



Public Guardian practice note

OPG's approach to Surety Bonds

Summary

The Office of the Public Guardian (OPG) supervises deputies appointed by the Court of Protection.

The court tells most deputies to get a 'surety bond' (also called a 'security bond'). The bond is insurance that protect the assets of the person whose affairs and property the deputy is managing.

OPG has set up a scheme for surety bonds but deputies can get a bond from a provider that isn't in the scheme.

The practice note explains what OPG expects from a bond provider, so that its surety bonds are suitable for deputies.

Introduction

The Mental Capacity Act 2005 (MCA) makes provision for ways in which decisions can be made on behalf of people in circumstances where they may be incapable of making such decisions personally. In such cases, where the person, (referred to as “P”), has property or finances and no attorney in place it will be necessary to apply to the Court of Protection (the Court) for an appropriate order.

Where the Court makes a one off order or appoints a deputy to manage P’s property and affairs, it may require security be given by way of a surety bond for the protection of P’s assets. The Court will decide the value of the surety bond.

The Public Guardian was created under the MCA on 1 October 2007. The Office of the Public Guardian (OPG) is an Executive Agency of the Ministry of Justice that

supports the Public Guardian in the discharge of his duties. The Public Guardian has a number of statutory functions, which includes receiving security which the Court requires a deputy or any other person to give. The Public Guardian can also apply to the Court to enforce the bond where the Deputy is in breach of duty.

The regulations that deal with security are set out at Annex A and can be found in full at:

The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (2007 No. 1253)

The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2010 (2010 No. 1063)

The Scheme

Regulation 34(4) allows the Public Guardian to make arrangements to facilitate the provision of bonds. The arrangement is commonly called “the Scheme”. The Scheme provides suitable surety bonds for the purposes of security to all deputies appointed by the

Court. From October 2016, the Scheme is administered by Howden UK Ltd. Deputies are not bound to enter into an arrangement within the Scheme and can seek their own arrangements.

The purpose of this document

This document sets out the Public Guardian's expectations for any company seeking to provide bonds outside of the Scheme. Providers need to demonstrate to deputies wishing to move outside the Scheme that they understand the unique nature of deputy bonds, they meet the requirements of the Regulations, and provide the requisite protection for "P". The OPG has no contract with any provider outside the Scheme and does not provide any endorsement or promotion of products offered.

The order giving the authority to act as a deputy will not be released until the Court and OPG are satisfied that appropriate security is in place. To ease this process the OPG would

expect to agree that the provider and product meet the requirements in the regulations and the Public Guardian's expectations before it is in use. Otherwise the matter will have to be dealt with on a case by case basis, which may delay the appointment of a deputy. Providers who satisfy the requirements in the Regulations and have agreed to meet the Public Guardian's expectations will be placed on a list maintained by the OPG and made available to the Court of Protection.

The OPG would expect to review regularly that a provider is meeting the requirements and the Public Guardian's expectations, usually annually.

Expectations for providers

1. Providers will need to be able to endorse a bond as set out in regulation 34.
2. The Public Guardian expects bond providers to maintain full membership of British Insurers Brokers Association (BIBA) or successor or equivalent association.

Expectations for the Bond

The security given by the bond is solely for the protection of P, and there is no protection for the deputy. These expectations provide assurance that the protection is robust and continuous throughout the deputyship. Bond providers should understand the following:

- The amount of security required is set by the Court and cannot be varied by the bond provider or the OPG;
- Neither the OPG or the Court are party to the bond, which is between the deputy and the bond provider;
- Once entered into, the bond cannot be cancelled by either party for any reason;
- The bond can only be discharged by the Court;
- Upon cessation of the deputyship the bond will lapse in line with the timescales in regulation 37(3) as amended;
- To discharge a bond outside these timescales will require one of the parties to make an application to the Court.

Enforcement

Where a deputy fails in his or her duties, the bond can be enforced if required. Bond providers should understand the following:

- The Court can call in all or part of the bond up to the limit secured. There is no requirement to prove fraud and the loss may not be quantifiable;
- The Court may order an interim payment, i.e. that part of the bond is called in pending quantification of the loss;
- The Insurer must pay on demand without further investigation;
- Notification will be via a Court Order;
- It is expected that Insurers will have the right to recover the amount they have paid out, plus their expenses, from the deputy. This is a matter for the insurer and in which the Public Guardian or Court play no part.

Deputies wishing to change provider

Where a deputy wishes to change bond provider, Regulation 35(3) provides that the Public Guardian must be satisfied that certain requirements have been met. Providers are expected to inform the OPG of any deputies wishing to change providers.

- The Public Guardian expects providers to ensure that deputies wishing to change provider understand whether the insurer

will accept retrospective liability for any loss during the deputyship, no matter when it occurred. If retrospective liability is not accepted, the Public Guardian expects providers to make it clear that unless the previous bond is discharged, the deputy may be liable to pay premiums for both bonds.

Changes to the Amount of Security

Bond providers should understand the following:

- The Court can change the amount of security required at any time. This is most common where an application is made to increase the deputy's access to funds. The Public Guardian considers it preferable, to ensure protection of P, that the wording of the bond ensures that the deputy accepts any increased security and premium without the need for further documents to be signed.

