

Subsidiary Legislation made under s. 53.

**FINANCIAL SERVICES (CONDUCT OF FIDUCIARY
SERVICES BUSINESS) REGULATIONS 2006**

(LN. 2006/139)

7.12.2006

Amending enactments	Relevant current provisions	Commencement date
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EU Legislation/International Agreements involved:

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SCHEDULE

1989-47

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In exercise of the powers conferred on him by section 53 of the Financial Services Act 1989, and all other enabling powers, the Minister has made the following regulations>

**PART I
Introduction**

Title.

1. These Regulations may be cited as the Financial Services (Conduct of Fiduciary Services Business) Regulations 2006.

Interpretation.

2. In these Regulations, unless the context otherwise requires—

“Commissioner” means the Financial Services Commissioner appointed under section 8 of the Financial Services Commission Act, 1989;

“customer” means any person with or for whom a licensee has entered into or intends to enter into an agreement for the provision of fiduciary services or who has received the benefit of such services provided by the licensee;

“fiduciary services business” means any activity falling within paragraph 1 or 2 of Schedule 3 to the Act and “fiduciary services” shall be construed accordingly;

“licensee” means a person licensed under section 8 of the Act to carry on fiduciary services business;

“management agreement” means any agreement the making or performance of which by either party constitutes an activity falling within paragraph 1 or 2 of Schedule 3 to the Act;

“Minister” means the Minister with responsibility for financial services;

“regulatory system” means the arrangements for regulating a licensee under the Act or any rules or directions made by the Commissioner.

Application.

3.(1) These Regulations apply in relation to all licensees in respect of their fiduciary services business.

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(2) These Regulations are of general application to all fiduciary services business provided that, where a regulation applies only in particular circumstances, that regulation shall apply to a licensee only if those circumstances are relevant to the course of the fiduciary services business undertaken by that licensee.

**PART II
Statements of Principle**

Integrity.

4. A licensee shall observe high standards of integrity and fair dealing in the conduct of its fiduciary services business.

Skill, care and diligence.

5. A licensee shall act with due skill, care and diligence in the conduct of its fiduciary services business.

Best market practice.

6. A licensee shall observe high standards of market conduct in the conduct of its fiduciary services business.

Know your customer.

7. A licensee shall develop and maintain 'know your customer' policies and procedures which shall require it to determine the true identities and businesses carried on by its customers.

Conflicts of interest.

8. A licensee shall either avoid any conflict of interest arising or, where conflicts arise, shall ensure fair treatment for all its customers by means of disclosure of information under internal rules of confidentiality, or shall decline to act.

Customer assets.

9. Where a licensee, in connection with or for the purposes of its fiduciary services business, has control of or is otherwise responsible for assets belonging to a customer, it shall ensure proper identification and segregation of those assets from the licensee's own assets and those of its other customers in accordance with the responsibility it has accepted.

Financial resources.

10. A licensee shall ensure that it maintains adequate financial resources to meet its commitments and adequate insurance to meet the obligations arising from its fiduciary services business and to withstand the risks to which its business is subject.

Internal organisation.

11.(1) A licensee shall organise and control its internal affairs in a responsible manner and shall keep proper records.

(2) Where a licensee employs staff or is responsible for the conduct of fiduciary services by others, it shall have—

- (a) adequate arrangements to ensure that they are suitable, adequately trained and properly supervised; and
- (b) well-defined procedures to facilitate compliance with the regulatory system which shall be set out in an administration manual with which all members of staff who are involved in the licensed activity shall be familiar.

Relations with the Commissioner.

12. A licensee shall deal with the Commissioner in an open and cooperative manner and shall keep the Commissioner promptly informed of anything concerning the licensee that might reasonably be expected to be disclosed to him having regard to the professional obligations and duties of the licensee and its staff to its customers.

