

GAT Guidance on “Likely to Benefit” rules

Guernsey Association of Trustees

INTRODUCTION

GAT has consulted with members and with the Guernsey Financial Services Commission (the Commission), with a view to establishing this guidance note to help trustees / Licensees over rules 115 *et seq* of the AML Handbook (June 2009)

Rules 115 and 116 are reproduced here for ease of reference:

115. When establishing a trust relationship, a financial services business which is acting as a trustee must, in order to identify and verify the identity of its customer and any beneficial owner and underlying principal, identify:

- the settlor(s);
- any protector(s) or co-trustee(s); and
- any beneficiary with a vested interest or any person who is, to the best of the trustee’s knowledge, likely to benefit from the trust.

116. Verification of the identity of beneficiaries and persons known to be likely to benefit must, where possible, be undertaken before or during the course of establishing a business relationship. Where it is not possible to do so, the reasons must be documented and verification must be undertaken prior to any distribution of trust assets to (or on behalf of) that beneficiary in accordance with the requirements of Regulation 7.

When considering the persons who are, to the best of the trustee’s knowledge, likely to benefit, the following guidance is considered to meet with best acceptable practice.

KNOWING WHO THE BENEFICIARIES ARE

Trustees are required to act in the best interests of the beneficiaries and in order to achieve this, trustees are presumed to be aware of who the beneficiaries are. In some cases, beneficiaries are described by reference to a class of persons. Typically the issue and remoter issue of a certain person, may be referred to as a class, without all members of that class being named in the deed. The absence of such names makes persons in that class no less beneficiaries of the trust than any beneficiary who is named. Because persons may come and go, into and out of a class (for example by way of marriage, divorce, death or birth) it is presumed that trustees will keep abreast of the identity of persons in relevant classes and any special needs that any of them might have (because trustees are obliged to act in the best interests of these persons, so they should at least know that they exist and who they are). However, trustees are not expected to conduct VOI on new members of a class, unless such new member is “likely to benefit” to the best of the trustee’s knowledge.

Many trusts (especially discretionary trusts) have beneficiaries spanning a number of generations, and the trusts have the capacity to continue through both present and future generations. Some modern trusts may not even have a perpetuity date and may continue indefinitely. Accordingly, the trustee will have to pay attention to beneficiaries’ requirements today, according to current circumstances, and onward into the foreseeable or unforeseeable future. In this context, it would be seen as acceptable best practice for the expression “likely to benefit” to be interpreted by reference to information currently available to the trustee at each time a review is undertaken. No regulations could be prescriptive about this but there is likely to be evidence on trustees’ correspondence files as to “who they are talking to” and “about whom they are talking”. Trustees should, therefore, be aware on a common sense basis, of when a beneficiary’s identity should be verified for the first time.

It should be noted that the question of whether a Beneficiary is likely to benefit is a factual one which is not dependent on the trustees exercising their discretion. It is acknowledged that the trustees may need to exercise discretionary powers before conferring benefit on a particular

beneficiary and that this action is incidental to and independent of the question of whether a person is likely to benefit.

PRACTICAL ASPECTS

Collecting VOI is, broadly speaking, a matter of obtaining original or certified copies of current official or public documents, to establish the true identity and principal address of the subject concerned. Such documents typically include passports and utility bills or similar. It is not a particularly onerous task, and these days most people readily accept the need to present such documentation, usually without question. Indeed, if a trustee encounters a person who protests too much over such a relatively simple act, it might raise the trustee's suspicions as to why the individual is so reluctant to provide such documentation.

Trustees are expected to enter into the spirit and professionalism of knowing the subjects of the trust arrangement that they are trustee of and verifying the identity of those whom they consider to be likely to benefit according to current circumstances.

GUIDANCE

In interpreting rule 115, trustees should be aware that it is not acceptable for a trust to have no beneficiary on whom VOI has been completed. There may be more than one beneficiary on whom VOI has been or should be conducted according to the words "likely to benefit" and in determining what "likely to benefit" means, trustees should always be able to recognise, on a common sense basis, beneficiaries who are "likely to benefit" in the current circumstances.

Clearly, if a beneficiary benefits either directly or indirectly, from the trust's assets, his identity should be verified, before benefit is conferred. However, this should not be adopted by trustees as the only basis on which VOI is to be conducted on beneficiaries and cannot be considered a substitute for determining which beneficiaries are "likely to benefit".

Trustees should periodically make themselves aware of the members of all relevant classes, by enquiry wherever necessary, into the current family tree (or other reference according to circumstances). With this knowledge, trustees should consider which beneficiaries are likely to benefit to the best of the knowledge taking account of the circumstances surrounding all the beneficiaries of the trust.

Trustees should take a realistic and practical approach to the question of VOI of beneficiaries.

Trustees should keep a record of their decisions as to which beneficiaries they conduct VOI on and the reasons for not conducting VOI on the remainder. Where it is not possible to conduct VOI (because the beneficiary is a minor, or unable to manage his affairs or of some other circumstance that makes it impossible (such as being unaware of the trust's existence for good reason)) the trustee should note the reasons on such record. Such record should, as a matter of good practice, be updated in line with any rolling review programme of the trust in question.