



Guernsey Financial  
Services Commission

**DISCUSSION PAPER ON  
THE REVISION OF LAWS PROJECT:  
Revising the Bailiwick's financial regulatory laws  
to maintain the Bailiwick's reputation as an  
efficient and well-regulated international  
finance centre**

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# 1 Introduction

## 1.1 Purpose of the discussion paper

- 1.1.1 This discussion paper seeks feedback from the financial services industry on a number of proposals to amend the Bailiwick's supervisory and regulatory laws. It is intended to facilitate discussion between the Commission, government and industry. The paper takes a different format from previous Commission discussion papers in that it will be published on the Commission's website. It is an invitation to industry to work with the Commission to endeavour that the Bailiwick's regulatory regime is as user-friendly as possible, while still complying with the relevant international standards.
- 1.1.2 The paper outlines a number of changes that the Commission is currently considering as part of the Revision of Laws project. Not all the changes that may be considered in the Revision of Laws project have, however, been included. The discussion paper focuses on the suggestions in respect of which the Commission wants to reassure industry that it is acting, and those in respect of which further information or feedback is sought in order to make further decisions.
- 1.1.3 The paper contains some suggestions that have been raised by industry and in respect of which more detailed information is sought so that the proposals can be fully considered. This is an opportunity for industry to help define the scope, breadth and effect of the Revision of Laws project.
- 1.1.4 The timeframes for this project are tight (see section 1.3). Feedback is sought no later than 5pm on **Friday 19 December 2014**. It may not be possible to include responses received after this date in the development of the consultation paper that is planned for February 2015. Detailed information about how to respond is set out in section 1.8.

## 1.2 Why do we want to make changes?

- 1.2.1 States of Guernsey policy makes clear the importance of appropriate financial services regulation to the Bailiwick's economy. The States Strategic Plan contains the general objective of "*maintenance of an internationally respected financial service regulatory regime: adopting and applying the international standards*".
- 1.2.2 Since the assessment by the International Monetary Fund of the Bailiwick's financial sector supervision and its legal framework in 2010, the international standards against which the Bailiwick was assessed have moved on. Many of these changes have been driven by the global financial crisis and an increased emphasis on consumer protection. As a result, the Bailiwick needs to consider further changes to its Supervisory Laws before the next IMF assessment.
- 1.2.3 The Bailiwick's financial services industry is governed by a range of supervisory and regulatory laws that were implemented as and when the need arose. Whilst each law has generally been effective in enabling supervision of the activities it covers, the differences within and between each of the laws in relation to supervisory practices and procedures have resulted in confusion and inconsistencies in approach between different types of activity. This is unhelpful to licensees and also makes the efficient discharge of the Commission's functions more difficult. The Commission

considers that clearer and more coherent legislation and regulatory requirements would be of benefit to industry.

- 1.2.4 The pace of change in the global finance industry is such that the Bailiwick needs to be able to respond quickly and appropriately to changes needed to ensure consumer protection and regulatory oversight. The ability to act responsively is also needed to support the Bailiwick's financial services industry as it seeks to extend the range of services on offer and the markets in which it operates. Suggestions have been sought from industry as to what areas may require regulation in the future, and further thoughts on this are invited in the discussion paper.

### 1.3 The timeframe for change

- 1.3.1 In order to meet the relevant international standards before the next review by the IMF, the Commission is seeking to have all necessary legislative changes in place by November 2016. The process for legislative change means that a Policy Letter detailing any changes sought to primary legislation must be completed by July 2015.

- 1.3.2 Responses to this discussion paper are sought by **Friday, 19 December 2014**. These responses will then be reviewed by the Commission, members of industry and representatives of government. This work will feed into a more detailed consultation paper that is planned for early February 2015.

### 1.4 The purpose of the Revision of Laws project

- 1.4.1 The key aims of the Revision of Laws project are to:

- include measures to maximise the usability of our laws, including making sure that those outside the Bailiwick can see how our laws work and that we might therefore be a good domicile in which to transact business;
- create efficiencies for both the Commission and industry by enhancing clarity and removing inconsistencies;
- so far as is possible, "future-proof" the Bailiwick's regulatory and supervisory regime by including enabling provisions that allow for the later development of new regimes and/or products;
- ensure compliance with relevant international standards before the next visit of the IMF, thereby maintaining the Bailiwick's international "licence to operate"; and
- provide for the possible requirements of the European Markets in Financial Instruments Directive II (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR).

- 1.4.2 The key driver behind the project timetable is the next IMF visit. There may also be potential changes required to ensure continued market access for investment firms to the EU under the new MiFID regime.

### 1.5 What this project is not about

- 1.5.1 As is key with any major project, one of the most important decisions is "what not to do". The purpose of the Revision of Laws project is set out in section 1.4. It is necessary to prioritise some changes in order to ensure that the de facto deadlines for implementing revised international

standards and the new MiFID regime are met. There are some areas of reform that will therefore lag slightly behind other changes. This includes some of the issues arising out of emerging financial technologies (“FinTech”) and a review of the *Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008* (the NRFSB Law), both of which are being progressed jointly by the Commission and the Commerce and Employment Department.

- 1.5.2 There are a number of other areas of the Commerce and Employment Department’s political responsibility that also do not fit within this part of the Revision of Laws project, and are the subject of separate current or future work streams. These include payment service providers regulation (being progressed in conjunction with the Policy Council); work on the Guernsey Companies Law, Trusts Law and Limited Partnerships Law; introduction of the Financial Services Ombudsman scheme and liaison with the DCS Board in relation to the depositor compensation scheme.
- 1.5.3 There are also some work streams that were started by the Commission even before the start of this project, and which therefore stand outside it. These include the introduction of a new solvency regime in the insurance sector,<sup>1</sup> work on Basel III, the *Guernsey Financial Advice Standards* (GFAS) and a review of the *Financial Services Handbook on Countering Financial Crime and Terrorist Financing*<sup>2</sup>.

## 1.6 Who is involved in the project and what have they been doing?

- 1.6.1 Whilst the Commission is the financial services regulator for the Bailiwick, it appreciates that development of an efficient regulatory regime requires the input from the people and entities that seek to conduct business within that regime on a daily basis. The Commission also recognises its role in meeting international standards and protecting the Bailiwick’s status as an accessible, high-quality international financial centre.
- 1.6.2 With these objectives in mind the proposals for the Revision of Laws project have been developed with assistance from a working party that includes representatives of industry and government. For the first time members from outside the Commission have also been included on a Project Board. Thus industry (through Peter Mills, the Chairman of GIBA) and government (through Jason Moriarty, the Chief Officer of the Commerce and Employment Department) have been working alongside the Commission to exercise oversight over these proposals.
- 1.6.3 A degree of informal stakeholder consultation was carried out in July and August 2014. This involved members of the Revision of Laws project team meeting individually with more than 30 representatives of industry bodies and sectors. The purpose of these informal soundings was to develop an understanding of how industry thinks the regulator can support the Bailiwick’s finance sector, and what barriers to business industry encounters as a result of regulation.
- 1.6.4 Members of the project team have also made presentations to the Minister of Commerce and Employment, the Finance Sector Forum and the Fiscal and Economic Policy Group. Further interactive sessions are scheduled to take place with a variety of government and industry bodies in the coming weeks.

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<sup>1</sup> See paragraph 3.5.1.

<sup>2</sup> See paragraph 6.1.5.

## 1.7 The format of this paper

1.7.1 The discussion paper addresses a variety of possible changes that are being considered against the key aims of the project, as detailed in paragraph 1.4.1.

