

THIS DOCUMENT IS ARCHIVED

It is retained for reference only and may no longer reflect current requirements.



Guernsey Financial
Services Commission

ARCHIVED

**GUERNSEY FINANCIAL SERVICES
COMMISSION**

**APPOINTMENT OF ADMINISTRATOR
AND
ADMINISTRATION MANAGER**

August 2016

Contents

1.	GLOSSARY.....	2
2.	EXECUTIVE SUMMARY	3
3.	INTRODUCTION	4
4.	RELEVANT LEGISLATIVE PROVISIONS.....	4
4.1.	THE ADMINISTRATION ORDINANCE.....	5
4.2.	THE COMPANIES LAW	5
5.	THE COMMISSION’S APPROACH.....	6
5.1.	WHETHER TO APPLY FOR AN ADMINISTRATION ORDER	6
5.2.	GRANT, DISCHARGE AND VARIATION OF ADMINISTRATION ORDER BY CONSENT	7
5.3.	DISCHARGE OR VARIATION OF ADMINISTRATION ORDER.....	7
6.	CONSEQUENCES OF DISCHARGE OF AN ADMINISTRATION ORDER	7
7.	PUBLICATION.....	7

1. GLOSSARY

Unless the context requires otherwise:

“Administrator” means a person appointed by the Court under section 374(2) of the Companies Law to act as an administrator,

“Administration Manager” means a person appointed by the Court under section 1(2) of the Administration Ordinance to act as an administration manager,

“Administration Order” means an order granted by the Court under section 1 of the Administration Ordinance or section 374 of the Companies Law,

“Administration Ordinance” means the Protection of Investors (Administration and Intervention) (Bailiwick of Guernsey) Ordinance, 2008,

“Bailiwick” means the Bailiwick of Guernsey

“Commission” means the Guernsey Financial Services Commission,

“Companies Law” means the Companies (Guernsey) Law, 2008, as amended,

“contravention” includes failure to comply,

“Court” means the Royal Court sitting as an Ordinary Court or the Court of Alderney,

“Enforcement Policy” means the Guidance Note on the Commission’s general approach to Enforcement dated 22 April 2016,

“Note” means this Explanatory Note,

“regulatory Laws” means:

- (a) the Banking Supervision (Bailiwick of Guernsey) Law, 1992 (**“Banking Supervision Law”**),
- (b) the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 (**“Fiduciaries Law”**),
- (c) the Insurance Business (Bailiwick of Guernsey) Law, 2002 (**“Insurance Business Law”**),
- (d) the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 (**“IMII Law”**),
- (e) the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (**“POI Law”**),
- (f) the Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 (**“Registered Businesses Law”**),
- (g) the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (**“FSC Law”**), and

- (h) any other enactment or statutory instrument prescribed for the purposes of section 24 of the FSC Law in connection with the definition of “regulatory Laws”,

all as amended,

“**regulatory sanction**” includes those measures as summarised in the Commission's Enforcement Powers summary on its website, and such equivalent measures as agreed to or imposed upon a party by another regulatory body,

“**relevant person**” means any person or entity which¹:

- (a) carries on controlled investment business, or
- (b) applies for a licence under section 2 of the POI Law or for an authorisation or registration under section 8 of the POI Law,

“**supervised company**” means a company which²:

- (a) holds or formerly held a licence under section 4 of the POI Law or an authorisation or registration under section 8 of the POI Law,
- (b) is or was a closed-ended investment company,
- (c) is a licensee or former licensee within the meaning of the Insurance Business Law or the IMII Law,
- (d) is a licensed institution or former licensed institution within the meaning of the Banking Supervision Law,
- (e) is a licensed fiduciary or former licensed fiduciary within the meaning of the Fiduciaries Law, or
- (f) is a company of any other class or description prescribed by the Commission for the purposes of section 530 of the Companies Law, and

“**undue risk**” means an investment risk that a reasonable person informed of the investment strategy and potential returns of the relevant person would consider excessive³.

