Arrangements on the Closing of an Advice Organisation

Aim and purpose

An advice organisation may have to close for a variety of reasons. This Guidance Note explains what steps an organisation should take to protect its clients when closing its business. Whatever the cause of the closure, organisations should be aware of the obligations under Code 86 and keep records of the files that are transferred or retrieved together with any files which are stored.

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Circumstances when an advice organisation may cease operations

Voluntary closure

An advice organisation may decide voluntarily to close for a variety of reasons such as the retirement of a sole practitioner or because the business is no longer financially viable. In such circumstances the organisation is obliged to inform its clients of the decision to cease trading within ten working days of that decision being made, including telling them the expected date of closure so that they can claim their file and instruct other advisers if they so wish. Not doing this would be failing to act in their clients' best interests and a breach Code 9.

Advice organisations that have not applied for continued registration and have subsequently been removed and exempt organisations which have left the regulatory scheme must not retain any client files notwithstanding that there are decisions pending or it is expected that matters will shortly be resolved. Retention of any client files by such organisations will lead to a suspicion of illegal working in contravention of section 84 of the Immigration and Asylum Act 1999 (the IAA 1999) and could result in the adviser being prosecuted under section 91 of that Act.

Advisers who retire from full-time practice but who continue to practise on a part -time or ad hoc basis or act as a consultant with another firm, must comply with section 84 (2) of the IAA 1999 in being a qualified person and meet all the requirements of professional conduct.
The OISC has issued guidance on this topic, which is available on the following link http://oisc.homeoffice.gov.uk/immigration_advisers/have_your_circumstances_changed/.

Refusal of continued registration/withdrawal of exemption

The Commissioner may decide to refuse to continue the registration of a for-profit organisation or withdraw the exemption of a not-for-profit organisation if she believes it is no longer fit and/or competent to provide immigration advice and/or services. Such a decision is appealable to the First-tier Tribunal

(Immigration Services) (the Tribunal). Not all organisations exercise that right of appeal, and, of those that do exercise their right of appeal, not all are successful.

Where an organisation chooses not to appeal, it must not retain client files. Subject to the client's consent, their file should be referred immediately (and not later than 28 days) either to another regulated organisation able and willing to assist the client, or, where no such organisation can be identified, be sent to the client/instructing sponsor.

An organisation, even if appealing, should make provisional arrangements for the possibility that the Commissioner's decision will be upheld on appeal. At present, it takes an average of six months from the Commissioner's decision to refuse or withdraw to the Tribunal's decision. During that period, the organisation can apply to the Tribunal for a stay of the Commissioner's decision, but this can be refused. Advisers considering appealing the Commissioner's decision must therefore consider their clients' best interests while awaiting the Tribunal's decision, and should make contingency plans for the care of their clients should the Tribunal find against them.

If an organisation has had its continued registration refused or its exemption withdrawn, it may only retain its client files if it is successful in having the Commissioner's decision suspended by the Tribunal. In those circumstances, the files may only be kept until the Tribunal has made its decision. If the appeal is unsuccessful, the files must be disposed of immediately in the manner required for an organisation which has chosen not to appeal as mentioned above. However, that requirement will not apply if the organisation is given leave to appeal to the Upper Tribunal and will only cease if the appeal process has concluded against the organisation.

Bankruptcy

If an organisation closes due to an order of bankruptcy, then it must ensure that all of its client files are, with the respective client's consent, referred either to another regulated organisation which is able and willing to assist the client in question, or, where no such organisation can be found, returned to the client/ instructing sponsor.

The OISC does have the power to intervene in these circumstances or to retain the client files of a bankrupted business. If an individual who has responsibility for such an organisation fails to deal with the organisation's client files accordingly, this will be taken into account should they apply to be regulated in future.

Change of Legal Entity

The Commissioner has issued guidance on this subject, which can be found at: http://oisc.homeoffice.gov.uk/servefile.aspx?docid=216.

In a recent case the Tribunal said that, in its opinion, if an organisation wished to acquire a new legal entity (e.g. change from sole trader to partnership) then the OISC must consider the new legal entity to be a completely new organisation requiring the submission of a fresh application to the OISC. As the OISC cannot transfer regulation from one legal entity to another, the new legal entity cannot provide immigration advice and/or services until its application is approved. However, while the application is being considered, the existing regulated organisations can continue to operate.

If the new legal entity is approved, then the previous legal entity is deemed to be no longer in the regulatory scheme. The new legal entity must arrange for the transfer of the old legal entity's clients to the new organisation by writing to the clients informing them that the new regulated organisation has been created replacing the previously regulated body. In that letter the organisation must enclose a new contract for the client to sign agreeing to the new organisation acting for them. Clients who agree to be advised by the new organisation must receive a new client care letter in accordance with Code 33.

Clients must be given the option of instructing the new organisation, moving to another provider or retrieving their file.

Alternative Business Structures

The Legal Services Act 2007 allowed changes to be made to the provision of legal

services in England and Wales by introducing alternative business structures (ABS). In so doing the Act opened ownership of legal services providers, once restricted only to lawyers, to anyone deemed "fit or proper" by the Solicitors Regulation Authority (SRA). Any OISC regulated organisation accepted by the SRA as coming under their regulation will cease thereafter to be OISC regulated. If a currently OISC regulated organisation wishes to become an ABS, it must concurrently make an application to the SRA and inform the OISC that it has done so.

Changing regulators has the effect of creating a new legal entity, and similar rules to those described above when an OISC organisation changes its legal entity apply. The SRA will determine the suitability of the new ABS. While it is considering the application the organisation's OISC regulatory status will remain unchanged.

If the ABS application is approved, arrangements for the transfer of clients to the new SRA regulated organisation must be made. In accordance with Codes 42-44, the organisation must write to its clients informing them that the new organisation has been created and approved for regulation by the SRA and that consequently, the previous OISC organisation has ceased exist. A new contract for the client to sign agreeing to the new organisation acting for them must be enclosed with that letter.

Clients must be given the option of instructing the new organisation, moving their instructions to another provider or retrieving their file.

Arrangements on the death of a sole adviser

A) Where the adviser left a will

A sole adviser should make a will containing adequate provision for the running of their practice after their death by another regulated organisation or for the business to be closed in an orderly manner. A sole adviser should ensure that their executors are able to make arrangements immediately after the adviser's death to appoint an appropriately regulated adviser to run the practice pending the practice's termination. The adviser's clients must be notified of the adviser's death and of their right to seek assistance from another regulated organisation, even if the practice is purchased by another regulated adviser.

The sole adviser's client account should be frozen on their death. Any incoming adviser should immediately open fresh books to deal with the deceased adviser's cases until the practice is disposed of. The incoming adviser will normally arrange with the deceased sole adviser's bank to open a new client account with an overdraft matching that of the existing client account. The incoming adviser must also make arrangements for the former client account's balances to be transferred to the new client account as soon as the grant of probate is registered with the bank or building society. The incoming adviser must not draw money from the new account in any circumstances where it would be improper to draw an equivalent amount from the old account.

A similar arrangement should be made for the office account.

No further monies should be paid into the deceased adviser's client account. Clients' money received after their death by the practice must be placed in the new account operated by the incoming adviser.

B. Where the adviser died intestate (without leaving a will)

If an adviser dies intestate, then the administrators of their estate must either pass the client files back to the clients/instructing sponsors or refer them with the clients' consents to another regulated organisation or the clients must be given the option of retrieving their file.