1.7.2 For the purposes of this paper, the changes have been grouped under the following headings:

- Changes necessary to meet international standards (section 3);
- The new MiFID regime (section 4);
- Eliminating confusion, seeking consistency and creating efficiencies (section 5);
- Supporting the financial services industry and looking to the future (section 6);
- Protecting the consumer (section 7);
- Distinguishing between supervision and enforcement (section 8);
- Creating certainty in supervision (section 9);
- A consistent approach to enforcement (section 10);
- Gathering information and keeping things confidential (section 11); and
- Miscellaneous and administrative changes (section 12).

1.7.3 There is some degree of overlap between some of these categories. For example, many of the elements of the enforcement regime (section 10) are driven by the desire to enhance consumer protection (section 7), and some of the changes necessary to achieve international standards in one sector (section 3) also support the objective of achieving consistency, clarity and efficiencies across the supervisory sectors (section 9). No section should therefore be taken in isolation.

1.7.4 This discussion paper is deliberately not written on a sector by sector basis. The Commission's aim is to provide a cohesive approach to financial services regulations, which it believes should be revised in a unified manner.

1.7.5 In parts of the document a key is given to show you which industry sectors may be directly affected by a specific issue. For example:

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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Sectors proposed to be affected: 

Investment
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Sectors proposed to be affected: 

Fiduciaries	Investment	Banking
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If for some reason a sector is not identified as being potentially affected by an issue, but you believe it may be, please make reference to this in your discussion response.

1.7.6 Questions are posed throughout the document. A complete list of the questions is also contained in Appendix B. The purpose of the questions is to seek comment and further information. Not all questions will be relevant to every respondent.

## 1.8 How to respond

- 1.8.1 Responses are invited from the financial services industry. Questions are in bold text and a consolidated list of questions is contained in Appendix B.
- 1.8.2 The discussion period runs from Monday, 10 November 2014 to 5pm on **Friday, 19 December 2014**. It may not be possible to include responses received after this date in the development of the consultation paper that is planned for February 2015. Participants are encouraged to feed back any comments as soon as possible.
- 1.8.3 Responses should be sent to Tania Shires, Legal Project Officer: [revisionoflaws@gfsc.gg](mailto:revisionoflaws@gfsc.gg). Please submit your responses in the form outlined in Appendix A. If you need an electronic version of this form, it is available to download from the [Consultations](#) section of the Website.
- 1.8.4 Copies of correspondence received by the Commission in respect of this consultation may be forwarded by the Commission to the Commerce and Employment Department.

## 2 Definitions

The following definitions are used throughout this document:

- **ACEIS Rules:** the *Authorised Closed-Ended Investment Scheme Rules 2008*;
- **Alderney Companies Law:** the *Companies (Alderney) Law, 1994 (as amended)*;
- **AML/CFT:** anti-money laundering and countering the financing of terrorism;
- **Basel Core Principles:** the Basel Committee Core Principles for Effective Banking Supervision, a copy of which can be found at <http://www.bis.org/publ/bcbs230.pdf>. Also referred to as “BCP”;
- **Banking Supervision Law:** the *Banking Supervision (Bailiwick of Guernsey) Law, 1994*;
- **Class Q Rules:** the *Collective Investment Schemes (Qualifying Professional Investor Funds) (Class Q) Rules 1998*;
- **consolidation consultation:** the *Consultation Paper on Consolidating and Revising the Supervisory Legislation* issued by the Commission in June 2013;
- **Commission:** the Guernsey Financial Services Commission;
- **controller:** in relation to a company, a managing director or chief executive of that company or of any other company of which that company is a subsidiary, a shareholder controller, an indirect controller, and any other person who has the power, alone or with another, to appoint or remove a director of a board or an executive committee. A controller would also include, in relation to a company, partnership or limited partnership, any other person not being a commercial lender who is a loan creditor and who is able to exercise a power to secure that the affairs of the company, partnership or limited partnership are conducted in accordance with his wishes;
- **EBA:** the European Banking Authority: an independent EU Authority whose mandate is to ensure effective and consistent prudential regulation and supervision across the European banking sector;
- **EEA:** the European Economic Area. A list of current EEA states can be found at <https://www.gov.uk/eu-eea>;
- **ESMA:** the European Securities and Markets Authority. An independent European Union regulatory authority with the objective, among other things, of enhancing investor protection in the financial sector;
- **EU:** European Union. A list of current EU member states can be found at [http://www.europa.eu/about-eu/countries/index\\_en.htm](http://www.europa.eu/about-eu/countries/index_en.htm);
- **Fiduciaries Law:** the *Regulation of Fiduciaries, Administration Businesses and Company Directors, (Bailiwick of Guernsey) Law, 2000 (as amended)*;

- **Financial Services Commission Law:** the *Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (as amended)*;
- **former licensee:** a person who is not, or is not deemed to be, a licensee but who has previously been a licensee. Persons who have carried on supervised business in circumstances where a licence was not required under the Laws also fall within the definition;
- **GIFCS Standard:** Group of International Finance Centre Supervisors Standard on the Regulation of Trust and Corporate Service Providers, a copy of which can be found at <http://gifcs.org/images/Documents/GIFCSStandardonTCSPs1.pdf>;
- **GFAS:** the *Guernsey Financial Advice Standards*;
- **GIFCS:** the Group of International Finance Centre Supervisors;
- **Guernsey Companies Law:** the *Companies (Bailiwick of Guernsey) Law, 2008 (as amended)*;
- **the Handbook:** the *Handbook for Financial Service Businesses on Countering Financial Crime and Terrorist Financing*;
- **IAIS:** the International Association of Insurance Supervisors – a voluntary membership organisation of insurance supervisors and regulators from more than 200 jurisdictions in nearly 140 countries;
- **IMF:** the International Monetary Fund. An organisation of 188 countries, working to promote, among other things, international financial stability and global monetary cooperation;
- **Insurance Business Law:** the *Insurance Business (Bailiwick of Guernsey) Law, 2002 (as amended)*, also referred to as “**IBL**”;
- **Insurance Managers and Insurance Intermediaries Law:** the *Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 (as amended)*, also referred to as “**IMIIL**”;
- **investment fund:** a collective investment scheme falling within paragraph 1 to Schedule 1 to the Protection of Investors Law;
- **IOSCO:** the International Organization of Securities Commissions. IOSCO develops, implements and promotes adherence to internationally recognised standards for securities regulation;
- **KYC:** know your customer. The process used by businesses to verify the identity of their clients;
- **licensee:** any person who holds a licence, consent, authorisation, registration or permission from the Commission;

- **Member State:** A member state of the European Union. A list of current member states can be found at [http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm);
- **MiFID II:** the European *Directive 2014/65/EU on markets in financial instruments*, also referred to in this discussion paper as “**the Directive**”. A copy of MiFID II can be found at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN>;
- **MiFIR:** *Regulation (EU) No 600/2014 on markets in financial instruments*, also referred to in this discussion paper as “**the Regulation**”. A copy of MiFIR can be found at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&qid=1415201548328&from=EN>;
- **the new MiFID regime:** the changes to the regime for marketing financial instruments into Europe brought about by the implementation of MiFID II and MiFIR;
- **NRFSB Law:** the *Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 (as amended)*;
- **Proceeds of Crime Law:** the *Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (as amended)*;
- **Prospectus Rules:** the *Prospectus Rules 2008*;
- **Protection of Investors Law:** the *Protection of Investors (Bailiwick of Guernsey) Law, 1987 (as amended)*, also known as “**the POI Law**”;
- **Registered CIS Rules:** the *Registered Collective Investment Scheme Rules 2008*;
- **Relevant officer:** directors, controllers, partners, managers, senior officers, general representatives and authorised representatives of licensees and former licensees;
- **Supervisory Laws:** the Protection of Investors Law; the Banking Supervision Law; the Fiduciaries Law; the Insurance Business Law; and the Insurance Managers and Insurance Intermediaries Law.
- **TCSPs:** trust and corporate service providers.