2. EXECUTIVE SUMMARY

This document sets out the Commission's approach and methodology in relation to seeking an Administration Order from the Court under the Administration Ordinance or the Companies Law.

¹ The Administration Ordinance, section 15(1)

² The Companies Law, section 530

³ The Administration Ordinance, sections 1(5) and 15(1)

3. INTRODUCTION

The Enforcement Policy provides that the Commission is committed to a fair, proportionate and consistent use of its enforcement powers, to achieve effective outcomes. Where appropriate, the Commission will address contraventions or misconduct by agreement with the person concerned through ordinary supervisory processes, and will endeavour to agree the implementation of a remedial action plan to restore that person to compliance as soon as possible. This may involve agreement to changes in corporate governance, management and internal controls, or agreement to discontinue some or all of the person's operations or areas of activity, or agreement to amended or additional licence conditions framed to encourage or ensure compliance going forward.

However, that approach is not always possible. The Commission will generally seek to use its enforcement powers in relation to more serious or repeated breaches of the law although it would be improper for the Commission to, a priori, rule out enforcement proceedings in relation to any breach.

In addition, it may also be appropriate for the Commission to take further steps in the public interest, in particular with a view to protecting the public, through other elements, such as deterring the firm concerned and others who may also be involved.

It is important that the Commission is able to fulfil its regulatory objectives and apply its Enforcement Policy. However, the Commission is also aware of the serious detrimental effect that an Administration Order may have on the reputation, livelihood or business of the party concerned.

The Commission may apply for an Administration Order alone or in addition to any regulatory sanction which it is empowered to impose under the regulatory Laws, as it determines to be reasonable and appropriate. Such determination will be made on a case by case basis.

Issues relating to solvency or undue risk to investors can often arise at short notice and require immediate action. The Commission, in issuing this Note, reserves the right to act swiftly where the circumstances dictate it and may have to disregard aspects of this Note as the case requires. The Commission will however seek to liaise with the Board of any company when looking to invoke these powers, where appropriate, but this may not always be possible.

4. RELEVANT LEGISLATIVE PROVISIONS

Under the Companies Law and the Administration Ordinance the Commission may apply to the Court to seek an order directing that, during the period for which the order is in force, the affairs, business and property of a relevant person⁴, a supervised company⁵ or company engaged in financial services business⁶, shall be managed by an Administration Manager⁷ or an Administrator⁸ appointed for the purpose by the Court.

⁴ In relation to an order sought under the Administration Ordinance, section 1(1).

⁵ In relation to an order sought under the Companies Law, section 375(1)(e).

⁶ In relation to an order sought under the Companies Law, section 375(1)(e).

⁷ In relation to an order sought under the Administration Ordinance, section 1(2).

⁸ In relation to an order sought under the Companies Law, section 374(2).

The right of appeal against an order is as prescribed by the Bailiwick's Court procedures.

4.1. THE ADMINISTRATION ORDINANCE

Under the Administration Ordinance the Commission may apply to the Court to seek an Administration Order directing that, during the period for which the order is in force, the affairs, business and property of the relevant person shall be managed by an Administration Manager appointed for the purpose by the Court.

The Court may make an Administration Order in relation to the relevant person if it⁹:

- (a) is satisfied that a relevant person:
 - i. has performed an act or made an omission¹⁰, or
 - ii. will or is likely to perform any act or make any omission that would cause undue risk to investors, and
- (b) Considers that the making of an Administration Order would be for the protection of investors.

4.2. THE COMPANIES LAW

Under the Companies Law the Commission may apply to the Court to seek an Administration Order directing that, during the period for which the order is in force, the affairs, business and property of a supervised company or the company engaged in financial services business shall be managed by an Administrator appointed for the purpose by the Court¹¹.

The Court may make an Administration Order in relation to a supervised company or the company engaged in financial services business if it¹²:

- (a) is satisfied that a company (or a cell of a protected cell company) does not satisfy or is likely to become unable to satisfy the solvency test¹³, and
- (b) considers that the making of an Administration Order may achieve one or more of the purposes set out below.

