients as recorded by the fiduciary; and
 - (c) correct any differences forthwith unless they arise solely as a result of normal timing differences;

and shall give written notice and details forthwith to the Commission if it has not carried out the reconciliation or if having done so, it is unable to, or does not, correct any differences.

Guidance Note

Where there has been no movement in an account, all that is required in respect of the monthly reconciliation is a sign-off noting "no movement".

Normal timing differences would include: -

- (a) lodgements recorded as receipts in the cash book but not credited in the bank statement until the following working day; and
- (b) unpresented cheques recorded as payments in the cashbook but not debited in the bank statements.

(4) A fiduciary may only withdraw money from a clients' account for or towards payment of its own fees (including expenses) if: -

- (a) the fees accord with the arrangements contained in the written client agreement between the fiduciary and its client or as notified in the fiduciary's terms of business as the case may be and such written client agreement or terms of business provides that the fiduciary may discharge its fees from moneys held for or on behalf of its client in its clients' account or from the assets of the trust; and
- (b) in any other circumstances the fiduciary has received prior written authority from the client to withdraw such money for the purpose of payment of the fiduciary's specified fees

and any moneys that under sub-paragraphs (a) or (b) properly belonging to the fiduciary, shall cease to be clients' money.

Operational procedures – controls/reconciliations (trust money)

11. (1) A fiduciary which holds trust money shall account properly for such trust money and, in particular, shall ensure that it can at any time identify and reconcile how much trust money is held on behalf of each trust in relation to which it carries out any regulated activity.

(2) Where trust money is held in a clients' account, the operational procedures relating to clients' money in paragraphs 7 to 10 apply.

Guidance Note

A fiduciary which holds trust money in a trust money account should regularly:-

- *reconcile the balance on each trust money account with the balance on that account as set out in the statement issued by the bank; and*
- *correct immediately any differences that do not arise solely as a result of normal timing differences.*

The frequency with which trust money account reconciliations should be carried out will depend on the amount of activity in the account but should be frequent enough to demonstrate, in accordance with the requirement in paragraph 9(1) of the Fiduciary Services (General Requirements) Regulatory Code 2005 (if a TSP is responsible for trust assets, it must be able to account for such assets), to the Commission that the fiduciary maintains adequate records and accounts relating to trust assets, including trust moneys.

The Guidance Note in respect of timing differences under paragraph 10(3) applies to trust money accounts also.

Interest on clients' money

12. (1) A fiduciary may not withdraw for its own account any interest accrued on a clients' account that is due to a client.

(2) A fiduciary must pay to clients, interest received on clients' money in accordance with the terms set out in the client agreement or terms of business. If no interest is to be paid, then this must be clearly stated in the client agreement or terms of business.

(3) The fiduciary must advise the Commission as to what arrangements it has in place with its clients with regard to the payment or non-payment of interest on moneys held in any clients' accounts.

Guidance Note

The Commission does not require notification of every individual arrangement with each client. It will however require details of the fiduciary's general arrangements with regard to the payment of interest.

Revocation

13. The Corporate Services (Clients' Money) Regulatory Code 2000^(e) and the Corporate Service Providers (Clients' Money) (Amendment) Regulatory Code 2003^(f) are hereby revoked.

Made this 13th day of July 2005

___W L B Stott_____ Commissioner

___J R Aspden_____ Chief Executive

EXPLANATORY NOTE

(This note is not part of the Regulatory Code)

This Regulatory Code is made by the Financial Supervision Commission for the purpose of setting out its requirements for clients' money and trust money held by fiduciaries licensed under the Fiduciary Services Acts 2000 and 2005. The Regulatory Code will apply to all CSPs with effect from 1 August 2005, but makes no material change to the current rules that apply to them. The Regulatory Code will not apply in relation to the TSP business of TSP licence applicants to whom the transitional provisions apply, until the close of the period for applications to be made for a licence by existing TSPs (1 August to 31 October 2005). Thereafter, all transitional applicants will be subject to the Code.

The Regulatory Code defines "*clients' money*" and provides that it be held by the fiduciary on trust and in a segregated bank account. It also specifies the operational procedures in respect of holding and reconciling any moneys held on behalf of clients (*clients' money*). A clients' money account must be designated and recognised by the bank as such. Bank interest accruing on a clients' money account must be paid to the relevant client, unless the client has agreed otherwise.

The Regulatory Code also defines "*trust money*", which is held by a fiduciary licensed to carry on TSP regulated activities. A TSP who holds trust money, whether as trustee of a trust or as agent or nominee of a trustee, must keep it separate from its own moneys and clearly identify the bank account as that of a particular trust. However, where it is impractical to open separate trust accounts for each individual trust, trust moneys may be held in a clients' money account, provided the TSP accounts properly under the clients' money account procedures for those moneys.

^(e) SD704/00

^(f) SD163/03