## 3 Changes necessary to meet international standards

### 3.1 The current international standards

3.1.1 The applicable international standards have moved on from those against which the Bailiwick was assessed during the last IMF visit. The relevant international standards at the date of this discussion paper are:

- The Basel Committee Core Principles for Effective Banking Supervision<sup>3</sup>;
- The Insurance Core Principles issued by the International Association of Insurance Supervisors on 1 October 2011 (revised October 2013)<sup>4</sup>;
- The International Organization of Securities Commissions Objectives and Principles of Securities Regulation<sup>5</sup>; and
- The Standards on Trusts and Corporate Service Providers issued by the Group of International Finance Centre Supervisors, September 2014<sup>6</sup>.

3.1.2 A gap analysis undertaken by the Commission has identified a number of potential changes to the Supervisory Laws, supporting rules and regulations. This discussion paper is, however, limited to a consideration of issues that require a change to the primary legislation. Appendix C lists the standards in respect of which the gap analysis has identified the need for potential changes to the Supervisory Laws.

3.1.3 The question of conformity to international standards is one which is not particularly subjective. A cursory explanation or analysis is usually sufficient to explain the context to support the potential revision. This section is therefore more factual than discursive.

### 3.2 Proposed changes to the Banking Supervision regime

Sectors proposed to be affected: **Banking**

3.2.1 The following paragraphs highlight a number of changes that the Commission suggests should be made to the Banking Supervision Law in order to comply with applicable international banking standards. In addition, it is likely that the Basel Core Principles will require further changes to banking rules and regulations, including the *Banking Supervision (Accounts) Rules, 1994*. As these proposed changes do not require an amendment to primary legislation, they are not included in this discussion paper. They will instead be progressed under a separate process.

#### *Disclosure of information*

3.2.2 Basel Core Principle 3, Essential Criteria 5 (“**BCP 3, EC 5**”) requires an amendment to the Banking Supervision Law to enable the Commission to disclose confidential information to domestic and foreign resolution authorities, or third parties acting on their behalf to undertake resolution and for the purpose of resolution planning and actions.

<sup>3</sup> <http://www.bis.org/publ/bcbs129.htm>

<sup>4</sup> <http://www.iaisweb.org/Insurance-Core-Principles--795>

<sup>5</sup> <http://www.iosco.org/>

<sup>6</sup> <http://gifcs.org/images/Documents/GIFCSStandardonTCSPs1.pdf>

3.2.3 Compliance with this principle is also consistent with the Commission’s desire to standardise procedures relating to disclosure of information to foreign authorities across all the sectors. This issue is addressed in more detail in section 11.7 below.

#### *Powers in respect of significant shareholders*

3.2.4 Basel Core Principle 6, Essential Criteria 3 (“**BCP 6, EC 3**”) requires the Commission to seek the power to object to the appointment of a significant shareholder. The BCP 6 further requires that the Commission have the power to object to an existing significant shareholder in the same manner as it currently has for controllers.

3.2.5 Since 30 April 2010, a person is required to provide prior notification to the Commission of their intention to become a significant shareholder in relation to a licensed bank and obtain the Commission’s conformation that it does not object. This requirement was imposed to satisfy a Basel Core Principles requirement and made in a regulation under the Banking Supervision Law<sup>7</sup>. There is nothing in the law, however, that would allow the Commission to object to *existing* significant shareholders. It is therefore proposed that such a power be inserted in the Banking Supervision Law<sup>8</sup>. This issue also falls within the Commission’s desire to clarify and simplify the notifications and authorisations schemes across the sectors generally, which is the subject of further consideration at section 5.2 below.

#### *Related parties*

3.2.6 Basel Core Principle 20, Essential Criteria 2 (“**BCP 20, EC 2**”) requires that transactions with related parties are not undertaken on more favourable terms than corresponding transactions with non-related counterparties. Paragraph 6B was introduced into Schedule 3 of the Banking Supervision Law in 2010 in an effort to address concerns raised during the last IMF assessment. However the definitions of related company and associate used are too narrow in comparison to the definition of related party in Essential Criteria 1 of BCP 20, (“**BCP 20, EC 1**”)<sup>9</sup>.

3.2.7 It is therefore proposed that paragraph 6B, Schedule 3 be amended to remove the reference to “*related companies and associates*” and replace it with “*related parties*”. A definition for “*related parties*” should then be inserted in the interpretation section (s56(1)) using the wording from BCP 20, EC 1.

3.2.8 At the same time the Commission suggests that paragraph 6B should be removed from Schedule 3 on the basis that it would sit more appropriately in the main body of the legislation under the heading *General requirements for licensed institutions*. The only exception to this would be paragraph 6B(c), which relates to significant shareholders and shareholder controllers. The Commission proposes that this item should also be transferred into the body of the law. The Commission believes that this is a technical redrafting exercise and does not change the application of the law in practice. Please refer to section 5.2 for further discussion in relation to this issue.

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<sup>7</sup> Regulation 3 of the *Banking Supervision (Bailiwick of Guernsey) Regulations, 2010* provides that s 14 of the Banking Supervision Law applies in relation to a significant shareholder as it applies in relation to a shareholder controller.

<sup>8</sup> Similar in form to the equivalent provision in section 15 of the Banking Supervision Law (objection to existing controller).

<sup>9</sup> BCP 20, EC 1 states: “*Related parties can include, among other things, the bank’s subsidiaries, affiliates, and any party (including their subsidiaries, affiliates and special purpose entities) that the bank exerts control over or that exerts control over the bank, the bank’s major shareholders, Board members, senior management and key staff, their direct and related interests, and their close family members as well as corresponding persons in affiliated companies.*”

- 3.2.9 **Do you foresee any problems arising as a result of the provisions of paragraph 6B of Schedule 3 being moved to the body of the Banking Supervision Law?**

#### *Bilateral meetings with auditors*

- 3.2.10 Basel Core Principle 27, Essential Criteria 8 (“**BCP 27, EC 8**”) requires that the regulator meet periodically with external audit firms to discuss issues of common interest relating to bank operations. The Insurance Business Law and the Insurance Managers and Intermediaries Law both contain statutory powers for the Commission to request meetings with auditors<sup>10</sup>. There is, however, no such power expressly stated in the Banking Supervision Law. The Commission proposes that it should be included.

- 3.2.11 **Do you have any comments on the practice or the principle of applying a common sectorial approach to bilateral meetings with auditors?**

### **3.3 Proposed changes to the Fiduciaries regime**

Sectors proposed to be affected: **Fiduciaries**

- 3.3.1 The Group of International Finance Centre Supervisors (GIFCS), of which the Commission is a member, has recently issued a Standard for the Regulation of Trust and Corporate Service Providers, which now sits alongside the Basel Core Principles, IOSCO and IAIS standards.

- 3.3.2 The following paragraphs highlight a number of changes that the Commission suggests should be made to the Fiduciaries Law in order to comply with the GIFCS Standard.

- 3.3.3 It is likely that adherence to the GIFCS Standard will also require further changes to fiduciary rules and regulations, including amendment of the *Regulation of Fiduciaries (Accounts) Rules 2001*, introduction of new client asset rules and development of a Commission policy in relation to the outsourcing of TCSP activities. As these proposed changes do not require an amendment to primary legislation, they are not included in this discussion paper. They will instead be progressed by the Fiduciary Supervision, Policy and Innovations Division.

#### *Corporate directors*

- 3.3.4 GIFCS Standard Part 3, B-4 provides that regulators shall not permit a corporate director to be on the board of a TCSP.

