

THE BERMUDA MONETARY AUTHORITY

**Trusts (Regulation of Trust Business) Act
2001**

Code of Practice



September 2002

Trusts (Regulation of Trust Business) Act 2001

Code of Practice

Pursuant to Section 7

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Trusts (Regulation of Trust Business) Act 2001

Section 7: Code of Practice

Introduction

This Code of Practice (“the Code”) is made pursuant to section 7 of the Trusts (Regulation of Trust Business) Act 2001 (“the Act”). Section 7 requires the Bermuda Monetary Authority (“the Authority”) to publish in such manner as it thinks fit a Code that provides guidance as to the duties, requirements, procedures, standards and sound principles to be observed by persons carrying on trust business. This Code should be read in conjunction with the Statement of Principles issued under section 6 of the Act.

1.0 Objectives

The objectives of this Code are to provide guidance to licensed undertakings as to the standards required under the Act and other financial services legislation, as well as to the best practice in the industry.

2.0 Application

The Code applies to all holders of trust business licences issued pursuant to section 11 of Act. The Code is of general application, and seeks to take account of the wide diversity of undertakings that may be licensed. The Code may be revised from time to time. However, before the Authority makes a material change to the Code, section 7(3) of the Act requires it to first publish a draft of the proposed changes and to consider any representations made to it regarding the contents of the draft.

Every undertaking licensed under the Act in Bermuda is expected to have regard to the Code as amended from time to time. The Code is not a statement of the law and in particular does not affect a licensed undertaking’s obligations under trust or common law. Failure on the part of a licensed undertaking to comply with the provisions of this Code is not of itself an offence but is taken into account by the Authority in determining whether or not the business is being conducted in a prudent manner as required by paragraph 5 of the First Schedule to the Act. Persistent failure by licensed undertakings to abide by the provisions of the Code is likely to result in formal action.

3.0 Know Your Customer

Licensed undertakings must have procedures in place to ensure that proper due diligence is carried out before a decision is made to act for any new customer. As a minimum, licensed undertakings need to be able to comply with The Proceeds of Crime Act 1997, the Proceeds of Crime (Money Laundering) Regulations 1998 and the Guidance Notes on the Prevention of Money Laundering, together with

any other relevant legislation that may come into operation from time to time. To ensure compliance with these requirements licensed undertakings should have adequate policies and procedures in place to ensure that they know the identity of each settlor, protector and custodian on an on-going basis and to the fullest extent possible the identity of the beneficiaries. They must also verify the source of all assets introduced, to satisfy themselves that they are not of illicit origin.

4.0 Integrity & Ethics

A licensed undertaking must conduct its business with integrity at all times and should not attempt to avoid or contract out of its responsibilities under this Code. It must exercise its fiduciary duties prudently and competently and, subject to the terms of the trust, consider the rights of all classes of beneficiaries when making decisions affecting the administration of the trust. It should invest, distribute or otherwise manage each trust's assets in accordance with the law and the trust deed. It must deal fairly with all clients (as defined in section 2 of the Act) and seek to ensure that they are not misled as to the service being provided and the duties and obligations of the service provider. A licensed undertaking should treat the interests of beneficiaries as paramount (subject to any legal obligations to other persons or bodies) and should always act with due care, skill and diligence. Subject to the terms of the trust, it should also act impartially between beneficiaries, while having regard to its legal and contractual obligations.

A licensed undertaking must have regard at all times to its legal obligations with regard to conflicts of interest. Generally it should avoid situations in which conflict of interest arises as between trusts administered by the undertaking or between the licensed undertaking's business and that of the beneficiaries of a trust. Similarly and unless authorized to do so, it should not enter into transactions in which it has a material interest, without first disclosing it to the relevant parties. Where conflicts of interest do arise it must ensure that the circumstances are properly disclosed to those affected. Licensed undertakings need to exercise particular care and attention when taking on discretionary trust business to ensure that they are able to exercise appropriate independent discretion.