**PART III.
Core Requirements****Conduct of fiduciary services business.**

13. The Schedule to these Regulations shall have effect with regard to the specific requirements of the application of the principles in Part II of these Regulations.

**PART I
Best market practice**

Issue of advertisements.

1.(1) A licensee who issues an advertisement concerning fiduciary services business shall ensure that—

- (a) the advertisement identifies the licensee as the issuer;
- (b) the contents and presentation of the advertisement are demonstrably fair and not misleading.

(2) A licensee who becomes aware that a business associate for whom it provides fiduciary services is itself advertising those services in such a way as may be detrimental to Gibraltar's reputation as a financial centre shall report the matter to the Commissioner forthwith.

Customer relations.

2.(1) A licensee shall take all reasonable steps to ensure that any agreement, written communication, notification or information that it provides to customers is presented fairly and clearly and that it sets out in adequate detail the basis on which its services are provided.

(2) A licensee shall enter into a management agreement with its customers which shall describe and govern the relationship between the parties and clearly set their respective functions, duties and responsibilities.

(3) A management agreement shall cover the following minimum points—

- (a) the scope of the duties to be undertaken by the licensee;
- (b) the extent, if any, to which the licensee shall give advice;
- (c) a requirement that the licensee shall observe all obligations imposed on the company under management by all relevant authorities and make all records available as required by law or authorised by the customer;

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- (d) confidentiality arrangements which shall include a proviso that their confidentiality may be breached by the licensee if required by law;
- (e) the governing law and jurisdiction;
- (f) the remuneration, fees or charges payable to the licensee, including transfer or exit fees if any;
- (g) the manner in which instructions are to be given and on whose instructions the licensee is to act;
- (h) a requirement that the customer shall notify the licensee of any material changes in its activities; and
- (i) a requirement that the customer shall notify the licensee, in advance, of any changes in beneficial ownership.

(4) A licensee shall not, in any written communication or management agreement, seek to exclude or restrict—

- (a) any duty or liability to a customer which it has under any relevant Act or under any rules or directions made by the Commissioner;
- (b) any other duty to act with skill, care and diligence that is owed to a customer in connection with the provision to him of regulated activities;
- (c) any liability owed to a customer for failure to exercise the degree of skill, care and diligence that may reasonably be expected of it in the provision of regulated activities, subject to compliance by the customer with his obligations under the management agreement.

Confidentiality arrangements.

3.(1) A licensee shall introduce procedures requiring staff members to sign an undertaking of confidentiality in respect of all of the information they receive or to which they may have access in the course of their work at the licensee together with all materials of whatsoever kind to which they may have access in the offices of or in connection with the activities of the licensee subject to any duty in law to disclose information to any relevant authority and subject to any prior agreement with the customer as regards the disclosure of information as set out in the management agreement.

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(2) Sub-paragraph (1) shall apply to all staff members employed as from the date these Regulations come into operation but licensees shall make all efforts to have all staff members sign such an agreement regardless of employment date.

(3) A licensee shall deal with trusts, foundations and companies administered in a manner which will ensure the confidentiality of each customer's affairs.

Provision of directorships.

4.(1) A person who acts as a director of a company shall acquaint himself with the duties and responsibilities attached to such an appointment and shall be aware of and accept the implications arising out of such a position and act in accordance with such obligations.

(2) Sub-paragraph (1) shall apply regardless of the jurisdiction in which the company is incorporated or registered.

(3) A company director may take account of advice given to him by shareholders, fellow directors or beneficial owners, but shall not act in accordance with such advice where this would result in illegality, impropriety or recklessness.

(4) A company director shall—

- (a) obtain and maintain an adequate knowledge of the business and activities of each company for which he acts; and
- (b) maintain full and effective control over all companies for which he acts.

Powers of attorney.

5.(1) A power of attorney shall be issued for a specific purpose and for a defined period of time not normally exceeding 12 months and shall wherever possible include a requirement for the attorney to report to the directors any action taken by virtue of the powers granted and to provide any relevant supporting documentation.

