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Guernsey Financial
Services Commission

GUERNSEY FINANCIAL SERVICES COMMISSION

DISQUALIFICATION ORDERS

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1. GLOSSARY

Unless the context requires otherwise:

"Bailiwick" means the Bailiwick of Guernsey,

"Breach" means the contravention of a provision of the prescribed Laws, The Prescribed Businesses Law or any relevant enactments to the Prescribed Businesses Law or the non-fulfilment of any of the minimum criteria for licensing specified in the regulatory Laws and applicable to the party,

"CDC" means a Commissioner's Decisions Committee which is an ad-hoc committee comprising of not less than three Commissioners,

"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,

"Customers" includes, collectively, actual and potential consumers, beneficiaries, investors, unit holders, policy holders, depositors and those who have or had a relationship with the party or, where the party is an individual, had a relationship with the Licensee with which the party is or was associated,

"Disqualification Order" means an order granted by the Court under section 427 of the Companies Law, section 15 of the Prescribed Businesses Law or section 26 of the Registered Businesses Law,

"Enforcement Policy" means the Guernsey Financial Services Commission's Enforcement Policy dated 13 June 2011,

"FSC Law" means The Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended,

"Licensee" means a person who holds or is deemed to hold or has held a licence, consent, registration, permission or authorisation from the Commission under the regulatory Laws,

"Note" means this Explanatory Note,

“Prescribed Business” means any business which is a relevant business for the purposes of The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 Law (as amended), but does not include:

- (a) business of a type described in paragraphs 2 ("High value dealing") or 4 ("Casinos and organised gambling") of Schedule 2 to that Law, or
 - (b) a small business (as defined in the Prescribed Businesses Law),
- and which is registered under The Criminal Justice (Proceeds of Crime) (Legal Professionals, Accountants and Estate Agents) (Bailiwick of Guernsey) Regulations, 2008, as amended,

“Prescribed Businesses Law” means The Prescribed Business (Bailiwick of Guernsey) Law, 2008, as amended,

“prescribed Laws”¹ means:

- (a) the regulatory Laws,
 - (b) The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999,
 - (c) The Drug Trafficking (Bailiwick of Guernsey) Law, 2000,
 - (d) The Terrorism and Crime (Bailiwick of Guernsey) Law, 2002,
 - (e) The Disclosure (Bailiwick of Guernsey) Law, 2007,
 - (f) The Transfer of Funds (Guernsey) Ordinance, 2007,
 - (g) The Transfer of Funds (Alderney) Ordinance, 2007,
 - (h) The Transfer of Funds (Sark) Ordinance, 2007, and
 - (i) any other enactment or statutory instrument prescribed for the purposes of section 24 of the FSC Law by regulations of the Commission made after consultation with the States of Guernsey (Policy Council), the Policy and Finance Committee of the States of Alderney and the General Purposes and Advisory Committee of the Chief Pleas of Sark,
- all, as amended,

“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,

¹ As defined under section 24 of the FSC Law.

“regulatory Laws”² means:

- (a) The Banking Supervision (Bailiwick of Guernsey) Law, 1994,
 - (b) The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000,
 - (c) The Insurance Business (Bailiwick of Guernsey) Law, 2002,
 - (d) The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002,
 - (e) The Protection of Investors (Bailiwick of Guernsey) Law, 1987,
 - (f) The Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 (**“Registered Businesses Law”**), and
 - (g) any other enactment or statutory instrument prescribed for the purposes of section 24 of the FSC Law by regulations of the Commission,
- 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, and

“relevant officer” means a person who when the contravention or non-fulfillment in question took place was a director, controller, partner, manager, general representative or authorised insurance representative.

2. EXECUTIVE SUMMARY

This document sets out the Commission’s approach and methodology in relation to seeking a Disqualification Order from the Court under the Companies Law, the Registered Businesses Law and the Prescribed Businesses Law.

3. INTRODUCTION

The Enforcement Policy provides that the Commission is committed to a fair, proportionate, consistent and responsive 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 attempt 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 an agreement to changes in corporate governance, management and internal controls, an agreement to discontinue some or all of the person’s operations or areas of activity, or an

² As defined under section 24 of the FSC Law.

agreement to amended or additional licence conditions, which are framed to encourage or ensure compliance going forward.

From time to time, there will be a need for the Commission to undertake more assertive enforcement action, through the use of its statutory powers, where action by agreement is not considered to be a sufficient or appropriate response, where co-operation on the part of the person is lacking and/or where the contravention or misconduct is such that a deterrence response is warranted.

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, though other elements, such as deterring the person concerned and others, may also be involved. This may require that a person is prevented by disqualification from performing certain roles or acting in a certain manner.

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 a Disqualification Order may have on the reputation, livelihood or business of the person concerned.

The Commission may issue or apply for a Disqualification Order alone or in addition to any other 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.

