



## **GUIDANCE FOR UNREGULATED OFFICERS OF TRUSTS AND PARTNERSHIPS OCTOBER 2023**

### **1. INTRODUCTION**

- 1.1 This guidance is issued by the Policy & Resources Committee under section 49AB of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999<sup>1</sup> (Proceeds of Crime Law). It takes the form of FAQs and its purpose is to assist unregulated officers in understanding how they come within the ambit of Schedule 10 to the Proceeds of Crime Law (Schedule 10) and how to meet their obligations under it.
- 1.2 An unregulated officer is a person who acts as an officer of a trust or partnership that is subject to the law of any part of the Bailiwick and who is not regulated or authorised for this purpose by the Guernsey Financial Services Commission (GFSC). This will be the case with anybody who is acting as a trustee or partner other than by way of business so is not receiving payment for doing so, where for example the person has taken on this role to assist a friend, family member or a charity.
- 1.3 References to trustees and partners in this guidance therefore mean those that come within the definition of unregulated officer, unless the context requires otherwise.
- 1.4 The measures at Schedule 10, which are outlined below, have been introduced to enable Guernsey<sup>2</sup> to meet requirements on transparency and beneficial ownership of legal arrangements in the recommendations of the Financial Action Task Force (FATF), the principal international standard setting body in this area. Recommendation 25 of the FATF Recommendations<sup>3</sup> requires jurisdictions to ensure that adequate, accurate and up-to-date information on legal arrangements such as express trusts and partnerships is maintained within the jurisdiction and can be obtained or accessed efficiently and in a timely manner by the authorities.
- 1.5 In practice, most unregulated trustees and partners are likely already to be taking many or all of the steps outlined below as a matter of good governance. In addition, there will be unrelated trustees and partners who have experience of working in sectors where a licence or authorisation from the GFSC is required and so are already familiar with transparency and beneficial ownership requirements.

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<sup>1</sup> [Criminal Justice \(Proceeds of Crime\) \(Bailiwick of Guernsey\) Law, 1999 \(guernseylegalresources.gg\)](https://www.guernseylegalresources.gg)

<sup>2</sup> References in this document to Guernsey mean the Bailiwick of Guernsey unless the context requires otherwise.

<sup>3</sup> [The FATF Recommendations](https://www.fatf-gafi.org/).

1.6 The measures at Schedule 10 fall into the following categories:

- A requirement to obtain and maintain information about the parties to the trust or partnership (e.g. beneficiaries or partners);
- A requirement to obtain and maintain information about regulated agents or service providers, i.e. third parties who provide certain services to the trust or partnership (e.g. accountants);
- A requirement to keep records for a specified period;
- A requirement to disclose the fact that the person is acting as a trustee or partner when carrying out certain business on behalf of the trust or partnership;
- A power to disclose information about the trust or partnership to the authorities and certain types of businesses.

1.7 The contravention of any requirement in Schedule 10 is a criminal offence. However, in determining whether a contravention has occurred, the court may take into account any relevant guidance issued by the Committee. It is also a defence for a person charged with a contravention of Schedule 10 to prove that they have taken all reasonable precautions or measures to avoid the commission of the offence. It is therefore important that persons who are subject to the requirements at Schedule 10 familiarise themselves with this guidance and put in place policies and procedures that take it into account.

1.8 However, the guidance is not intended to replace the legislation and it is important that both are read together in order to have a proper understanding of the obligations that an unregulated officer must meet. Anybody who is unsure about any of these matters is advised to obtain legal advice.

1. FAQ 1: What trusts does Schedule 10 apply to?

Schedule 10 applies to trusts that come within the definition of “relevant trust” at section 51 of the Proceeds of Crime Law. This is an express trust that is governed by or otherwise subject to the law of any part of the Bailiwick.

An express trust is one that has been deliberately created by a formal document, typically a deed of trust. An express trust may also be created by statute, although this is much less common (an example is trusts that have been created in relation to premises within the Bailiwick that have a public function, such as a church or a parish hall). An express trust will be subject to or otherwise governed by the law of any part of the Bailiwick if it has been created by or under a law enacted in a part of the Bailiwick or is stated to be governed by such a law. In practice, this will usually be the Trusts (Guernsey) Law, 2007.