(2) A licensee who provides directorship services to a customer shall ensure that effective control of the company is not removed from the directors by the issuance of powers of attorney.

Termination and transfer of customers.

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6.(1) The property of a company under management, subject to any statutory or common law lien specified in the agreement, shall be handed over by the licensee, if required, without delay or fee on termination unless such fee is specified in the agreement.

(2) A termination arrangement shall provide for a notice period sufficient to give the company under management time to make alternative arrangements and provide for the proper and orderly transfer of business in the event of cessation of fiduciary services business by the licensee.

PART II**Know your customer****Customer due diligence.**

7.(1) A licensee shall establish and maintain specific policies and procedures and training programmes that promote high ethical standards in order to prevent its business and the financial system being used for the purposes of money laundering.

(2) The policies and procedures in sub-paragraph (1) shall cover–

- (a) internal controls and communication of policies;
- (b) identification procedures;
- (c) record keeping;
- (d) recognition of suspicious transactions and reporting procedures; and
- (e) education and training.

(3) A licensee shall act in accordance with the requirements of the Gibraltar Anti-Money Laundering Guidance Notes.

(4) A licensee shall know its customers and shall have regular contact with them to establish the nature of the activities and assets of client companies and to ensure that it is informed of any material changes.

Conflicts of interest.

8.(1) A licensee shall make all efforts to avoid conflict of interests between customers and itself or between one client and another or others.

(2) A licensee shall not unfairly place its interests above those of its customers and, where a properly informed customer would reasonably

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expect that the licensee would place the customer's interests above its own, the licensee shall live up to that expectation.

- (3) A licensee who is acting for a customer shall—
- (a) not claim it is independent or impartial if it is not; and
 - (b) ensure that any claim it makes as to its independence or impartiality adequately includes any limitation that there may be on either.
- (4) A licensee who has a material interest in a transaction to be entered into with or for a customer or has a relationship which gives rise to a conflict of interest in relation to such a transaction, shall not knowingly enter into that transaction unless—
- (a) it has fairly disclosed that material interest or relationship, as the case may be, to the customer; and
 - (b) it has taken reasonable steps to ensure that neither the material interest nor relationship adversely affect the interests of the customer.
- (5) A licensee shall take all reasonable steps to ensure that neither it nor any of its employees or agents offers, gives, solicits or accepts any inducement that is likely to conflict with any duty owed to customers.

**PART III
Customer assets**

Safeguarding of customer investments.

9. A licensee who has custody of a customer's assets in connection with or with a view to regulated activities shall—
- (a) keep safe, or arrange for the safekeeping of, any documents of title relating to those assets and ensure that the location of such title documents is recorded in the customer's records; and
 - (b) ensure that any registrable investments that it buys or holds for a customer are properly registered in that customer's name or, with the consent of the customer, in the name of an appropriate nominee.

Customer monies.

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10.(1) Customer monies shall be passed without delay into a bank account, separate from other accounts of the licensee, which may be either a general account or an account in the name of the specific customer but which shall in all cases be designated as a customer account.

(2) A licensee who opens a customer bank account shall give written notice in clear terms to the bank of the nature of the account, requiring the bank to acknowledge in writing that it accepts the terms of the notice.

(3) Customer accounts shall be set up as accounts designated as such so that liquidators, banks etc. are not able to access such monies should the licensee default on its commitments or is put into liquidation.

(4) A licensee who receives a cheque or draft which includes both customer monies and other monies shall—

- (a) cause both the customer monies and other monies to be credited to a customer account; and
- (b) once the monies have been received into such customer account, withdraw from that customer account such part of the sum received as can properly be transferred to the licensee's own account in accordance with this paragraph and the Financial Services (Accounting and Financial) Regulations 1991.

(5) Save as allowed by these Regulations and regulation 33 of the Financial Services (Accounting and Financial) Regulations 1991, no monies other than customer monies shall be paid into a customer account.