- 3.3.5 As a matter of practice, the fiduciary regime has developed the practice of full and joint licence holders, the latter being subsidiaries of a full licensee often fulfilling specific roles, such as providing company secretarial functions. However, there is in law no distinction between full and joint licensees, and the only formal recognition is in the Commission’s Fees Regulations. This means that joint licensees as currently constituted with a corporate director will breach the GIFCS Standard.

- 3.3.6 The purpose of this GIFCS Standard is to protect against rogue full licensees. In the circumstances it is proposed that a lead licensee be prohibited as a matter of law from having a corporate director, and that the concept of a joint licensee be created in law as a licensee who is a subsidiary of a full licensee.

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<sup>10</sup> Section 60, IMIIL and section 83 IBL. See also further discussion at paragraph 11.8.3 and note 91.

### 3.3.7 Do you agree with a change to the legal status of joint licensees?

#### *Notification and approvals*

3.3.8 The GIFCS Standards suggest a number of amendments to the Fiduciaries Law in relation to the notification and approvals regime. These include changes to:

- provide prior notification of the appointment of directors or senior managers and provide for the Commission to refuse approval for the appointment of such persons (GIFCS Standard Part 3, D-1.2);
- give the Commission the power to object to an existing director or senior manager and require their removal from such a position (GIFCS Standard Part 3, D-1.1 and 1.2); and
- require the Commission to give consideration to whether a controller has any existing or potential conflicts of interest in determining whether the Controller is fit and proper under the Fiduciaries Law (GIFCS Standard Part 3, C-5.1).

3.3.9 These issues also fall within the Commission's desire to clarify and simplify the notifications and authorisations schemes across the sectors generally, and are the subject of more general consideration at section 5.2.

#### *Auditors and accounts*

3.3.10 The GIFCS Standard includes a number of standards relating to auditors and accounts, some of which will require amendments to the Fiduciaries Law. These include changes to:

- give the Commission the power to refuse to allow a licensee to appoint a proposed auditor (GIFCS Standard Part 3, G-3.7);
- require auditors of licensees to report significant breaches of regulatory requirements (GIFCS Standard Part 3, G-3.8); and
- give the Commission the power to require audited financial statements of parent entities (GIFCS Standard Part 3, G-3.9).

3.3.11 This issue also falls within the Commissioner's desire to clarify and provide consistency across the sectors generally in relation to auditors and are subject of more general consideration in section 11.7.11.

## 3.4 Proposed changes to the Protection of Investors regime

Sectors proposed to be affected: **Investment**

3.4.1 The following paragraphs highlight a change that the Commission suggests should be made to the Protection of Investors Law in order to comply with IOSCO Principle 22.

3.4.2 The Commission also believes that adherence to other IOSCO Principles will require changes to investment rules and regulations, including amendment of the *Registered CIS Rules*, *Class Q Rules*, *ACEIS Rules*, and the *Prospectus Rules*, in advance of the next IMF visit. As these proposed changes do not require an amendment to primary legislation, they are not included in this discussion paper. They will instead be progressed by way of separate working parties and consultation.

- 3.4.3 IOSCO Principle 22 calls for the ability to introduce a registration or licensing regime in relation to credit rating agencies. The economic and financial crisis has led to particular scrutiny of credit rating agencies and increased international expectations in respect of such agencies. Internationally, IOSCO and investment sector supervisory authorities have taken the lead in setting standards for credit rating agencies and in proposing structures for their supervision.
- 3.4.4 While there are currently no credit rating agencies operating from the Bailiwick the Commission suggests that enabling provisions be included in the Protection of Investors Law to allow the States to introduce such a regime by ordinance if it later decided that this was appropriate.
- 3.4.5 **Do you agree that enabling provisions should be included in the Protection of Investors Law as described?**

### 3.5 Proposed changes to the Insurance regime

Sectors proposed to be affected: **Insurance**

- 3.5.1 There are currently a number of gaps between the provisions in the Bailiwick's insurance regime and the requirements set out by International Association of Insurance Supervisors. The majority of these, however, are already being addressed by the revisions to the current solvency regime for insurers proposed by the *Insurance Business (Bailiwick of Guernsey) (Amendment) Ordinance, 2014*, which the States will be asked to approve at their December meeting. This proposed Ordinance, and its underlying rules, incorporate the requirements of the following Insurance Core Principles ("ICPs"):
- ICP 14 Valuation, which establishes requirements for the valuation of insurers' assets and liabilities for solvency purposes;
  - ICP 15 Investment, which establishes requirements to address the risks associated with the investment activities of insurers;
  - ICP 16 Enterprise Risk Management, which addresses the process by which insurers identify, assess and mitigate risk; and
  - ICP 17 Capital Adequacy, which sets the standards for capital and solvency frameworks in order to protect policyholders.
- 3.5.2 The ability to undertake group-wide supervision may be necessary to ensure compliance with the ICPS. The international standards on group supervision are, however, still being developed. It is therefore proposed that no legislative changes be sought in respect of group supervision until the international position is clarified.
- 3.5.3 Adherence to the IAIS Standards will also require changes to insurance rules and regulations, including amendment of the *Licensed Insurers' Corporate Governance Code*, to reflect the new ICPs 7 and 8 on Corporate Governance and Internal Controls respectively, and the *Insurance Business (Public Disclosure of Information) Rules, 2010*, to reflect the new ICP 20 on Public Disclosure. As these proposed changes do not require an amendment to primary legislation, they are not included in this discussion paper. They will instead be progressed along with the revisions to the solvency regime mentioned above.

## 4 The new MiFID regime

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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### 4.1 What is the new MiFID regime / MIFID II / MIFIR?

4.1.1 What is referred to in this section as “the new MiFID regime” is in two parts.

- MIFID II (“the Directive”)<sup>11</sup> aimed at providing protection for retail investors; and
- MIFIR (“the Regulation”)<sup>12</sup>, which is designed to provide analogous protections to professional and other investors.

4.1.2 The primary objective of the new MiFID regime is to increase pre and post-trade transparency and reduce trading costs, and create a range of safeguards protecting investors in the European Union (EU).

4.1.3 It also effectively introduces a single market access regime for providers of investment services from third countries, such as the Bailiwick, into the EU. The specifics of the market access regime remain unknown. It is therefore not currently possible to determine the exact scope of the new MIFID regime's application to the activities of Bailiwick firms. A jurisdictional assessment of equivalence of the Bailiwick's own supervisory and regulatory regimes will be required in order to achieve market access under the Regulation.

4.1.4 The potential scope of the regime is sufficiently large, and the potential requirements sufficiently broad, that it is likely that some revisions to the practice and laws of the Bailiwick's supervisory laws and regulations will be required. The new MiFID regime applies from early 2017, although the third country provisions are delayed. Any required legislative changes will therefore need to feed into the Revision of Laws project as soon as they can be identified.

### 4.2 Scope

4.2.1 Both the Directive and the Regulation apply to access to EU markets, which includes the market in the United Kingdom.

4.2.2 By virtue of European protocols, the Directive will not be effective in Member States until it has been transposed into each Member State's domestic law. The Directive can be thought of as setting a minimum standard for regulation, although it is customary practice for certain Member States to add provisions during their domestic legislative process. On the other hand, the Regulation applies across the EU with no further action required by national governments, and thus sets a consistent level of regulation.

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<sup>11</sup> Directive 2014/65/EU of 15 May 2014.

<sup>12</sup> Regulation (EU) No 600/2014 of 15 May 2014.

4.2.3 The Directive applies to investment firms, market operators, data reporting providers and firms providing investment services or performing investment services (to retail investors) in the EU (including the United Kingdom) and establishes requirements in relation to:

- authorisation and operation conditions for investment firms;
- provision of investment services or activities from third countries through a branch (where a Member State chooses to require a branch);
- authorisation and operating conditions for regulated markets and data service providers; and
- supervision, co-operation and enforcement by competent authorities.