2. FAQ 2: What partnerships does Schedule 10 apply to?

Schedule 10 applies to two types of partnership. The first type is limited partnerships without legal personality under the Limited Partnerships (Guernsey) Law, 1995. All limited partnerships must be registered with the Guernsey Registry. In practice, the vast majority of limited partnerships are created in connection with investment schemes or other financial services businesses. Schedule 10 will apply to a limited partnership without legal personality if its general partner is not licensed by the GFSC. This will include those limited partnerships without legal personality whose general partners have a discretionary exemption from licensing by the GFSC, as they are not directly regulated.

The second type is partnerships that are subject to the Partnership (Guernsey) Law, 1995. These are sometimes referred to as general partnerships and are typically created by local traders providing non-financial services (e.g. dentistry or plumbing).

3. FAQ 3: Who is an unregulated officer?

An unregulated officer is defined at section 51 of the Proceeds of Crime Law as a trustee or partner who is not licensed or authorised to act in that capacity by the GFSC. In the case of limited partnerships, only the general partners, not the limited partners, come within the definition of unregulated officer.

The words “in that capacity” in section 51 mean that someone who holds a licence or authorisation from the GFSC will still come within the definition of unregulated officer if the licence or authorisation they hold is for a purpose that is unrelated to their role as trustee or partner. An example would be where somebody who holds a licence to provide insurance services is acting as a trustee of a trust on a completely unconnected<sup>4</sup> basis and pro bono because of a personal connection with the settlor. Section 51 also means that a trustee or partner who holds a licence or authorisation to do this from the GFSC is not an unregulated officer (but must as a specified business comply with Schedule 3 of the Proceeds of Crime Law and the GFSC Handbook, which include provisions similar to those in Schedule 10.

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<sup>4</sup> In this instance “unconnected” would also mean where no insurance or insurance-related advice has been provided to the settlor and/or beneficiaries regarding the trust.

It is important to be aware that the obligations in Schedule 10 apply to all unregulated officers, even those who have a co-trustee or fellow general partner who is regulated.

4. FAQ 4: Which parties to a trust or partnership must be identified?

The parties to a trust who must be identified are the following persons:

- a) the settlor(s);
- b) any co-trustee(s);
- c) the protector(s) (if any);
- d) beneficiaries; and
- e) any other natural person exercising ultimate effective control over the trust.

The parties to a partnership who must be identified are the following persons:

- a) for (general) partnerships, the fellow partners;
- b) for limited partnerships, any fellow general partner and the limited partners; and
- c) any other natural person exercising ultimate effective control over the partnership.

5. FAQ 5: What is meant by a natural person exercising ultimate control over a trust or partnership?

This means an individual (other than a settlor, trustee, protector, beneficiary or partner, as the case may be,) who in practice controls decisions that affect the affairs and assets of the trust or partnership.

This situation can occur if, because of a particular familial or social relationship with an individual, a trustee or partner is disproportionately influenced by that individual on matters relating to the trust or partnership. For example, a trustee or partner could have a friend or spouse with a dominant personality who directs the trustee or partner to act in a particular way, and the trustee or partner does not feel able to refuse.

This situation can also occur with professional or commercial relationships. It will not ordinarily arise in the context of a standard professional or commercial relationship between the trustees or partners and an individual such as a legal adviser, an accountant, a landlord, a lender or a supplier. Nor will it ordinarily arise in the context of the exercise of a statutory function such as that of a registrar or regulator.

However, relationships or functions of this kind may give an individual ultimate control over a trust or partnership if the particular relationship or function is significantly different from the way in which such relationships or functions are normally understood, or if it is one of a number of opportunities the relevant individual has to influence or direct the trustees or partners. In other words, what is relevant here is the substance of the relationship, not its formal description.

An example where the substance of an individual's relationship would lead to the individual being treated as exercising ultimate control over a trust or partnership, irrespective of the individual's official status, is where trustees or partners routinely defer to their accountants on matters relating to the running of the trust or partnership above and beyond the provision of accountancy advice. Another example would be where an individual uses ownership of certain rights or assets relevant to the purposes of the trust or partnership. For instance, the landlord of premises which the trust or partnership needs to use might threaten to terminate the lease as a way of putting pressure on the trustees or partners to act in particular way about something that is not related to the use of the premises.