(6) The monies referred to in the following paragraphs may be withdrawn from a customer bank account, provided that the sums withdrawn do not exceed the total of the monies held for the time being in the account of the customer concerned—

- (a) monies properly required for a payment to or on behalf of the customer;
- (b) monies properly required for or towards payment of fees or commissions payable to the licensee by the customer in accordance with the terms of the management agreement;
- (c) monies properly required for or towards payment of a debt due to the licensee from the customer, otherwise than in respect of fees or commissions earned by the licensee; and

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- (d) monies drawn on a customer's authority or in conformity with any contract between the licensee and the customer.

(7) Monies shall not be withdrawn from a customer bank account for or towards payment of fees or commissions payable to the licensee unless—

- (a) the customer has been notified in writing that monies held or received on the customer's behalf will be applied against those fees or commissions and the customer has not disagreed; and
- (b) a director of the licensee or staff member who has been granted executive powers has expressly authorised the withdrawal; and
- (c) the appropriate time has elapsed since the date of delivery to the customer of the notification; or
- (d) the precise amount to be withdrawn has been agreed with the customer.

(8) A licensee shall at all times maintain records, in a cashbook or similar form, so as to show clearly the monies it has received, held or paid on account of its customers, and the details of any other monies dealt with by it through a customer account, clearly distinguishing the monies of each customer from the monies of other customers and from the licensee's monies, together with adequate supporting documentation to justify each movement in the customer bank account.

(9) Customer bank accounts shall not be used for payment or settlement of the licensee's own expenses or liabilities.

(10) All customer money accounts shall be under dual signatory control consistent with the four eyes requirements in the conduct of business.

PART IV

Financial resources

Accounting records and financial statements.

11.(1) A licensee shall keep proper accounting records of, and prepare financial statements for, any relevant regulated activities and shall maintain the general standards expected in a prudently run company or trust management operation.

(2) By virtue of the fiduciary nature of its business, a licensee shall keep exemplary accounting records.

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(3) A licensee shall be duty bound to implement a separate system of procedures and controls that shall enable proper accounting records to be kept and shall be required to submit to the Commissioner, on an annual basis, a statement of income and expenditure (profit and loss account) relating to the activity or activities for which a licence is held, and a balance sheet, together with the report of the auditor thereon.

(4) A licensee shall keep accurate records of every transaction or commitment which it enters into, either on its own behalf or on behalf of companies for which directors are provided or trusts or foundations administered, with sufficient information to—

- (a) explain its nature and purpose;
- (b) explain any asset and liability, actual or contingent, which arises from it;
- (c) explain any income and expenditure, current or deferred, which arises from it; and
- (d) clearly identify the parties.

(5) A licensee shall be aware that it is not sufficient for the relevant regulated activities to be accounted for within the financial statements of a related entity given that, amongst other reasons, it needs to satisfy the Commissioner that it has adequate financial resources for the classes of business it carries on.

Professional indemnity insurance.

12.(1) A licensee shall be covered by adequate professional indemnity insurance, so far as such insurance is reasonably available, or by some other arrangement, agreed in writing by the Commissioner, which has a similar effect.

(2) Such an insurance policy shall typically cover, inter alia—

- (a) breach of duty in respect of any negligent act, error or omission or dishonest or fraudulent act or omission;
- (b) libel or slander;
- (c) loss of customers' monies or other property arising from fraud or dishonesty by any employee, former employee, director or former director; and

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- (d) legal liability resulting from loss of documents and costs and expenses of restoring and replacing such documents.

(3) The excess or deductible under such an insurance policy shall not be greater than can be reasonably borne by the financial resources of the licensee.

(4) A licensee in possession of a Class VIII-Company Manager or Class VII-Professional Trustee licence shall so far as such insurance is reasonably available have a minimum cover of £500,000 and £1,000,000 respectively, or their equivalent in another currency.

