SUSTAINABLE INVESTING FOR PRIVATE WEALTH AND FAMILY OFFICES

Guidance for developing sustainable trust deeds

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Image: Rue du Moulin Huet, Guernsey

INTRODUCTION

As part of our strategic commitment to sustainability, we have committed to publish a series of briefings and publications helping to support the development of sustainability in the private wealth sector.

Owners of private wealth and family offices are increasingly concerned with the impact of their investments and the companies they are investing in. As an extension of the historic approach whereby owners of private capital have looked to commit to philanthropic projects that have deep and measurable environmental and social impact, they are now looking to incorporate a similar approach within their overall investment strategies while maintaining financial returns. Our own research, and that of many others, points to a wall of private capital that is looking to be unleashed to the cause of financing sustainability, driven in large part by the pressures of a new generation and the prospect of intergenerational transfer.

Guernsey is proud to be at the forefront of the development of green and sustainable finance. As a global leader in the provision of private wealth services, it is also well-positioned to support the development of family offices and their advisers building sustainability into their offerings to clients and maintaining their duties as trustee. We are fortunate to be blessed with so many far-sighted firms and organisations with strong commitments to sustainability, and have a strategic group committed to the cause of the development of services in this sector.

During 2020, we have sought, with others, including the Guernsey Association of Trustees and the Guernsey Branch of STEP, to understand how family offices and their advisers view sustainable investing, and how we can encourage a greater movement towards sustainable investing by family offices and their clients. We have aimed to discover from industry what the key barriers are to sustainable investing and to understand what tools and solutions would be of use to family offices and others to enable them to develop their own sustainable private wealth offering. Our objective is to alleviate these barriers with the publication of tools and briefings.

The example trust clauses within this report aim to overcome one of the central barriers to sustainable investing we identified during the course of discussions with our local private wealth industry. This guide to developing sustainable trust deeds has been produced with the support of Ogier in Guernsey. Our intention is that, as part of that private wealth offering, these tools enable fiduciaries build their sustainable finance services to clients, and directly support family offices financing sustainability.

What it also does is clearly showcase the sustainable services available in Guernsey.