5.0 Trust Creation

When establishing a trust, a licensed undertaking should familiarize itself with the objects of the trust and satisfy itself that the trust is being established for a lawful purpose. It should also ensure that the settlor has access to all appropriate information, including relevant independent professional advice where necessary. In order to adequately perform its fiduciary and other duties, a licensed

undertaking must ensure that it has a complete understanding of the trust deed in each case and must seek legal or other advice where necessary. The licensed undertaking also has a responsibility to ensure that trust property is brought properly under its control.

Over and above their legal obligations to ‘know your customer’, undertakings are expected to have a considered and agreed policy on new client engagements or acceptances, having regard to their assessment of the quality, nature and scale of the services involved and the ability of the undertaking to provide the services in question. Undertakings need to ensure that they understand fully the rationale for particular structures and to be comfortable that the business is suitable. These standards also apply *mutatis mutandis*, in relation to any trust business delegated to the licensed undertaking by another trustee. In such cases, the licensed undertaking must have full knowledge of the trust arrangements, and must retain in its files copies of all the records which would pertain to trust business introduced directly to the trust company by a settlor. A licensed undertaking should not act as agent for others in the management of trust assets unless it is satisfied that the trustee is subject to professional standards equivalent to its own.

6.0 Disclosure of Information

Licensed undertakings should observe any obligation of confidentiality that may apply in respect of information communicated by persons concerned with trusts (e.g. settlors, protectors, enforcers and beneficiaries and their professional advisers) unless the licensed undertaking is given relevant consent to disclose information, is required by applicable law to disclose information or gives information in accordance with the terms of the trust instrument or in the ordinary course of the administration of the trust. In maintaining the confidentiality owed to those persons to whom the undertaking has responsibility, the licensed undertaking should take particular care not to mislead third parties as to the beneficial ownership or origin of trust assets.

Employees, officers, directors and other persons who have access to confidential information of the licensed undertaking and the trusts it administers should be advised in writing upon their engagement and reminded periodically thereafter by the licensed undertaking of confidentiality issues.

7.0 Internal Management Controls

7.1 Powers of Investment

The responsibility of the licensed undertaking is to invest and manage or arrange for the investment and management of the funds of the trust in light of the purposes, terms, distribution requirements and other circumstances of the trust and, where appropriate, in accordance with applicable law.

Subject to any enlargement or restriction of a trustee's powers of investment set out in the trust instrument or by law:

- (a) a trustee may invest or otherwise apply trust property in the purchase or acquisition of property of any kind whether or not income-producing and whether for the purpose of receiving an appropriate total return from income and capital appreciation, controlling or limiting risk or benefiting persons interested in any way whatsoever in the income produced by trust property or for a mixture of such purposes.
- (b) in so investing or otherwise applying trust property, a trustee shall act as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust and by exercising reasonable care, skill and caution.
- (c) in determining whether a trustee has acted in accordance with the above any decision to invest or otherwise apply trust property shall be evaluated in the context of trust property as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

7.2 Segregation of Funds

A licensed undertaking must ensure that trust funds are kept at all times separately from those of the licensed undertaking and also that they are not co-mingled with funds from another trust unless the necessary consents have been obtained, a contrary intention is shown in the trust instrument or full records are available at all times which confirm the beneficial ownership of the pooled monies.

7.3 Prompt and Timely Execution

A licensed undertaking should deal effectively and in a timely manner with all requests from those persons to whom the undertaking is responsible or accountable, having previously sought and obtained such consents or approvals as may be necessary.

7.4 Competent and Effective Management

A licensed undertaking should have effective management and systems that are commensurate with the scale and complexity of the trust business to be undertaken. It must also have appropriate management resources to control the affairs of the licensed business, including ensuring compliance with legal obligations and standards under the Code.