4. RELEVANT LEGISLATIVE PROVISIONS

Under the Companies Law³, the Prescribed Businesses Law⁴ and the Registered Businesses Law⁵ the Commission may apply to the Court to seek a Disqualification Order prohibiting a person from undertaking a range of positions or acting in a certain manner. Please see the Appendix for further details in relation to the grounds upon which a Disqualification Order may be sought, the possible scope of such a Disqualification Order, the possible consequences of contravention of a provision of Disqualification Order and other issues.

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

³ section 428.

⁴ section 15.

⁵ Section 26.

5. THE COMMISSION'S APPROACH

5.1 WHETHER TO APPLY FOR A DISQUALIFICATION ORDER

Neither the FSC Law, the relevant regulatory Laws nor the Companies Law prescribe any criteria that the Commission must take into consideration in determining whether to make an application for a Disqualification 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 a Disqualification Order is consistent with the Commission's Enforcement Policy and consistent with the Commission's functions under the FSC Law, in particular with regard to the protection of the public interest and the protection and enhancement of the reputation of the Bailiwick as a financial centre.

In determining whether to make an application for a Disqualification Order, the Commission will also have regard to:

- a) Whether it is desirable in the public interest to apply for a Disqualification Order,
- b) The criteria laid down in the relevant Law to which the court is required to, or may, have regard in deciding whether to make a Disqualification Order.

In deciding these questions the Commission will consider all the circumstances of the particular case. In relation to the public interest the Commission will consider (among other things) the seriousness of the matter, whether the public should be protected from the person's involvement in companies or particular businesses, the need to encourage the person to remedy failings, shortcomings or contraventions related to the relevant legislation, the need to deter the person from repeating misconduct and the need to deter others.

The Commission does not consider itself precluded from applying for a Disqualification Order in relation to a person, where a criminal prosecution has been discontinued against the person or where the Law Officers have proposed a Disqualification Order as part of a sentencing option in connection with a criminal prosecution and the Court has not chosen to impose this.

5.2 DISQUALIFICATION ORDERS AND PROHIBITION ORDERS

In cases where the nature of the contravention or misconduct of the individual is such that the Commission has determined that the person is not fit and proper under the relevant regulatory Law, the Commission will consider whether it is appropriate to impose a prohibition order (where the relevant regulatory Law provides for such a sanction), instead of, or in addition to, making an application to the Court for a Disqualification Order.

Generally the Commission will seek a Disqualification Order under the Companies Law in addition to a prohibition order where the Commission is of the view that:

- a) A prohibition order alone would not adequately protect the public interest or is for some other reason not a sufficient response to the seriousness of the case, for example where the case relates to dishonesty, fraud, money-laundering, financial crime or facilitating such matters,
- b) Doing so would protect or enhance the reputation of the Bailiwick as a financial centre, or
- c) Any other circumstances which appear to the Commission to make the behaviour more suitable for it to be dealt with in one way rather than the other.

5.3 DISQUALIFICATION ORDER BY CONSENT

The power to grant, revoke or (where provided for) renew a Disqualification Order is in the Court's absolute discretion, and a Disqualification Order cannot be made, revoked or (where provided for) renewed by agreement between the parties alone.⁶ In the circumstances any proposal to request the Court grants, revokes or renews a Disqualification Order by consent, including the duration and scope of disqualification, shall be subject to the agreement of a CDC.

5.4 RENEWAL OF DISQUALIFICATION ORDER

Under the Prescribed Businesses Law and the Regulated Businesses Law the Court may renew a Disqualification Order on more than one occasion. There is no guidance in those Laws on the criteria to be applied when the Court is considering whether to renew the Order. In deciding whether to apply for the Order to be renewed the Commission will take into account the same matters that it takes into account when deciding to apply for a Disqualification Order but in the case of renewal will also consider matters such as:

- (a) The background to the making of the original Order,
- (b) Whether the person has remedied the matters that led him to be disqualified where it would have been reasonable to expect him to do so,
- (c) The likelihood of re-occurrence, and
- (d) Whether he has committed further Breaches or contraventions or otherwise been guilty of further unfit conduct.

6. REMOVAL OR VARIATION OF DISQUALIFICATION ORDER

The Commission does not have the power under the Companies Law, the Prescribed Businesses Law or the Registered Businesses Law to apply for the removal or variation of a

⁶ The Companies Law, section 427(4), the Registered Businesses Law, section 26(11); the Prescribed Businesses Law, section 15(10).

Disqualification Order. Only the person subject to a Disqualification Order (or renewal of it) may do this.

7. PUBLICATION

Details of a Disqualification Order granted by the Court will be published on the Register of Disqualification Orders maintained by the Registrar of Companies. The Register of Disqualification Orders 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 publication in relation to the making of a Disqualification Order by the Court. Such publication will generally be made on the Commission's website once the Court has granted the Disqualification Order.