4.2.4 The Regulation objective is maximum harmonisation with the EU in relation to:

- disclosure of trade data to the public;
- reporting of transactions to competent authorities;
- trading of derivatives on organised venues;
- non-discriminatory access to clearing and access to trading in benchmarks;
- product intervention power of competition authorities, ESMA and EBA;
- powers of ESMA on position management controls and position limits; and
- provision of investment services to eligible counterparties<sup>13</sup>, professional clients<sup>14</sup> and elected professional investors<sup>15</sup>.

4.2.5 There are many exemptions from the Directive and Regulation. These include investment funds and pension funds (albeit these are presently undefined), insurance companies providing services regulated under Solvency II<sup>16</sup>, and provision of services when these are provided in an incidental manner or the service is not specifically remunerated (again as yet presently not defined).

4.2.6 Key to determining the eventual scope of the new MIFID regime as it applies to Bailiwick firms will be the interpretation of what constitutes investment services. The definition of “*investment services and activities*” in both the Directive<sup>17</sup> and the Regulation<sup>18</sup> is:

- reception and transmission of orders in relation to one or more financial instruments;

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<sup>13</sup> Within the meaning given in the Regulation.

<sup>14</sup> Article 47(1)(3) of the Regulation provides that “*professional clients*” has the meaning set out on Section I of Annex II to the Directive. This definition includes specified types of clients in Section I and Section II enables certain clients to be treated as professionals on request when they meet certain criteria.

<sup>15</sup> Section II of Annex II to the Directive provides that clients may be treated as professionals on request when they meet certain criteria.

<sup>16</sup> European Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance.

<sup>17</sup> Article 4(1)(2) of the Directive provides that investment services and activities are as defined in Section A of Annex I of the Directive.

<sup>18</sup> Article 2(1)(2) of the Regulation provides that investment services and activities under the Regulation are as defined in the Directive.

- execution of orders on behalf of clients;
- dealing on own account;
- portfolio management;
- investment advice;
- underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;
- placing of financial instruments without a firm commitment basis;
- operation of a multilateral trading facility; and
- operation of an organised trading facility.

4.2.7 Whilst inferences can be made from previous ESMA Discussion Papers, it is currently unclear how broadly or narrowly “*investment advice*” will be defined. A key issue that may significantly impact the fiduciary sector is whether fiduciary activities such as the appointment of investment professionals will be deemed to be part of an investment service.

4.2.8 **What proportion of your current business do you think could be considered to fall under the EU definition of investment services?**

### 4.3 Market Access/Equivalence

#### *Retail investors*

4.3.1 The Directive gives Member States the option to insist upon the creation of a branch by a third country firm in order to gain market access to retail clients in that Member State. However, the creation of a branch provides no passporting facility in relation to retail clients in other Member States.

4.3.2 The key issue for Bailiwick firms wanting to access retail investors in EU countries are therefore: which Member States will impose a branch requirement; and in those cases what are the requirements for a branch? Article 39 of the Directive provides that a third country branch must comply with:

- Articles 16-20, 23, 24, 25, 27, 28(1), 30, 31, 32 of the Directive (as enacted by that Member State), which cover general rules for provision of investment services and importantly client principles, information and suitability of products; and
- Articles 3-26 of the Regulation, which cover rules on pricing, pre- and post-trade transparency for market participants.

4.3.3 Branches must also hold adequate capital,<sup>19</sup> and be a member of an investor compensation scheme that is authorised or recognised by the European Directive on investor-compensation schemes<sup>20</sup>. The firm's home jurisdiction must also<sup>21</sup>:

- conform to FATF standards;
- have agreements in place for the exchange of information between competent authorities; and
- have tax information exchange agreements in place for the effective exchange of information in tax matters (ie TIEAs)<sup>22</sup>.

4.3.4 In summary, marketing to retail clients through a branch of a firm based in the Bailiwick into an EU Member State requires compliance with the Directive as interpreted by that Member State, meeting that Member State's capital requirements, and may also require the introduction of a EU equivalent investor compensation scheme in the Bailiwick.

4.3.5 **How feasible is the formation of branches in EU jurisdictions? Where in the EU would these be?**

4.3.6 **What are your views on the requirement for a firm to belong to an EU equivalent investor compensation scheme?**

#### *Professional and other investors*

4.3.7 In order to market services to eligible counterparties, professional clients and elective professional investors a third country firm will need to seek equivalence from ESMA, and be based in a third country that has itself obtained a positive jurisdictional equivalence assessment from the European Commission. Passporting across the EU will then be possible without a branch being required.

4.3.8 The key issue for Bailiwick firms wanting to access professional and other investors in EU countries is therefore what will be necessary to achieve jurisdictional equivalence? Article 47(1) of the Regulation is ambiguous, it states that the European Commission<sup>23</sup> may adopt a decision in relation to a third party country stating that:

*“the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding prudential and business conduct requirements which have equivalent effect to the requirements set out in this Regulation, in Directive 2013/36/EU<sup>24</sup> and in [the Directive] and in the implementing measures adopted under this Regulation and under those Directives and that the legal framework of that third country provides for an effective equivalent system for the recognition of investment firms authorised under third-country legal regimes.”*

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<sup>19</sup> The exact wording is slightly ambiguous. Article 39(2)(c) of the Directive requires that “sufficient initial capital is at free disposal of the branch”.

<sup>20</sup> Directive 97/9/EC on investor-compensation schemes.

<sup>21</sup> These requirements are set out in Article 39(2) of the Directive.

<sup>22</sup> These standards for these agreements are laid down in Article 26 of the *OECD Model Tax Convention on Income and Capital*.

<sup>23</sup> Under AIFMD equivalence assessments are carried out by ESMA. The position under the Regulation is different in that the assessments will be undertaken by the European Commission. This means that different approaches may be taken.

<sup>24</sup> *Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms* (the “Prudential Requirements Directive”).

4.3.9 This implies that the Bailiwick's regulatory regime would be considered in totality in any equivalence assessment. This could necessitate the introduction of a range of rules and regulations regarding operation of regulated markets and trading rules, transparency and data reporting. However, Article 47(1) goes on to state that:

*"The prudential and business conduct framework of a third country may be considered to have equivalent effect where that framework fulfils all the following conditions:*

- a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;*
- b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body;*
- c) firms providing investment services and activities in that third country are subject to adequate organisational requirement in the area of internal control functions;*
- d) firms providing investment services and activities are subject to appropriate conduct of business rules; and*
- e) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation".*

4.3.10 This implies an assessment could be more restricted and focus on the regulation on investment service firms and whether the effect of the Bailiwick's regulation is similar in this area.

4.3.11 The key will be to what extent the European Commission assesses that, following guidance as yet unpublished by ESMA, the Bailiwick's regulatory regime creates the same outcomes as that created by the Directive, the Regulation and the Prudential Requirements Directive<sup>25</sup> in the areas outlined above.

4.3.12 Given this current lack of clarity, it is probable that a separate supplemental consultation specific to issues arising from the new MiFID regime may need to be published when more information is available.

## **4.4 Discussion issues**

4.4.1 Consideration will need to be given to the new MiFID regime requirements in the areas of authorisation, enforcement and supervision. An assessment of comparable capital requirements will also need to be made. It is hoped that potential issues in the areas of authorisation, enforcement and supervision will be addressed as part of the Revision of Laws project's review of compliance with international standards.

4.4.2 The issue in respect of comparable capital requirements will depend upon how strict an equivalence test is required. Current capital adequacy rules in the Bailiwick tend to use three

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<sup>25</sup> Directive 2013/36/EU.

months' expenditure capital requirement criteria. The minimum required by the EU Prudential Requirements Directive for many firms may, however, be higher<sup>26</sup>.

