

Submitted by email: john.aspden@fsc.gov.im

21 July 2014

Dear Mr Aspden,

ICSA response to the Group of International Finance Centre Supervisors consultation on the Draft International Standard on the Regulation of Trust and Corporate Service Providers

We welcome the opportunity to comment on the Group of International Finance Centre Supervisors (“GIFCS”) consultation regarding the Draft International Standard on the Regulation of Trust and Corporate Service Providers. The Institute of Chartered Secretaries and Administrators (“ICSA”) is the international professional body that qualifies Chartered Secretaries, and, as a result our members are well placed to understand the concerns of trust and corporate service providers. In preparing our response we have consulted with members of British Overseas Territories.

General commentary

We support proposals that lead to the effective regulation of Trust and Corporate Service Providers (“TCSPs”). The intentions behind the proposed international standard can be appreciated and we agree that TCSPs should ensure that their organisations are not used as a conduit for bribery and corruption, the holding of stolen assets or tax evasion. However, as with all regulations seeking greater transparency, these need to be flexible, proportionate and balanced. We do note that this draft international standard goes much further than the original Best Practice Statement on the supervision of Trust and Company Service Providers in 2002, some of which (as discussed below), are a concern for affected members.

Commentary on specific Parts/ Sections

Introduction/ Part 1

It should be noted that, unlike professional trust companies and other financial service businesses, corporate service providers (“CSPs”) rarely, if ever, exercise control over client’s cash. Accordingly, we recommend that CSPs should be segregated from trust companies for the purposes of this initiative, their business models are quite different. For example, the statement, contained in the introduction, clearly applies to trust companies but not CSPs:



“The purpose of this Statement is not to interfere with trust law existing in a relevant jurisdiction, which is the responsibility of the Courts. It is the responsibility of the TCSP to ensure that in carrying out its duties as a trustee, fiduciary and/or administrator it fully complies with that law in all aspects of safeguarding the assets of the trusts and acting in the best interests of beneficiaries.”

A TCSP may provide a director or even a corporate director, but the activities of a Director must necessarily be divorced from those of a TCSP, the roles are entirely different. A TCSP is an administrator, it does not make business decisions on behalf of its clients. Activities of Directors should always be divorced from those of the TCSP and we recommend that this also should be made clear.

Part 2 Licensing

Section 1 para 4

“Where an ownership structure involves the use of nominee shareholders or a trust, the regulator should have a clear understanding about who ultimately lies behind such a structure and ensure that such persons are also fit and proper persons.”

This concern should, in any event, effectively be dealt with by the anti-money laundering laws of the relevant jurisdiction. There are numerous similar statements that likewise seem to overlap with anti-money laundering legislation.

Section 1 para 5

“Where a controller is associated with a higher risk jurisdiction, inherent risks arise. In order to demonstrate that it can manage any such risks arising, the TCSP will be expected to be able to demonstrate a longer relevant and satisfactory track record and mature relationship with a relevant supervisory authority.”

This would effectively present a barrier to entry for any new enterprise.

Part 3

A – Corporate Governance - Section 1 and throughout

The Standard pre-supposes that a TCSP is a company with a Board of Directors. In some instances, TCSPs could be Partnerships and we recommend that the Standard provide for this.

C - Individuals

Statement

“1. A TCSP must ensure that all of its employees are fit and proper for their roles. In making a fit and proper determination, the Regulator should consider integrity, competence and where necessary

financial soundness.”

As drafted, this is a well-intentioned but poorly conceived notion, the abilities of senior management may be reasonably evaluated by the regulator but to reach to evaluate every member of staff is to overreach, this responsibility must lie with senior management. Is it possible that for ‘Regulator’ it was intended to draft ‘TCSP’? If so, then that resolves this issue.

Key Persons

These must be defined for the relevant controls proposed to be properly evaluated.

In particular:

4.4 “...public criticism” should be removed, likewise “censure” by whom? This is dangerously vague. Press comment, for example, can be significant but is not always justified.

4.8 “Subject to civil action” should likewise be removed, civil action may arise in the normal course of business and is not indicative in itself of any fault on the part of the defendant.

Likewise 4.9 “subject to investigation” is meaningless, an investigation by itself implies no fault on the part of the person or organization being investigated. The test, rather, should be criminal conviction or regulatory discipline.

Other Individuals

The same comments apply to the above provisions where they are echoed under “Other Individuals”.

E - Conduct

Terms of Business

“12. The regulatory regime should require that:

- Complaints against a TCSP that are not resolved satisfactorily or include an allegation of failing to meet regulatory standards are logged in a central register and reported to the Regulator.”

Concern has been expressed over unproven allegations and the possibility that TCSPs could be intimidated by clients as a result. However, it is also noted that should this happen the matter should be reported to the Regulator for adjudication.

F – Prudential

Financial resources of a TCSP

“1. The regulator should aim to maintain a level of capital and liquidity in a TCSP so as to:

- Reduce the risk of financial failure; and
- Maintain a level of capital and liquidity which should permit the business to be operated under temporary management or liquidated in an orderly manner if that should become necessary.

and

Capital and liquidity requirements of a TCSP”

In general the proposed requirements around capital adequacy, while appropriate for a trust company seems excessive for a corporate service provider. The regulations could be much simpler, a corporate service provider must be adjudged by its auditors to have the ability (or where exempted from an audit, exhibit the ability to the satisfaction of the regulator) to operate as a going concern. This approach deals with both solvency and liquidity in a simple manner. It should be noted that the bankruptcy of a corporate service provider is unlikely to cause much more than temporary inconvenience to its clients, while the bankruptcy of a trust company carries with it much more serious concerns.

Outsourcing of key functions

This section is overly complex. It could simply be stated that a TCSP remains responsible for the actions of any sub-contractor and that the failure of a sub-contractor to perform is not exculpatory except to the extent that the TCSP remediates promptly upon becoming aware of such failure. The TCSP should have in place such controls as will enable it to monitor the performance of each sub-contractor and to adjudge their competence and adherence to applicable law and regulation. The proposal that outsourcing agreements be subject to the prior consent of the regulator removes control of the business from management and vests it in the regulator and is commercially unmanageable. The regulator will be better served by taking the general approach that the TCSP is ultimately responsible for the overall management of its affairs and answerable to the regulator for any deficiency.

“11. A TCSP who is not restricted from maintaining their accounting and other records in a location outside of the jurisdiction, should ensure that:

- 11.1 The data is kept secure and poses no operational risk,
- 11.2 It maintained so as to be readily accessible; and
- 11.3 All regulatory and confidentiality laws are complied with.

Specific further regulation regarding data protection is appropriate, but dealt with in its own section

(i.e. 19 and 20) and need not be echoed here.

H - Financial Crime and International Sanctions

This should already be in hand under the relevant Proceeds of Crime / Anti Money Laundering legislation and regulations, there need be no further controls imposed and the danger of a conflict of laws arises if the regulator seeks to impose such regulations outside of the existing framework.

I - Beneficial Ownership

Same comment as above.

Conclusion

To conclude, we would re-iterate our support for any proposals that lead to the effective regulation of Trust and Corporate Service Providers ("TCSP"). The intentions behind the proposals to aid transparency, combat anti-money laundering and counter the financing of terrorism are to be commended. However, such regulations need to be flexible, proportionate and balanced. Furthermore, much of the areas of concern raised in the above response are in connection with a misunderstanding of the differences between corporate service providers and professional trust companies and other financial service businesses and thus the former should be segregated from the latter for the purposes of this initiative.

We hope our comments are useful and if you would like to discuss any comment in more details, please contact me.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Peter Swabey', written in a cursive style.

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