6. FAQ 6: What information is required about the parties to a trust or partnership?

Information on parties to a trust or partnership must be adequate, accurate and current. Schedule 10 is not prescriptive on what this means because it will depend on the particular circumstances of the trust or partnership.

As a general rule, adequate information about individuals is the following:

- a) full legal name;
- b) principal residential address;
- c) date and place of birth
- d) nationality
- e) any occupation, public position held and, where appropriate, the name of any employer.

In the case of an individual who is a beneficiary under a discretionary trust, the name and principal residential address of the individual will generally suffice, but in the event that the individual is likely to receive a distribution of trust assets, the additional details set out above should be obtained before any such distribution is made.

Adequate information about entities (i.e. legal persons such as a company or a foundation, or legal arrangements such as a trust or partnership) will generally be the following:

- a) name of the entity, including any trading names;
- b) the legal form and law to which the entity is subject;
- c) date and country/territory of incorporation/registration/establishment (as applicable);
- d) any official identification number;
- e) the registered office address and principal place of business (where different from the registered office); and
- f) the names of the natural persons having a senior a senior management position (for example, the directors or equivalent).

With some trusts, the beneficiaries are not individually named but belong to a class of persons. If this class is narrow (e.g. the children of the settlor) it will not be difficult to obtain the required information in relation to all members of the class. However, there may be cases where the class of beneficiaries is too wide to obtain the required information about every

potential member of the class (e.g. people affected by a natural disaster). Similar issues may arise in respect of limited partnerships where the number of limited partners is too large to identify them all. In these situations, information only needs to be held about the class itself, but this must be sufficiently detailed to enable the determination of whether any particular person falls within that class.

In most cases, there will be details about the relevant parties in the official documents of the trust or partnership, whether that is the trust or partnership deed or any subsequent document of variation. Therefore a trustee or partner will usually already hold all or most of the required information, or can easily obtain it.

In order to determine whether information is accurate and current, the trustee or partner must consider the source of the information and assess whether any checks are needed. Where a trustee or partner already has a good knowledge of the parties to the trust or partnership, checks would not usually involve more than asking the parties concerned to confirm their details. However, if for some reason the trustee or partner is unsure of the reliability of the information that has been provided, it may be necessary to take steps to verify that information.

For individuals, this could be done by obtaining copies of documents such as passports, identity cards or utility bills. For entities, this could be done by obtaining copies of documents such as a Certificate of Incorporation (or equivalent), the entity's latest audited financial statements or annual return, or its register of directors or shareholders. In some cases it may also be necessary to check information against publicly available information (e.g. a charities register in the case of a beneficiary that is a charity).

Having obtained the information, the trustee or partner must also keep the information updated on a timely basis. This will require putting in place some monitoring mechanisms, which could take the form of periodic reviews of the information held or periodic requests for confirmation from the parties concerned that their details have not changed. If a trustee or partner is informed that the details relating to a party to the trust or partnership have changed, they should update the information they hold as soon as possible. If a trustee or partner has reason to believe that the details relating to a party to the trust or partnership may have changed, they should take steps to clarify the position and make any necessary changes to the information they hold as soon as possible.

#### 7. FAQ 7: Who are regulated agents and service providers?

A regulated agent is someone who acts in relation to or on behalf of the trust or partnership, and in order to do so is required to hold a licence from the GFSC or equivalent overseas authority (see paragraph 21(1) of Schedule 3 to the Proceeds of Crime Law). In practice this will include all banks, investment funds, and insurance companies. It will also include trust and corporate services providers from the Bailiwick, Jersey, the Isle of Man (or any other jurisdictions that treat trust and corporate services providers as financial services businesses and require them to be licenced).

A service provider (also defined at paragraph 21 of Schedule 3 to the Proceeds of Crime Law), is someone who is not a regulated agent but who provides the trust or partnership with investment advisory or management services, managerial services, accountancy services, tax advisory services, legal services, trust services, partnership services or corporate services. It does not matter for the purposes of Schedule 10 whether the regulated agent or service provider has an ongoing business relationship with the trust or partnership (for example a bank that holds the assets of the trust or partnership) or whether the regulated agent or service provider has only carried out an occasional transaction with the trust or partnership (for example providing legal advice on a one-off basis).