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APPENDIX

	The Companies Law	The Prescribed Businesses Law	The Registered Businesses Law
Who may be disqualified?	A person - which includes an individual, body corporate or unincorporated body. ⁱ	A person - which includes an individual, body corporate or unincorporated body. ⁱⁱ	A person - which includes an individual, body corporate or unincorporated body. ⁱⁱⁱ
What are the grounds on which a Court may grant a Disqualification Order?	That by reason of a person's conduct in relation to a company or otherwise, that person is unfit to be concerned in the management of a company. ^{iv}	That a person has contravened in a material particular any provision of, or made under, the Prescribed Businesses Law or any of the relevant enactments, or has committed an offence under such a provision and the making of the order is in the public interest. ^v	That a person is unfit to be concerned in the management of a financial services business and the making of the order is in the public interest. ^{vi}
Criteria that Court must have regard to	The Companies Law sets out the criteria which the Court may have regard to in determining whether a person is unfit to be concerned in the management of a company. ^{vii}	No criterion is provided in the Prescribed Businesses Law.	The Court must have regard to the provisions of Schedule 2 (Directors etc. to be fit and proper persons) of the Registered Businesses Law in determining whether or not a person is unfit to be concerned in the management of financial services business. ^{viii}

What may the person be disqualified from?	Prohibiting the person from: (a) Being a director, secretary or other officer of any company or any specified company, (b) Being a shadow director of any company or any specified company, (c) Participating in, or being in any way concerned in, directly or indirectly, the management, formation or promotion of any company or any specified company, (d) Participating in, or being in any way concerned in, directly or indirectly, the management, formation or promotion of any overseas company, (e) Being an administrator of any company or any specified company, (f) Being a receiver of a cell of any protected cell company or any specified protected cell company, (g) Being a liquidator of any company	Prohibiting the person, without the leave of the Court, from: (a) being a director, controller, partner or senior officer of any, or any specified, prescribed business, or (b) participating in, or being in any way concerned in, directly or indirectly, the management, formation or promotion of any or any specified, prescribed business. ^x	Prohibiting the person, without the leave of the Court, from: (a) being a director, controller, partner or senior officer of any, or any specified, financial services business, or (b) participating in, or being in any way concerned in, directly or indirectly, the management, formation or promotion of any, or any specified, financial services business. ^{xi}
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	or any specified company. ^{ix}		
What is the maximum term of any one Disqualification Order?	15 years	15 years	15 years
Can the Disqualification Order be renewed?	The Companies Law does not specifically provide for renewal of a Disqualification Order.	Yes – on one or more occasions. ^{xii}	Yes – on one or more occasions. ^{xiii}
Revocation of the Disqualification Order	Possible upon application to the Court by the person subject to the Disqualification Order. ^{xiv}	Possible upon application to the Court by the person subject to the Disqualification Order. ^{xv}	Possible upon application to the Court by the person subject to the Disqualification Order. ^{xvi}
Consequence of Contravention of a provision of a Disqualification Order	The person: 1. Shall be guilty of an offence; and 2. Shall be personally liable for any debts and liabilities (on a joint and several basis) of the company in relation to which the contravention was committed which were incurred at any time when he was acting in	The person: 1. Shall be guilty of an offence; and 2. Shall be personally liable for any debts and liabilities (on a joint and several basis) of the prescribed business in relation to which the contravention was committed which were incurred at any time when he	The person: 1. Shall be guilty of an offence; and 2. Shall be personally liable for any debts and liabilities (on a joint and several basis) of the financial services business in relation to which the contravention was committed which were incurred at

	contravention of the Disqualification Order. ^{xvii}	was acting in contravention of the Disqualification Order. ^{xviii}	any time when he was acting in contravention of the Disqualification Order. ^{xix}
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ⁱ The Interpretation (Guernsey) Law, 1948, as amended, section 9.

ⁱⁱ The Prescribed Businesses Law, section 32.

ⁱⁱⁱ The Registered Businesses Law, section 42.

^{iv} The Companies Law, section 428(1).

^v The Prescribed Businesses Law, section 15(1).

^{vi} The Registered Businesses Law, section 26(1).

^{vii} The Companies Law, sections 428(2) and (3).

^{viii} The Registered Businesses Law, section 26(7).

^{ix} The Companies Law, section 427(1).

^x The Prescribed Businesses Law, section 15(1).

^{xi} The Registered Businesses Law, section 26(1).

^{xii} The Prescribed Businesses Law, sections 15(1) and (7).

^{xiii} The Registered Businesses Law, sections 26(1) and (8).

^{xiv} The Companies Law, section 430.

^{xv} The Prescribed Businesses Law, section 15(8).

^{xvi} The Registered Businesses Law, section 26(9).

^{xvii} The Companies Law, sections 431 (1) and (2).

^{xviii} The Prescribed Businesses Law, sections 15(5) and (6).

^{xix} The Registered Businesses Law, sections 26(5) and (6).