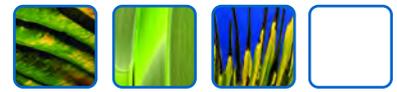


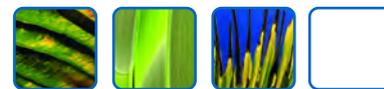
Guidance Notes: Step Practice Rule to Trustee Exemption Clauses





Guidance Notes: Step Practice Rule to Trustee Exemption Clauses

1. Where a member prepares, or causes to be prepared, a will or other testamentary document or a trust instrument (each an “**Instrument**”), or is aware of being named as an original trustee or executor in an Instrument:
 - a) (i) in which he, or any trustee or executor, is entitled to remuneration under the terms of the Instrument; or (ii) where he has, or may expect to have, a Financial Interest in the trusteeship or executorship of the trust or will or the preparation of the Instrument; and
 - b) any one or more of the circumstances described in paragraph 2 below applies (together “**the Disclosable Circumstances**”), such member shall use his reasonable endeavours to ensure:
 - (i) that he or another shall have notified the Settlor of the provisions in the Instrument or the original trustee or executor’s terms and conditions relating to the Disclosable Circumstances; and
 - (ii) that he has reasonable grounds for believing that the Settlor has given his full and informed acceptance of such provisions prior to his execution or approval of the Instrument.
2. The Disclosable Circumstances referred to in paragraph 1 above are the existence of provisions in the Instrument or the original trustee or executor’s terms and conditions the effect of which limit or exclude the liability of a trustee or executor for negligence.
3. In this rule:
 - a) “Financial Interest” means circumstances where the member benefits or reasonably expects to benefit (whether directly or indirectly) from providing a service as trust advisor or as trustee.
 - b) “Settlor” means any person who would be a principal initial settlor in relation to a settlement, or at whose directions the Instrument is created.
4. This rule shall be subordinate to any legislation or other binding provision of law in any jurisdiction where the member shall practice and shall only apply to Instruments governed by the law of England and Wales.



Guidance Notes: Step Practice Rule to Trustee Exemption Clauses

Trustee Exemption Clauses (“TECs”)

Guidance notes in relation to the STEP Practice Rule (“the Rule”) and its application to wills and trust instruments

1. Background

1.1 The Rule has been introduced by STEP England and Wales in response to the Law Commission’s 18 July 2006 Report on TECs (“the Report”)¹, which itself followed a Consultation Paper issued in January 2003 (“the CP”)².

1.2 In the CP the Commission proposed to legislate to prohibit reliance by professional trustees on TECs which exonerated them from liability for negligence. In the Report the Commission accepted the place for this type of TEC but proposed a non-statutory rule of practice in order to ensure awareness by any testator or settlor of the existence of a TEC and its implications.

1.3 In the Report, the Commission proposed a form of model practice rule to bind professionals and other regulated individuals and companies who act as trustees. The Commission encouraged professional bodies either to adopt the Commission’s model rule or to devise their own. STEP believes that the Commission’s proposal reflects existing best practice, but proposes a formal rule to this effect. It has therefore introduced its own practice rule – the Rule, which these guidance notes are intended to supplement.

2. Application of the Rule

2.1 Relevant criteria and types of TEC

2.1.1 Financial Interest criterion

Clause 1 (a) provides that the Rule applies to any member of the STEP England and Wales region who (i) drafts a will or trust instrument and is paid for doing so (or whose firm or company is paid) or (ii) will or may later act as a paid trustee or executor of a will or trust instrument. It will therefore apply to practitioners and members who are officers or employees of trust companies. STEP appreciates that trust companies and firms of advisers are not themselves STEP Members, but nevertheless hopes that they will voluntarily comply with the rule (and will be encouraged to do so by STEP Members).

2.1.2 Disclosable Circumstances criterion

Clause 1 (b) requires the disclosure to the settlor or testator of “disclosable circumstances”. These are defined in Clause 2 as provisions in the will or trust instrument (or the terms and conditions of the executor or initial trustees) which limit or exclude liability for negligence on the part of the executors/trustees.

It is not intended by STEP that this criterion should apply to every single provision in a trust instrument or will which could conceivably be construed as restricting liability for negligence. For the avoidance of doubt the Rule does not apply to clauses which simply extend the trustees’ powers (“extended powers clauses”).

The Rule is, however, intended to apply to typical TECs which limit the potential liability of the trustee or executor such as the following:-

“No Trustee shall be liable for any loss to the Trust Fund arising by reason of

(i) any mistake or omission made in good faith by such Trustee or by any of the Trustees [except in the case of negligence by a paid Trustee]; or

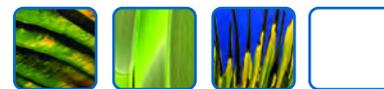
(ii) any other matter or thing except his own actual fraud”

There are many variations in the form of standard TECs. STEP Members would be expected to apply the Rule even if the effect of the standard TEC wording was contained in a wider provision which limited the scope of trustees’ duties (“duty modification clauses”), or which entitled the trustees to indemnity from the trust fund (“indemnity clauses”).