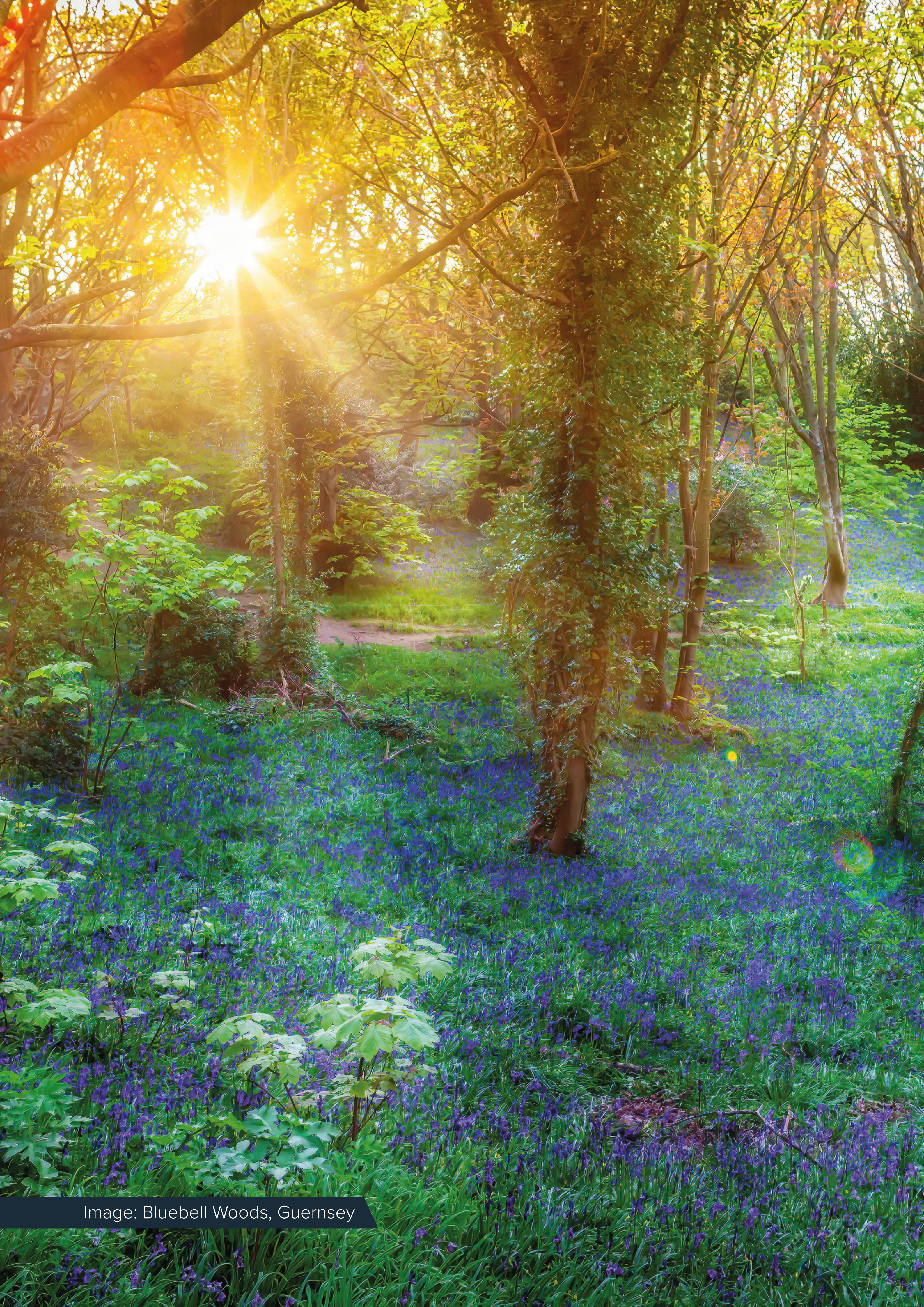

Image: Bluebell Woods, Guernsey

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THE DUTY OF THE TRUSTEE

A central theme emerging from our discussions during the course of the year was the need to ensure the compatibility of trustees' duties and sustainable investing.

It has been suggested that such concerns may act as a barrier to conversations around the question of sustainable investing. The purpose of publishing these example trust deeds is to provide clarity that the use of such sustainable clauses can ensure that the sustainability offering is clearly consistent with maintenance of the trustee's duty.

Trustees remain subject to a duty to act in the best interests of the beneficiaries, which includes ensuring that the trust fund is managed in a careful and fully justifiable manner. Per the Trusts (Guernsey) Law, 2007, trustees must "preserve and enhance, so far as is reasonable, the value of the trust property" and as such trustees may be held to account if investments perform badly.

Historically this duty to act in the best interest of the beneficiaries, to preserve and enhance the value of the fund, has considered only financial returns. Arguably ignoring sustainability concerns could be seen as not having careful management of the fund, the duty does not currently include any specific mention of sustainable investment – whether this relates to ESG investing, green investing or socially responsible investments.

Family offices therefore will need to be comfortable that by choosing sustainably-focused investments, they will not be compromising their duties as a trustee in preserving and enhancing the value of the trust property.

AIMS OF THE TRUST CLAUSES

As with all exercises of fiduciary powers, investment decisions must be made on a case-by-case basis and there is no formula that can be applied across the board. As such we did not wish to develop a specific proforma trust deed that could be applicable to all family offices and fiduciaries in Guernsey. Instead, we understood that it would be important for trustees to undertake a balancing exercise between achieving positive returns and good investment outcomes through strategies that are aligned with the beneficiaries' interests and views, while ensuring that they are comfortable that they are not risking compliance with their duties as a trustee.

Ogier has collated the following illustrative clauses which can be implemented into a trust deed between a family and their family office.

These clauses can act as a guide for family offices and their advisers, and demonstrate what may be necessary to include in a trust deed if a client wishes to include sustainability considerations into their portfolio while maintaining their duties as a trustee.

It will still be important for family offices to have an on going dialogue with their client on specific investment and with investment managers as to the assessment of ESG or sustainable ratings. These example clauses aim to give a level of comfort to family offices to be able to kickstart the initial conversation between clients, family offices and their advisers as to how they will be able to build considerations of sustainability into their offerings to clients. The clauses offer a range of solutions from giving powers of investment, to the wishes of the settlor.

EXAMPLE CLAUSES

Powers of investment

“The Trustee[s] shall* have the power to invest in sustainable investments.”

“The Trustee[s] shall have regard to directions given by the Settlor for investments to be made in line with ventures involved in socially responsible investing.”

“When deciding where and how to invest the Trust Fund, the Trustee[s] shall in the first instance endeavour to invest the Trust Fund in ventures which consider environmental, social and corporate governance.”