The purposes for which the Court may make an Administration Order are¹⁴:

- (a) the survival of the company (or cell, as the case may be), and the whole or any part of its undertaking, as a going concern, or

⁹ The Administration Ordinance, section 1(1).

¹⁰ Being acts performed or omissions made after 10 December 2008, which is the commencement of the Administration Ordinance.

¹¹ The Companies Law, section 374(2).

¹² The Companies Law, section 374(1).

¹³ The Companies Law, section 527.

¹⁴ The Companies Law, section 374(3).

- (b) a more advantageous realisation of the company's (or cell's, as the case may be) assets than would be effected on a winding up.

5. THE COMMISSION'S APPROACH

5.1. WHETHER TO APPLY FOR AN ADMINISTRATION ORDER

The Administration Ordinance and the Companies Law apply in very different circumstances. In considering whether to apply for an Administration Order, the Commission will be guided by the criteria set out in the relevant law which entitled the Court to make an Administration Order. Otherwise, the Administration Ordinance and the Companies Law do not prescribe any criteria that the Commission must take into consideration in determining whether to make an application for an Administration Order. It is not possible nor would it be appropriate for the Commission to try and produce a definitive list of matters that the Commission might take into account.

The Commission will consider in each case whether the making of an application for an Administration Order is consistent with the Commission's Enforcement Policy and consistent with the Commission's functions. In determining whether the application would be consistent with the Commission's functions, the Commission shall have regard to:

- (a) protection of the public interest,
- (b) the protection and enhancement of the reputation of the Bailiwick as a financial centre, and
- (c) any matter which it considers appropriate.

In deciding these questions, the Commission will consider all the circumstances of the particular case. The Commission will consider (among other things):

- (a) the seriousness of the matter,
- (b) whether the public or investors should be protected from the relevant persons, the supervised company's or other company's involvement with controller investment business or financial services business (as the case may be), and
- (c) in the case of the Administration Ordinance whether an Administration Order would be likely to provide investors with effective and adequate protection and, in the case of the Companies Law, the solvency test and the prospect that either of the purposes set out in 4.2 above may be achieved.

In the event that the Commission makes an application to the Court for an Administration Order, the Commission will include in its application to the Court a recommendation for the appointment of a particular Administrator or Administration Manager (as relevant).

5.2. GRANT, DISCHARGE AND VARIATION OF ADMINISTRATION ORDER BY CONSENT

The power to grant, discharge or vary an Administration Order is in the Court's absolute discretion, and an Administration Order cannot be made, discharged or varied by agreement between the parties¹⁵. For further details in relation to this process, please refer to the Guidance Note – Decisions Committee Process.

5.3. DISCHARGE OR VARIATION OF ADMINISTRATION ORDER

The Commission does not have the power under the Administration Ordinance or the Companies Law to apply for the discharge or variation of an Administration Order.

6. CONSEQUENCES OF DISCHARGE OF AN ADMINISTRATION ORDER

An Administration Order will not be expunged from a firm's regulatory history, nor from the regulatory history of those individuals, who were involved in its control and direction at the time the Administration Order was granted, by discharge or variation of the order. The Commission reserves its right, should determine it reasonable to do so, to take the Administration Order into account should regulatory concerns arise in the future.

7. PUBLICATION

Details of an Administration Order granted by the Court will be published on the Register of Companies maintained by the Registrar of Companies. The Register of Companies is published on the Guernsey Registry website and is available for inspection on that website.

The Commission will proceed on the basis that there is a presumption in favour of the Commission seeking to publish a statement in relation to the making of an Administration Order by the Court. Such publication will generally be made on the Commission's website once the Court has granted the Administration Order.

¹⁵ The Administration Ordinance, sections 2(2) and 6(5); the Companies Law, sections 374(1) and 382(3).