(5) The Commissioner shall, with the approval of the Minister, be the arbiter of whether any such insurance as is referred to in subparagraph (1) is reasonably available in the case of any particular licensee.

Sufficient financial resources.

13.(1) A licensee shall maintain and be able to demonstrate sufficient financial resources commensurate with the nature and volume of its business.

(2) A licensee is required to be solvent and to be able to meet the risks which it faces.

(3) A licensee shall be expected to maintain a minimum level of financial resources equivalent to 3 months worth of operating expenses and the measure of these financial resources shall be the net asset figure in the licensee's balance sheet.

(4) In this paragraph, "net assets" means the total assets of any type less the total liabilities of any type except for—

- (a) intangible fixed assets; and
- (b) related party balances (e.g. shareholders and directors and associated companies) unless in the ordinary course of business, outstanding balances are being settled under normal commercial terms.

(5) A licensee shall calculate the requirement in this paragraph as appropriate to the business, at least once every 3 months.

(6) A licensee shall, unless previously agreed in writing by the Commissioner, have a paid-up share capital of substance depending on its

business which shall not be less than £10,000 for a company manager or £50,000 for a professional trustee.

**PART V
Internal organisation**

Management of licensees.

14.(1) The mind and management of a licensee shall be in Gibraltar and in considering whether this is so the following matters, among others, shall be taken into account—

- (a) where the day to day management decisions are taken;
- (b) where the staff and management responsible for the central administration and control perform their functions;
- (c) where the Commissioner would find management able to answer the full range of questions about the day-to-day running of the licensee;
- (d) whether, and on what terms, other parties are able to commit the licensee to accept business; and
- (e) what management functions are exercised by other parties or in other jurisdictions.

(2) A licensee's regulated activities shall all take place in or from within Gibraltar except that, in exceptional circumstances, limited powers of attorney may be granted to other parties on appropriate occasions.

Composition of boards of directors.

15.(1) The Commissioner requires—

- (a) the directors of a licensee to ensure and secure compliance with statutory requirements;
- (b) a board of directors to be constituted and motivated, and to exercise direction and control of the licensee accordingly;
- (c) a board of directors to have, and to keep under review, written policies on aspects of the operation of the licensee which are of particular prudential significance and to monitor their staff's compliance with these policies in the way they carry on business.

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(2) A company director shall be ultimately responsible for material errors, omissions and failures and shall be expected to act promptly to remedy any breaches of the relevant regulatory requirements.

(3) A company director shall be frank and open in his discussions with the Commissioner on all matters concerning the prudent management of the licensee's affairs.

(4) A licensee which is a limited company shall hold regular board meetings with a pre-arranged agenda including proper reports from management of a nature appropriate to the licensee's size and type of business.

(5) A licensee which is not a limited company shall have procedures equivalent to the board meetings referred in sub-paragraph (4).

Management structure.

16.(1) Not less than two persons ("the executives") shall effectively direct the business of the licensee and these shall be either executive directors or persons granted executive powers by, and reporting immediately to, the board.

(2) Notwithstanding sub-paragraph (1), the Commissioner may, in his discretion and depending on the situation of each licensee, accept a different arrangement.

(3) The executives shall demonstrate the qualities and application necessary to influence strategy and day-to-day policies and apply themselves to the formulation and implementation of the policy of the licensee.

(4) The executives' judgements shall be engaged in order that major errors leading to difficulties for the business as a whole are less likely to occur.

(5) The executives shall have sufficient experience and knowledge of the business and the necessary authority to detect and deal with any imprudence, dishonesty or other irregularities in the licensee, companies under management or trusts or foundations administered.

Staff policies and training.

17.(1) A licensee shall be structured and staffed in a manner appropriate to the operations of the company taking into account the number of companies, trusts and foundations administered and its management shall ensure that staff are competent and that they are adequately supervised.