**4.4.3 What impact (if any) do you think that the imposition of EU levels of capital adequacy could have on businesses in the Bailiwick?**

4.4.4 Further areas of potential uncertainty are the requirements applicable to shareholders, members of an entity's management body, and organisational requirements in the area of internal control functions and conduct of business rules. These areas will therefore need to be further reviewed when ESMA provides technical guidance as to how equivalence may be assessed.

4.4.5 An overriding concern of the new MiFID regime is to ensure transparency in costs and to ensure appropriateness of suitability of product for the end-investor. When the technical guidance for the assessment of third country equivalence under the Regulation is finalised, areas such as the operation of the *Code of Corporate Governance*<sup>27</sup> and GFAS may well require review. Whether this will also necessitate revision of the Supervisory Laws remains to be determined.

**4.4.6 The main areas of direct relevance in the Regulation's proposed rules are in the following three areas:**

- **requirements applicable to shareholders and members of management bodies;**
- **organisational requirement in the area of internal control functions; and**
- **conduct of business rules.**

**What issues could you foresee in requirements making the Bailiwick's approach in these areas equivalent to the EU?**

4.4.7 A working party has been created to consider how the Bailiwick should respond to the new MiFID regime. The group has the full involvement of industry, and is monitoring developments. Some questions have already been raised and discussed. These include identification of key EU markets for which discussions around requirements or otherwise of a branch for market access under the Directive should be prioritised.

4.4.8 Without knowledge of the detailed requirements for continued market access an assessment of the costs and benefits of such change cannot yet be made. The current working presumption is that continued market access for those providing 'investment services' is desired. A proportionate approach is however required.

4.4.9 It is believed that 60-80% of overall current financial service business is dependent on market access to the EU in some way. No information exists, however, as to what proportion of that business is derived from 'investment services' as defined as within scope of the new MiFID regime. If, for example, it transpired that just 5% of business depended on market access through the new MiFID regime, yet the price of access was to significantly increase the costs for all Bailiwick financial services businesses, a presumption of continued access would clearly be tested.

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<sup>26</sup> Noting the current range of exemptions, i.e. collective investment funds, pension funds, insurance companies providing services regulated under Solvency II.

<sup>27</sup> *Finance Sector Code of Corporate Governance*, issued by the Commission in September 2011

- 4.4.10 It is therefore important to understand the importance of continued access to the EU market (including the UK) for Bailiwick financial service providers
- 4.4.11 **How much of your current business directly or indirectly originates from the EU (including the UK)?**
- 4.4.12 **How contingent are business development plans on direct or indirect business from the EU (including the UK)?**
- 4.4.13 There may also be market opportunity evolving through the new MIFID regime. As recently reported in the Financial Times<sup>28</sup> the Directive will require the disclosure of the full true costs of services of private banks and wealth managers. This may provide a market opportunity for services provided from a well-regulated offshore jurisdiction, equivalent or otherwise.
- 4.4.14 **Can you identify market opportunities from the provision of MIFIR compliant services from the Bailiwick or from the provision of non-MIFIR compliant services to the rest of the world?**

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<sup>28</sup> *"MiFID II: Regulatory Typhoon on Course for Europe"*, FTfm, 26/10/14

## 5 Eliminating confusion, seeking consistency and creating efficiencies

### 5.1 A word on consistency

5.1.1 The Supervisory Laws have developed sequentially. Of the laws currently in force, the first in time is the Protection of Investors Law, followed by the Banking Law, the Fiduciaries Law, the Insurance Managers and Insurance Intermediaries Law and the Insurance Business Law. A natural process of evolution and refinement of laws has occurred which has, over time, led to inconsistency between the laws. By way of an example (this is addressed later in the paper) by the time the surrender of licence powers were drafted in the Insurance Business Law and the Insurance Managers and Insurance Intermediaries Law, the thinking had evolved and the Commission's consent was required for the surrender of a licence to take effect. The intention of this section is to increase consistency across all laws and therefore simplicity of use for both the industry and Commission.

### 5.2 Notifications and authorisations

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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5.2.1 Currently the requirements to either provide notification, or seek authorisation of a person being appointed to a position vary across the Supervisory Laws. In this section reference to seeking authorisation also includes situations where the Commission is required to confirm that it does not have any objection to an appointment. The Supervisory Laws contain differing requirements in relation to a variety of positions, including auditor, director, controller, indirect controller, manager, partner and shareholder controller.

5.2.2 Primarily these differences relate to whether or not prior consent to an appointment is needed, and who is responsible for seeking authorisation or making post-appointment notifications. These differences can cause uncertainty, confusion and inefficiency, more so where an entity is licensed under more than one Supervisory Law. This is because each Law may have the different notification or authorisation requirements (or processes) in relation to the same position.

5.2.3 Some changes are required in this area to meet international standards<sup>29</sup>. The Commission believes this is also an opportunity to standardise the procedures across the various Supervisory Laws.

5.2.4 It is proposed that the relevant Supervisory Laws be amended to:

- Require that a proposed director, partner (for a limited partnership, the general partner only), managing director, or holder of such other position as may be prescribed by regulations, be required to obtain confirmation of the Commission approval prior to commencing their appointment to such a role<sup>30</sup>.
- Allow the Commission to object to an *existing* director, partner (for a limited partnership, the general partner only), managing director, or holder of such other position as may be prescribed by regulations.

<sup>29</sup> See paragraph 3.3.8 above.

<sup>30</sup> Including a requirement in the Fiduciaries Law that the Commission have the opportunity to object to the proposed appointment of a director will assist in meeting the requirements of GIFCS Standard Part 3, D-1.2. See paragraphs 3.3.8 above.

- Ensure that the positions for which licensees are required to provide notification or seek authorisation are consistent across the Supervisory Laws. This would include relevant officers, controllers and holders of such other positions as may be prescribed by regulation. However, it is acknowledged that the requirement that prior approval of a significant shareholder, at this time, only applies in relation to the Banking Supervision Law.
- Where appropriate, definitions of the relevant classes of positions for which notifications and authorisations are required be amended to be consistent across the Supervisory Laws.
- Ensure that where the Commission has the power to object to a person prior to their being appointed to a relevant position, the Commission also has the power to object to an *existing* holder of such a position. It should be noted that, in relation to the Banking Supervision Law, this would include significant shareholders.
- Where appropriate, the person who is responsible for providing the notification, or making any application for authorisation be consistent across the Supervisory Laws.
- Ensure that post-appointment notifications are required on a consistent basis. For example, ensure that all of the Supervisory Laws contain a requirement that the Commission is notified in writing by a licensee of the fact that a person has become or has ceased to be a relevant officer, shareholder controller, significant shareholder, etc.

5.2.5 **Do you have any comments in relation to the above proposals?**

5.2.6 **Do you have any view on who should be responsible for notifications to the Commission that a relevant person has become or ceased to be a director, shareholder controller, significant shareholder, etc. of a licensee?**

### *Application to investment funds*

Sectors proposed to be affected: Investment

5.2.7 Currently the Commission does not have the power to object to an existing or proposed director, partner (for a limited partnership, the general partner only), manager, managing director, chief executive, trustee or holder of such other position as may be prescribed by regulations, of an investment fund. The Commission believes that its inability to do so hampers its ability to provide effective and efficient supervision of the investment funds industry.

5.2.8 It is therefore proposed that the provisions in the Protection of Investors Law relating to notification of changes of director, partner (for a limited partnership, the general partner only), managing director, or holder of such other position as may be prescribed by regulations be extended to apply in relation to the persons set out above in connection with investment funds.

