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Guernsey Financial
Services Commission

**GUERNSEY FINANCIAL SERVICES
COMMISSION**

**DISAPPLICATION OF THE DIRECTORSHIP
EXEMPTION**

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August 2016

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1. GLOSSARY

Unless the context requires otherwise:

“Bailiwick” means the Bailiwick of Guernsey,

“behaviour” includes the behaviour of the individual which indicated that the individual was not a fit and proper person to be or to become a director of a company (having regard to the criteria in Schedule 1 of the Fiduciaries Law),

“Commission” means the Guernsey Financial Services Commission,

“contravention” includes failure to comply,

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

“Exemption” means the exemption from the requirement for an individual to hold a fiduciaries licence under section 3(1)(g) of the Fiduciaries Law,

“Note” means this Explanatory Note,

“regulatory body” means a body formed or mandated under the terms of a legislative act or statute to supervise and ensure compliance with the provisions of that act or statute, and in carrying out its purpose,

“regulatory Laws” means:

- (a) the Banking Supervision (Bailiwick of Guernsey) Law, 1994 (“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 Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (“FSC Law”),
- (g) the Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 (Registered Businesses Law”), and
- (h) any other enactment or statutory instrument prescribed for the purposes of section 58 of the Fiduciaries Law in connection with the definition of “regulatory Laws”,

all, as amended, and

“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.

2. EXECUTIVE SUMMARY

This document sets out the Commission’s approach and methodology in relation to the disapplication of the Exemption available to individuals, under section 3(1)(g) of the Fiduciaries Law, who are acting as a director of not more than six companies.

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 with that person 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, 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 the disapplication of the Exemption may have on the reputation, livelihood or business of the person concerned.

The Commission may disapply the Exemption alone or in addition to any other 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.

4. RELEVANT LEGISLATIVE PROVISIONS

Under the Fiduciaries Law, a person cannot carry on by way of business, in or from within the Bailiwick, any regulated activities¹ except in accordance with a licence granted by the Commission under that Law².

Further under the Fiduciaries Law acting as a director in or from within the Bailiwick is a regulated activity for which a full or personal fiduciary licence is required if that director is acting by way of business³. However, the Fiduciaries Law provides a number of Exemptions from the requirement for a director to obtain such a licence if that company⁴:

- (a) has an established place of business in the Bailiwick, provided that no services consisting of or comprising a regulated activity are supplied to the company by the director (other than acting as director)⁵,
- (b) is a company listed on a stock exchange recognised by the Commission for the purposes of section 3(1) of the Fiduciaries Law⁶,
- (c) is a company of which the individual or a close relative (or a trust of which he or a close relative is a beneficiary) owns more than half of the nominal value of the equity share capital⁷,
- (d) is a company which is regulated under one of the other regulatory Laws in the Bailiwick⁸, or
- (e) is a subsidiary company of any of the companies in (a) to (d)⁹.

The Fiduciaries Law also contains a further exemption in relation to acting as a director, the Exemption, which allows an individual to hold up to six directorships or companies which do not fall under any of the categories stated above¹⁰. The Exemption applies only to acting as a director and covers no other regulated fiduciary activity. The Exemption applies to directorships of companies incorporated anywhere in the world. Once an individual steps over that threshold of six directorships he would be required to hold a personal fiduciary licence should he wish to hold any further directorships of companies which do not fall in categories (a) to (e) above and the individual is carrying on that activity by way of business.

The Exemption only applies to individuals and not to any company acting in or from within the Bailiwick as a corporate director. The Exemption can be disapplied by the Commission in cases

¹ As defined in section 1(1) of the Fiduciaries Law.

² The Fiduciaries Law, section 1(1).

³ Section 58(3) of the Fiduciaries Law provides that for the purposes of the Fiduciaries Law a person who carries on any activity shall be deemed to do so by way of business if he receives any income, fee, emolument or other consideration in money or for money's worth for doing so.

⁴ The Fiduciaries Law, section 3(1).

⁵ The Fiduciaries Law, section 3(1)(b).

⁶ The Fiduciaries Law, section 3(1)(c).

⁷ The Fiduciaries Law, section 3(1)(d).

⁸ The Fiduciaries Law, section 3(1)(e).

⁹ The Fiduciaries Law, section 3(1)(f).

¹⁰ The Fiduciaries Law, section 3(1)(g).

where, having regard to the minimum licensing criteria in the Fiduciaries Law, the Commission is not satisfied that the individual is a fit and proper person to be or to become a director of a company¹¹.

A person aggrieved by the Commission's decision to disapply the Exemption may appeal to the Court against that decision¹².

5. THE COMMISSION'S APPROACH

Although the Fiduciaries Law specifies the criteria to which the Commission is to have regard for the purposes of deciding whether it is satisfied that a person is a fit and proper person, it does not prescribe any factors that the Commission must take into consideration in determining whether to disapply the Exemption. 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 disapplication of the Exemption is consistent with, and an effective discharge of, the Commission's functions, including the Commission's Enforcement Policy, and consistent with the Commission's regulatory objectives of¹³:

- (a) Providing effective supervision of the financial services sector,
- (b) Making recommendations to the States on schemes for the statutory regulation finance business,
- (c) Countering financial crime and the financing of terrorism,
- (d) Maintaining confidence in the Bailiwick's financial services sector, and
- (e) Ensuring the safety, soundness and integrity of the Bailiwick's financial services sector.

6. CONSEQUENCES OF DISAPPLICATION REVOCATION

The disapplication of the Exemption is a regulatory sanction that is applied as a result of the individual's behaviour. Any re-instatement of the Exemption by the Commission will not expunge the prior disapplication from the person's record with the Commission. The Commission reserves its right, should it determine it reasonable to do so, to take the disapplication of the Exemption into account should regulatory concerns relating to the individual or a firm with which the individual is involved in its management or control, arise in the future.

¹¹ The Fiduciaries Law, section 3(1)(g).

¹² The Fiduciaries Law, sections 3(1)(g) and 19(1)(d).

¹³ As set out in the Commission's Enforcement Policy.

7. PUBLICATION

The Commission shall publish the fact that a person has ceased to hold a fiduciary licence¹⁴.

The Commission may publish the fact that a particular person has been granted or refused a licence or that a particular person does not hold or has not held a fiduciary licence¹⁵. Any publication may contain such information (if any) in respect of all or any of the persons named therein as the Commission thinks desirable or expedient¹⁶. When determining whether to publish this information, the Commission will take into consideration the circumstances, the Commission's functions and the interests of the public and the reputation of the Bailiwick.

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¹⁴ The Fiduciaries Law, section 13(3).

¹⁵ The Fiduciaries Law, section 13(4).

¹⁶ The Fiduciaries Law, section 13(5).