(2) A licensee's staff shall be appropriately qualified and experienced for the level of their responsibility.

(3) A licensee's management shall—

(a) provide training courses, or access thereto, to assist staff in understanding and complying with the licensee's policies and procedures which should include, wherever possible, professional examinations; and

(b) encourage executive staff to obtain recognised professional qualifications.

Complaints.

18.(1) A licensee shall have internal procedures to ensure the proper handling of complaints from customers and to ensure that any appropriate remedial action on those complaints is promptly taken.

(2) A licensee shall enter in a register a written summary of all material complaints received and the manner in which they were handled.

(3) Such a register shall be open for inspection by the Commissioner and any person duly authorised by him.

Compliance.

19.(1) A licensee shall take all reasonable steps, including the establishment and maintenance of appropriate procedures, to ensure that its officers, employees and other representatives are aware of their obligations under the Act and rules made by the Commissioner, and that they act in conformity with them.

(2) A licensee shall designate an appropriately skilled and experienced person as its compliance officer.

(3) A licensee shall ensure that sufficient information is recorded and retained about its regulated activities and compliance with the regulatory system.

(4) A licensee shall keep all records required by the Act which shall be kept available for not less than 6 years for inspection by the Commissioner and any person duly authorised by him.

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(5) A licensee shall submit to the Commissioner the returns and notifications specified in sub-paragraphs (6) and (7) and shall bring to the Commissioner's attention such matters as are specified therein.

(6) The returns in sub-paragraph (5) to be submitted on an annual basis are—

- (a) return (no later than 10 March each year) of the number of trusts, foundations, partnerships and companies under management, the calculation of which must be certified correct by a duly qualified auditor as at the end of the financial year immediately preceding 1 March; and
- (b) financial statements (within 4 months of the end of the licensee's accounting period).

(7) The notifications in sub-paragraph (5) of which a licensee must notify the Commissioner in writing are—

- (a) its name;
- (b) any registered trading name under which it carries on regulated activities;
- (c) its trading address;
- (d) the address of its registered office;
- (e) any changes in its shareholding and beneficial ownership;
- (f) any changes in the composition of its board of directors;
- (g) any changes in its executive management, including changes affecting compliance with the 'four eyes' principle;
- (h) any material change in the nature of the business being undertaken;
- (i) the presentation of any application to the court for its winding-up or the winding-up of a company which is its subsidiary or holding company;
- (j) an application by any person for the commencement of any insolvency proceedings, appointment of any receiver or

provisional liquidator under the law of any country in respect of the licensee;

- (k) the conviction of the licensee or any of its employees under the law of any country for an offence involving fraud or dishonesty;
- (l) the granting or refusal of an application for, or revocation of, authorisation to carry on regulated business in any country or territory outside Gibraltar;
- (m) the withdrawal of an application for, or revocation of, membership of any professional body in any jurisdiction by any member of its staff holding a notifiable position;
- (n) the appointment of or resignation of its auditor;
- (o) any notification to its professional indemnity insurers or any payment by the insurer under a professional indemnity insurance policy;
- (p) any other matter which the licensee considers would be material to the requirements placed on it, on any of its notifiable persons, or on any of its employees by a relevant Act;
- (q) any matter that might reasonably be expected to affect its licence or be in the interests of clients to disclose; and
- (r) any matter that might be prejudicial to the reputation of Gibraltar as a finance centre.

(8) Any matter notified to the Commissioner under (r) above shall forthwith be notified by the Commissioner in writing to the Minister.

Supervision.

20. A licensee shall establish and maintain procedures—

- (a) for the supervision of each of its officers, employees and other representatives; and
- (b) for ensuring that each such person does not give advice or provide services of such a nature as is beyond his competence to give or to provide.

Cessation of business.

21. A licensee who decides to cease carrying on regulated activities shall ensure, to the satisfaction of the Commissioner, that any such activities that are outstanding are properly completed or transferred to another licensee.