5.2.9 **Do you foresee any commercial issues arising out of the approval of persons related to investment funds?**

5.2.10 The Commission has recently implemented the Commission's Online Services Portal. While the Commission has powers to require the provision of certain information in electronic format under the *Electronic Transactions (Obligation to use Electronic Form) (Guernsey) Ordinance, 2014*, it would

be useful to take the present opportunity to amend the Supervisory Laws to reflect the new powers and to ensure consistency and efficiency moving forwards.

5.2.11 Accordingly, the Commission proposes that the Supervisory Laws be amended to clearly state that the Commission has the ability to determine the form, manner or content, means of transmission, and sign off or approval of notifications, whether by rules or otherwise.

5.2.12 **Do you have any concerns regarding the above proposal?**

### 5.3 Deemed withdrawal of a licence application

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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5.3.1 The Supervisory Laws are structured such that an applicant must initiate steps in order to withdraw an application for a licence, registration or authorisation. Currently the Commission is able to refuse an incomplete application but is unable to deem it as withdrawn. As a result, an application can sit in abeyance for an indeterminate period, a position that is not necessarily helpful to either the Commission or the applicant.

5.3.2 It is proposed that under each of the Supervisory Laws, where information in support of an application has not been received by the Commission in a timely manner, the Commission should be able to notify the applicant that it has deemed the application to have been withdrawn. A deemed withdrawal would not have the same potentially detrimental consequences as a refusal. The exercise of this power should be subject to the provision of prior written warning to the applicant.

5.3.3 **Do you agree that the ability to deem an application to have been withdrawn should be introduced?**

### 5.4 Minimum criteria for licensing

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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5.4.1 Currently the minimum criteria for licensing applicable to each Supervisory Law are set out in a schedule to the relevant law. However, while the provisions under each of those laws are broadly similar, there are some differences. The minimum criteria for licensing set out the minimum criteria that a licensee should fulfil to obtain and retain its licence. Further it sets out criteria that relevant individuals related to a licensee need to fulfil to hold certain positions.

#### *Could the criteria be standardised?*

5.4.2 The Commission has recently received suggestions from members of industry suggesting there would be benefits to the development of a standard set of minimum criteria for licensing.

5.4.3 The rationale behind this suggestion is that the general principles underlying the minimum criteria for licensing apply equally across all sectors. These include requirements for licensees to:

- be honest;
- observe proper standards of conduct;

- treat customers fairly;
- provide sound, suitable, accurate and clear advice;
- arrange adequate protection, segregation and control of customer assets; and
- not engage in unsafe or unsound practices that could jeopardise the licensee, customers or the financial system.

5.4.4 However, not all criteria set out in each of the minimum criteria for licensing apply to each sector. Accordingly, it is proposed that each of the minimum criteria for licensing be standardised to the extent possible, but deviations necessary to the relevant sector be maintained.

5.4.5 **Do you support the introduction of substantially standardised/consistent minimum criteria for licensing across all sectors?**

5.4.6 **Do you think there are any minimum criteria for licensing that should apply to one or more, but not all, sectors? If so, what criteria and to what sector(s)?**

#### *Minimum criteria for registration or authorisation of investment funds*

Sectors proposed to be affected: **Investment**

5.4.7 The minimum criteria for licensing in the Protection of Investors Law does not extend to investment funds. The Commission believes that this is a significant gap in its supervisory framework. In the interests of investors in Bailiwick investment funds it is therefore proposed that there should also be a minimum criteria for registration or authorisation of investment funds. It is suggested that the criteria should cover minimum standards of fitness and propriety for investment funds and their directors, partners (for a limited partnership, the general partner only), etc and would encompass requirements in relation to the need for sound corporate governance, risk management and internal controls and compliance with applicable law.

5.4.8 **Do you consider that the introduction of minimum criteria for registration or authorisation of investment funds would pose a risk or a benefit to the Bailiwick's status as an international finance centre? If so, in what way(s)?**

### **5.5 Powers and liabilities of receivers**

Sectors proposed to be affected: **Investment** **Banking**

5.5.1 The powers and liabilities of receivers under each of the Supervisory Laws are currently inconsistent. There is no justification for this and it is clearly illogical for a receiver in respect of banking assets to have lesser powers and be at greater risk of litigation than a receiver in respect of insurance assets.

5.5.2 The Commission suggests that the Protection of Investors Law and the Banking Supervision Law should be amended to contain the same powers and protections as are currently found in the

Insurance Mangers and Insurance Intermediaries Law<sup>31</sup>, the Insurance Business Law<sup>32</sup> and the Fiduciaries Law<sup>33</sup>.

- 5.5.3 **Can you identify a good reason why the investment and banking regimes should have different powers and liabilities relating to receivers than in the insurance and fiduciary regimes?**

## 5.6 Private equity and the fiduciaries regime

Sectors proposed to be affected: **Fiduciaries** **Investment**

- 5.6.1 It is recognised that in private equity structures applicants have often needed to seek a discretionary exemption under the Fiduciaries Law for vehicles that are part of fund structures, and only exist because of them, but do not fall within the provisions of the Protection of Investors Law as they do not require either licensing or authorisation. Such vehicles may include, among others, general partners that are themselves limited partnerships and carried interest vehicles.
- 5.6.2 The Commission accepts that these items should not fall within the fiduciaries regime, and that the current need to apply for an exemption under section 3(1)(y) of the Fiduciaries Law is not efficient. The need to apply for a discretionary exemption could, however, be removed if these vehicles could be said to be carried on under the authority of, and in accordance with the conditions of, a licence or authorisation under the Protection of Investors Law. The statutory exemption in section 3(1)(w) of the Fiduciaries Law would then apply.
- 5.6.3 The Commission therefore proposes a common ownership test within the Protection of Investors Law, whereby, although falling outside of the sphere of regulation, it is accepted that such structures form part of the overall structure, for which other vehicles in the structure are authorised and/or licensed. The Commission believes that, regardless of the structure, ultimate ownership of such vehicles would always fall to the owners of any manager.
- 5.6.4 **Do you agree with the principle that the need to apply for discretionary exemptions in the private equity context should be removed?**
- 5.6.5 **Do you believe that a common ownership test would be sufficiently wide to capture all such structures?**
- 5.6.6 **How would you define common ownership?**

## 5.7 Exemptions

Sectors proposed to be affected: **Fiduciaries**

- 5.7.1 Section 3 of the Fiduciaries Law provides a number of exemptions from licensing. Any person or entity wishing to carry out by way of business a regulated activity as defined under section 2 of the Fiduciaries Law requires either a licence or an exemption. Alongside the statutory exemptions found in section 3, section 3(1)(y) specifically allows the Commission to exempt an entity or person from the operation of the Law by written instrument. Applications for discretionary exemptions are made in writing and accompanied by a one-off application fee.

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<sup>31</sup> Section 54, IMIIL.

<sup>32</sup> Section 77, IBL.

<sup>33</sup> Section 55, Fiduciaries Law.

- 5.7.2 It has been suggested to the Commission that the current exemptions provisions are unwieldy and inefficient, and the Commission is therefore undertaking a review of the regime. Industry’s feedback concerning its experiences with the regime would be helpful in this process.
- 5.7.3 See also the more general discussion of the Commission’s ability to obtain information from exempted entities at section 11.6.
- 5.7.4 **Do you think the current exemptions regime works? What problems, if any, have you encountered?**
- 5.7.5 **Do you think the regime would benefit from the development of additional statutory exemptions within the law to cover the most common activities that currently require a discretionary exemption?**
- 5.7.6 **What specific changes, if any, do you suggest should be made to the current list of statutory exemptions?**
- 5.7.7 **Do you think the regime would benefit from a development in the Protection of Investors Law that enables the Investment Division to supervise related entities that are closely associated or adjunct to an investment fund already supervised under the Protection of Investors Law? If so, see section 5.6.**

## 5.8 Common and clear definitions

- 5.8.1 The Commission accepts that it is desirable to have consistency of definitions across the Supervisory Laws.