8. FAQ 8: What details should be obtained about regulated agents and service providers?

Where the regulated agent or service provider is an entity (i.e. a legal person such as a company, or a legal arrangement such as a partnership), the required information is the -

- a) name of the entity, including any trading names;
- b) registered office address; and
- c) any official identification number.

Where the regulated agent or service provider is an individual, the required information is their -

- a) legal name; and
- b) principal residential address.

When obtaining the required information, the trustee or partner must also ensure, as far as possible, that it is accurate and up to date. This will involve considering how the information has been obtained and whether to undertake searches on publicly available sources on any registry, regulatory authority or supervisory body.

Having obtained the information, the trustee or partner must ensure that it is updated on a timely basis. Schedule 10 does not specify a time frame for this as it will depend on the circumstances in any given case. However, as a general rule the expectation is that if a trustee or partner has reason to believe that the details relating to a regulated agent or service provider have changed, they should take steps to clarify the position and update the information they hold as soon as possible.

9. FAQ 9: How long must records be kept?

Information about parties to a trust or partnership must be kept for at least five years starting from the date of the dissolution or termination of the trust or partnership. This includes any information obtained by the trustee or partner to verify the information they hold. The information may be kept in any form, as long as it can be easily retrieved.

Information about a regulated agent or service provider with whom there is a business relationship must be kept until at least five years after the business relationship ceases. Information about a regulated agent or service provider who has carried out an occasional

transaction must be kept until at least five years after the transaction is completed. Again, the information may be kept in any form, as long as it can be easily retrieved.

In specific cases, certain Guernsey authorities (for example the police, the GFSC, the Financial Intelligence Unit, the Law Officers and the Guernsey Registry) can require the trustee or partner to keep information for longer than the five years specified above. This can be, for example, to assist the assessment of risks to Guernsey from money laundering, terrorist financing, breach of international sanctions or other economic crime. In that situation, the trustee or partner should retain the information for as long as requested by the authority in question.

#### 10. FAQ 10: When must a trustee or partner disclose their status?

Trustees or partners who deal with certain businesses on behalf of the trust or partnership must disclose their status as a trustee or partner when doing so. This applies to both business relationships and occasional transactions with those businesses. The businesses concerned are financial services businesses and relevant businesses, which are listed at Schedules 1 and 2 respectively of the Proceeds of Crime Law. Financial services businesses include banks, insurers, investment businesses, trust and corporate services providers and any institution that deals with or transmits money. Relevant businesses include accountants, transactional lawyers, tax advisers, insolvency practitioners, estate agents, casinos and businesses trading in goods with a value of over £7,500.

Trustees and partners must familiarise themselves with Schedules 1 and 2 (see the link to the Proceeds of Crime Law at the start of this guidance) to ensure that they are aware of when the disclosure requirement applies. However, as a matter of good practice it is recommended that they disclose their status when dealing with any third party on behalf of the trust or partnership.

Schedule 10 is not prescriptive about the form that a disclosure should take, and a trustee or partner could meet the disclosure requirement by referencing their capacity in their sign off, for example, “as trustee of the [trust name] trust” or “as (general) partner of the [partnership name] partnership”. Other forms of disclosures would also be acceptable, providing that it is clear and documented that the trustee or partner’s status has been disclosed to the financial service business or relevant business in question.

#### 11. FAQ 11: May a trustee or partner disclose information about the trust or partnership?

Under Schedule 10, a trustee or partner may disclose any information related to the trust or partnership that is requested by a specified Guernsey authority (as indicated above, this includes the police, the GFSC, the Financial Intelligence Unit, the Law Officers and the Guernsey Registry).

Schedule 10 also empowers trustees or partners to disclose to a financial services business or relevant business when entering into a business relationship or an occasional transaction information about:



- a) the beneficial ownership of the trust or partnership;
- b) assets of the trust or partnership that are relevant to the purposes of the business relationship or occasional transaction in question.

However, it is important to be aware that Schedule 10 does not authorise any disclosure that would comprise a breach of data protection legislation.