Should this not be the case, bond providers should ensure that a process is in place for notifying the Public Guardian where changes in security ordered by the Court have not been effected.

Exchange of Information

There are requirements for exchange of information within the regulations. The OPG would look to agree an appropriate method of electronic transfer of information with providers who can meet the above expectations.

The OPG would seek an information sharing agreement between the provider, the Court

and itself. The agreement would be expected to cover notification of a bond being put in place, the cessation of a deputyship, enforcement of bonds, and the format and layout of the information. It would also seek to agree timescales for transfer of information and to replying to information requests from the OPG and the Court.

Complaints

The Public Guardian expects bond providers to set out a clear complaints procedure, available on its website, which meets the

requirements of both the Financial Services Authority and Financial Ombudsman Service.

For further advice:
Office of the Public Guardian
Telephone 0300 456 0300
www.gov.uk/opg

Annex A

Public Guardian Regulations 33-37

Persons required to give security for the discharge of their functions

33. (1) This regulation applies in any case where the court orders a person (“S”) to give to the Public Guardian security for the discharge of his functions.

(2) The security must be given by S—

- a) by means of a bond which is entered into in accordance with regulation 34; or
- b) in such other manner as the court may direct

(3) For the purposes of paragraph (2)(a), S complies with the requirement to give the security only if—

- a) the endorsement required by regulation 34(2) has been provided; and
- b) the person who provided it has notified the Public Guardian of that fact.

(4) For the purposes of paragraph (2)(b), S complies with the requirement to give the security—

(a) in any case where the court directs that any other endorsement must be provided, only if—

- (i) that endorsement has been provided; and
- (ii) the person who provided it has notified the Public Guardian of that fact;

(b) in any case where the court directs that any other requirements must be met in relation to the giving of the security, only if the Public Guardian is satisfied that those other requirements have been met.

Security given under regulation 33(2)(a): requirement for endorsement

34. (1) This regulation has effect for the purposes of regulation 33(2)(a).
- (2) A bond is entered into in accordance with this regulation only if it is endorsed by—
- (a) an authorised insurance company; or
 - (b) an authorised deposit-taker.
- (3) A person may enter into the bond under—
- (a) arrangements made by the Public Guardian; or
 - (b) other arrangements which are made by the person entering into the bond or on his behalf.
- (4) The Public Guardian may make arrangements with any person specified in paragraph (2) with a view to facilitating the provision by them of bonds which persons required to give security to the Public Guardian may enter into.
- (5) In this regulation—
- “authorised insurance company” means—
- (a) a person who has permission under Part 4 of the Financial Services and Markets Act 2000[6] to effect or carry out contracts of insurance;
 - (b) an EEA firm of the kind mentioned in paragraph 5(d) of Schedule 3 to that Act, which has permission under paragraph 15 of that Schedule to effect or carry out contracts of insurance;
 - (c) a person who carries on insurance market activity (within the meaning given in section 316(3) of that Act); and
- “authorised deposit-taker” means—
- (a) a person who has permission under Part 4 of the Financial Services and Markets Act 2000 to accept deposits;
 - (b) an EEA firm of the kind mentioned in paragraph 5(d) of Schedule 3 to that Act, which has permission under paragraph 15 of that Schedule to accept deposits.
- (6) The definitions of “authorised insurance company” and “authorised deposit-taker” must be read with—
- (a) section 22 of the Financial Services and Markets Act 2000;

(b) any relevant order^[7] under that section; and

(c) Schedule 2 to that Act.

Security given under regulation 33(2)(a): maintenance or replacement

35. (1) This regulation applies to any security given under regulation 33(2)(a).

(2) At such times or at such intervals as the Public Guardian may direct by notice in writing, any person (“S”) who has given the security must satisfy the Public Guardian that any premiums payable in respect of it have been paid.

(3) Where S proposes to replace a security already given by him, the new security is not to be regarded as having been given until the Public Guardian is satisfied that—

(a) the requirements set out in sub-paragraphs (a) and (b) of regulation 33(3) have been met in relation to it; and

(b) no payment is due from S in connection with the discharge of his functions.

Enforcement following court order of any endorsed security

36. (1) This regulation applies to any security given to the Public Guardian in respect of which an endorsement has been provided.

(2) Where the court orders the enforcement of the security, the Public Guardian must—

(a) notify any person who endorsed the security of the contents of the order; and

(b) notify the court when payment has been made of the amount secured.

Discharge of any endorsed security

37. —(1) This regulation applies to any security given by a person (“S”) to the Public Guardian in respect of which an endorsement has been provided.

(2) The security may be discharged if the court makes an order discharging it.

(3) Otherwise the security may not be discharged—

(a) if the person on whose behalf S was appointed to act dies, until the end of the period of 2 years beginning on the date of his death; or

(b) in any other case, until the end of the period of 7 years beginning on whichever of the following dates first occurs—

(i)if S dies, the date of his death;

(ii)if the court makes an order which discharges S but which does not also discharge the security under paragraph (2), the date of the order;

(iii)the date when S otherwise ceases to be under a duty to discharge the functions in respect of which he was ordered to give security.”.

4) For the purposes of paragraph (3), if a person takes any step with a view to discharging the security before the end of the period specified in that paragraph, the security is to be treated for all purposes as if it were still in place.