“The Trust Fund may be invested or laid out in the purchase of (or at interest upon the security of) such property whether involving liability or not and whether producing income or not or upon such personal credit with or without security as the Trustee shall think fit, taking into account any of the Beneficiaries’ wishes as to sustainable investments, including the purchase, building and improvement of any property as a residence for any person, and the purchase of chattels for the use of any person to the intent that the Trustee shall have the same full and unrestricted powers of investing and transposing investments and laying out moneys in all respects as if the Trustee were absolutely entitled thereto beneficially and without regard to the requirements of the Proper Law, save to the extent that these are obligatory.”

Consultation by trustees

“The Trustee[s] may, at the expense of the trust property, consult professional persons for advice as to socially responsible investing of the trust property.”

“The Trustee[s] shall consult the Beneficiaries and Settlor of the Trust on the sustainable investing of the trust property before exercising any function, though this will not be binding and the Trustee retains absolute discretion how the trust property will be invested.”

“The Trustee[s] shall consult an Investment Adviser in relation to socially responsible investing before exercising any function.”

Delegation by Trustees

“Subject to clause [...] when delegating the power of investment, the Trustee[s] shall inform the investment agent of the requirement to consider in the first instance investing the Trust Fund in ventures which take into account socially responsible and sustainable investing.”

Wishes of the Settlor

“In the exercise of their powers and discretions hereunder the Trustees may, if they think fit so to do, have regard to but shall in no way be bound by the wishes of the Settlors as expressed to the Trustees from time to time in writing, but shall take extra consideration in accordance with the investment of the Trust Fund in ventures which are sustainable and socially and environmentally responsible.”

The draft clauses have been prepared by Ogier for illustrative purposes only; they are not intended to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

*We note that in legal documentation there is an important distinction to made between the use of “shall” and “may” in the above example clauses. When using “shall” the implication is that the trustee is obligated to, or must follow the clause, whereas the use of “may” offers the opportunity for the trustee to follow the clause but is not mandatory. It will be up to the discretion of the family office and their advisers based on individual situations to use either shall or may as the situation requires based on the wishes of the client.

CONCLUSIONS

We hope that these draft clauses will enable family offices to build sustainability into their offerings to clients, and demonstrate that sustainable investing can be compatible with the duties of the trustee. This guidance on developing sustainable trust deeds is just the first of a series of guidance and reports in encouraging sustainable private wealth practices. As part of our strategic commitment to private wealth and sustainable finance, we will continue to keenly follow the development of family office sustainability services.

We understand that there will be barriers to overcome in transitioning to sustainable practices and we aim to continually engage with family offices locally to develop solutions and guidance to scale these challenges.

Private wealth investing responsibly and sustainably is exceedingly important in terms of Guernsey’s commitment to international climate change goals and objectives. We are optimistic that we will continue to see increases in capital from the private wealth sectors flowing to the green and sustainable investments, and that the transformative power of private wealth will continue to drive action on climate change.

GUERNSEY GREEN FINANCE

Guernsey is a specialist centre for many areas of financial services, and particularly in the servicing of private wealth and alternative investment assets such as private equity, infrastructure and debt. As a responsible global citizen, Guernsey contributes its expertise and experience as a global finance centre to the fulfilment of the UN's Sustainable Development Goals.

Guernsey Green Finance brings together Guernsey's finance and public sectors to drive the development of green and sustainable finance in Guernsey and support the global fight against the climate change.

Guernsey Green Finance is developing a framework for the investment of private wealth, seeking to transpose the benefits of the strengths of the Guernsey Green Fund regulatory regime, transparency and trust, to the private capital sphere.

Guernsey Green Finance is a member of the United Nations' Financial Centres for Sustainability network, a UN Environment Programme initiative, and Guernsey's regulator, the Guernsey Financial Services Commission, is a member of the Network for Greening the Financial System.

We are grateful to Ogier for their support in helping us to develop this guide to developing sustainable trust deeds and the illustrative clauses contained within this report.

Ogier has a dedicated Sustainable Investing and Impact Funds practice established to assist clients in structuring, operating and investing in investment funds which focus on environmental and/or socially responsible investment, as well as other sustainable investment transactions.

The team works with asset managers, corporates and investors looking to incorporate environmental, social and governance (ESG) factors into their operations and/or investment processes.

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WEAREGUERNSEY.COM

+44(0) 1481 720 071 info@weareguernsey.com

Guernsey Finance, PO Box 655, St Peter Port, Guernsey, GY1 3PN

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