2.2 The form of disclosure

2.2.1 STEP recognises that a STEP Member may not be advising the settlor or testator himself e.g. if the Member has been asked by a trust company to prepare a trust deed which the company will pass on to the settlor itself. For this reason, Clause 1 (b) (i) of the Rule provides for the possibility of a third party (e.g. the instructing trust company) making disclosure instead of the STEP Member.

2.2.2 The Rule deliberately places the onus on the STEP Member to satisfy himself that adequate disclosure has been made to the settlor/testator. The adequacy of the disclosure will always depend on the



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circumstances of the case. However, it is anticipated that ordinarily there would be adequate disclosure if the STEP Member sent a letter to the settlor/testator which included the following statement⁴ (with the statements in parentheses modified according to the circumstances):-

“I should also draw your attention to clause [X]. This clause provides that no [executor of your will/trustee] will be personally liable for any act by them in that capacity unless they are guilty of fraud. [If an [executor/trustee] is paid for their services then they will also be liable if they are negligent]. If you have any queries in relation to this, then please let me know.”

- 2.2.3** If the STEP Member is preparing the document for someone else to send to the settlor/testator then he might include the following statement⁴:-

“I should also draw your attention to the trustee exoneration clause in clause [X]. I recommend that you highlight this provision to the [settlor/testator] and explain that it provides that no [executor of the will/trustee] will be personally liable for any act by them in that capacity unless they are guilty of fraud. [If an [executor/trustee] is paid for their services then they will also be liable if they are negligent.]”

- 2.2.4** Neither of the above model explanations is intended to be used slavishly – what is needed is an explanation of the meaning and effect of the TEC in plain English in order to try and ensure that the testator/settlor has an adequate understanding of the TEC. STEP Members are obliged by the Rule to use their reasonable endeavours. The level of detail required will depend on the STEP Member’s understanding of the settlor/testator’s likely ability to understand the explanation provided. In some circumstances a more comprehensive explanation may therefore be needed. It is suggested that the alternative forms of model explanation above should be the simplest form i.e a STEP Member should not give a less comprehensive explanation unless one of the exemptions described in section 3 below applies.

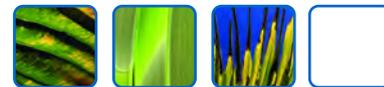
- 2.2.5** In order for members to be able to demonstrate their compliance with the Rule it is recommended that:-
- the letter containing the relevant explanation is retained permanently (e.g. with the original or a copy of the completed will or trust instrument)
 - if the contents of the relevant explanation are communicated orally, the STEP Member subsequently confirms this advice in writing
 - the relevant explanation should not be “buried” in a voluminous letter or guide to the document in question.

- 2.2.6** Clause 3 (b) defines “the Settlor” for the purposes of the Rule as the “principal initial settlor”. Therefore if, for example, a trust company is executing a declaration of trust over an initial trust fund of £10 but it is known that Mr X will shortly be adding £50,000 to the trust, then the relevant statement should be given to Mr X and not the trust company. The definition of “settlor” is intended to include the principal initial settlor of a charitable trust who is involved in its establishment⁶.

3. Exemptions

There is no need for compliance with the Rule in the following circumstances:-

- 3.1** If the will or trust instrument was executed prior to 19 July 2006.
- 3.2** If the STEP Member has had previous dealings with the settlor or testator and is confident that the settlor’s/testator’s knowledge and experience in relation to trust matters is so great that compliance with the Rule is unnecessary.
- 3.3** If the settlor/testator receives independent legal advice.
- 3.4** in the case of ‘commercial trusts’, which were defined by the Law Commission⁵ as situations where either:-
- (a) The trustee is subject to statutory regulation of TECs e.g. trustees of debentures or authorised unit trust schemes; or.
 - (b) The settlor is acting in the course of a business (unless it ought reasonably to be apparent that it is still an unusual transaction for the settlor to enter into).



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- 3.5 if the trust is a pension trust
- 3.6 on a change of trustees (disclosure having been given to the settlor when the trust instrument was prepared)
- 3.7 when a will comes into force on the death of the testator (disclosure having been given to the testator when the will was prepared)
- 3.8 if the will or trust instrument is governed by a foreign law (ie other than that of England and Wales)

3. Consequences of non-compliance

It is hoped that Members will adopt the Rule so that over time it becomes standard best practice. At present it is not proposed that any Member should have any duty to report any other Member to STEP for breach of the Rule, although the STEP Disciplinary Committee, in considering a complaint, would have regard to non-compliance where relevant. It is of course possible that the Rule may in due course become part of the central regulation of trustees in England and Wales pursuant to the Third Money Laundering Directive.

¹ Law Com No 301

² see www.lawcom.gov.uk/docs/cp171.pdf

³ For further examples see Appendix A1 of the CP

⁴ The statement will need to be tailored to explain the effect of the TEC in question.

This statement would be suitable for the example TEC in paragraph 2.1.2 above

⁵ See paragraph 6.88 of the Report

⁶ In paragraph 6.82 of the Report

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