The board of directors of a corporate licensed undertaking is responsible for the proper exercise of fiduciary powers and ensuring that the licensed undertaking has proper policies, procedures and other arrangements in place. In discharging this responsibility the board of directors may assign the administration of such of the corporate licensed undertaking's fiduciary powers as it may consider proper to such directors, officers, employees or committees as it may designate in accordance with policies and procedures which provide for appropriate authorisation and signing powers.

7.5 Delegation

A licensed undertaking should have regard to the trust instrument, the law and any internal procedures as appropriate with regard to the delegation of its duties and/or the granting of powers of attorney and delegate only in accordance therewith.

In certain instances undertakings holding a limited trust licence will be required to make arrangements for a company holding an unlimited trust licence to manage either all or a portion of the assets of the trusts for which they act as trustee. These arrangements must be documented in a suitable management agreement between the parties. This should provide, to the fullest extent possible, for the administrative functions of the individual trustee to be delegated to the licensed trust company. The licensed trust company must have responsibility for administering the assets and maintaining records of the trust pertaining to the administration of the assets; for preserving and maintaining the trust assets; and for managing the investments and providing for the custody of the assets.

7.6 Accounting and other Record Keeping

Licensed undertakings must keep and preserve appropriate records in Bermuda which will at least include such records as are appropriate for their functions, as required by any applicable law and as will enable the provision of information, to persons interested in trusts and entitled to the information, on a timely basis. This should include the identity of co-trustees, custodians, the settlor, protector, enforcer and, where appropriate, the principal beneficiaries, their personal circumstances, residence and a copy of the trust instrument, minutes of all decisions taken by trustees, other trust documents and trust accounts or records which would enable trust accounts to be drawn up. The licensed undertaking should hold title to the trust assets in its own name or through appropriate custodians or nominees. Where custodians or nominees are appointed to hold assets, the licenced undertaking should ensure that 7.5 is complied with. Financial records must be maintained so as to permit a thorough and satisfactory supervisory activity and to permit the performance of trust audits as pre-arranged.

7.7 Adequate Personnel

A licensed undertaking must have available suitable numbers of staff who are appropriately trained and competent to discharge its fiduciary duties effectively. It should ensure that the responsibilities and authority of each member of staff are clear and appropriate to his or her qualifications and experience, and that staff receive the necessary training appropriate for their roles. A licensed undertaking also needs to formulate and keep up to date plans for staff training and development.

7.8 Adequate Systems and Controls

A licensed undertaking should ensure that it has in place systems, controls and procedures, to ensure that staff perform their duties in a diligent and proper manner. It is important that staff understand and comply with the established systems, policies and procedures including those dealing with new business acceptance, distributions of trust assets, investment reviews and staff training. The Authority also expects the undertaking to have in place a documented business interruption recovery plan, dealing with all of its critical functions.

7.9 Fees and Remuneration

A licensed undertaking must agree a clear fee structure with each relevant person in advance of taking on an appointment and ensure that the fees charged are transparent at all times. Licensed undertakings should also ensure that adequate notice is given before any material change in the fee structure is introduced.

7.10 Internal Complaints Procedures

A licensed undertaking should ensure that client complaints are properly handled and dealt with on a timely basis. A record of the details of the complaint, the licensed undertaking's response and any action taken as a result should also be made and maintained.

8.0 Disclosure of Licensing Body

A licensed undertaking should ensure that its status as a licensed person is disclosed in all advertisements and correspondence. The following wording is suggested:

“Licensed to conduct Trust Business by the Bermuda Monetary Authority.”

9.0 Co-operation with Regulatory Authorities

A licensed undertaking is expected to deal openly and in a spirit of co-operation with the Authority and any other relevant regulatory authorities. Licensed undertakings should alert the Authority to any proposal to extend their business materially and in particular if it is proposed to undertake non-trust business within the licensed entity. Undertakings should also be proactive in alerting the Authority to any significant developments relevant to the staffing of the undertaking or to its systems and controls environment. (In this regard the Authority would draw the attention of licensed undertakings to sections 13, 24, 34, and 35 of the Act.)