### *From “designated manager” to “designated administrator”*

Sectors proposed to be affected: Investment

- 5.8.2 The provisions of the Protection of Investors Law require that both authorised and registered investment funds must appoint a locally licensed “designated manager”<sup>34</sup>. A designated manager is the administrator of an investment fund and is appointed by the manager of the fund or the fund itself. Unless the designated manager is specifically contracted to take on investment management, or other functions, its role is limited to administration functions.
- 5.8.3 The term “designated manager” therefore causes confusion, especially to third parties, who do not understand that the firm acting as the designated manager does not necessarily have any supervisory responsibility in terms of the overall management of the investment fund or in relation to the fund’s assets. It is also important in respect of the regime to be implemented following the introduction of the Alternative Investment Fund Manager Directive that it is clear where management of the fund lies. It is therefore proposed that the term “designated manager” be replaced throughout the Protection of Investors Law by “designated administrator” to better reflect the reality of the appointment.
- 5.8.4 Some designated managers do not perform full administration services, these being outsourced to a firm outside of the Bailiwick. However, while the functions are delegated to other parties the

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<sup>34</sup> As defined in s44(1), POI Law.

responsibility remains with the designated manager, therefore the term “designated administrator” is considered appropriate for those firms.

- 5.8.5 **Do you think there are any circumstances in which substitution of the term designated administrator for what is currently the designated manager could cause confusion or potentially mislead investors?**

*Section 23(2) Banking Supervision Law: “significant shareholder”*

Sectors proposed to be affected: 

Banking
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- 5.8.6 A concern has been raised that as section 23(2) of the Banking Supervision Law is currently drafted there is some confusion as to whether the words “*incorporated in the Bailiwick*” attach to the parent of the licensed institution, rather than to the licensed institution itself. The intention of the section is to ensure that the definition of significant shareholder applies in relation to licensed institutions that are incorporated in the Bailiwick (ie, are subsidiaries), but not to Bailiwick branches of licensed institutions that are incorporated elsewhere.

- 5.8.7 It is therefore proposed that section 23(2) of the Banking Supervision Law be amended to provide as follows:

*“23(2) For the purposes of this law a significant shareholder, in relation to an institution incorporated in the Bailiwick means a person who, alone or with associates, is entitled to exercise, or control the exercise of, 5 per cent or more but less than 15 per cent of the voting power in general meeting of that institution or of any other institution ~~incorporated in the Bailiwick~~ of which that institution is a subsidiary.”*

- 5.8.8 **Would you agree with this amendment?**

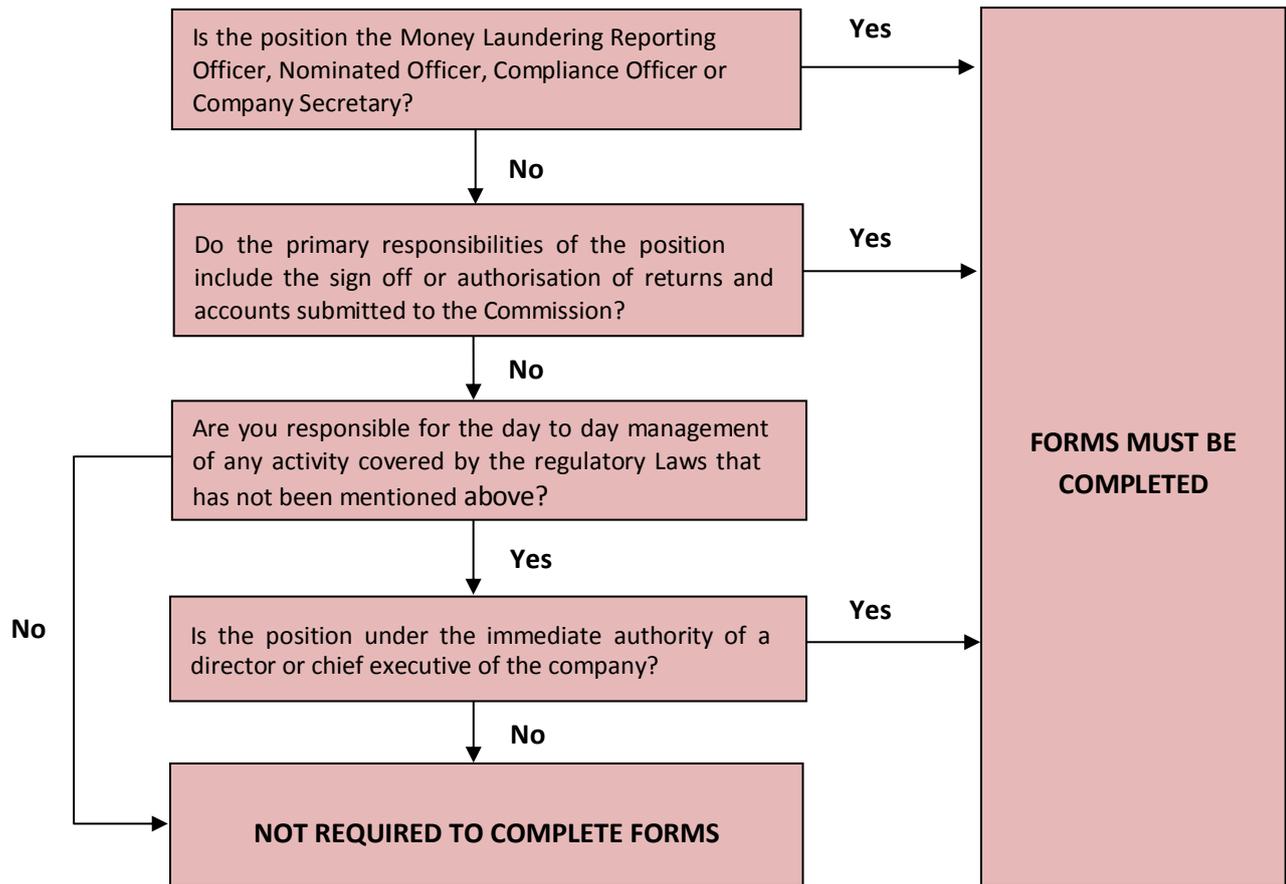
*“manager”*

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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- 5.8.9 It has been suggested that there is sometimes some confusion over which positions fall within the concept of “manager”, and the requirements of each sector are different. Essentially manager has an ordinarily understood meaning. The Commission has issued the following flowchart guidance in the context of completing personal questionnaires and personal declarations<sup>35</sup>:

<sup>35</sup> Appendix A: Manager Decision-Tree, *Personal Questionnaires and Personal Declarations Guidance Notes*, issued by the Commission: <http://www.gfsc.gg/The-Commission/Documents%20and%20Forms/Form-PQ-Guidance.pdf>.



5.8.10 Is the guidance clear enough and, if not, what changes do you suggest?

5.8.11 Do you think the guidance should be added to the definitions in the Supervisory Laws, or remain as guidance?

*“by way of business”*

Sectors proposed to be affected: Fiduciaries Investment Banking Insurance

5.8.12 Each of the Supervisory Laws applies the concept of acting by way of business in some way in determining the requirement for licensing, authorisation or registration. The only definition, however, exists in section 58(3) 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 money’s worth for doing so”*

5.8.13 Would you find it useful to have a standardised definition of “by way of business” that applied across all the Supervisory Laws? If so, what do you suggest it should be?

*“sophisticated investor”*

Sectors proposed to be affected: Fiduciaries Investment Banking Insurance

5.8.14 The concept of a sophisticated investor exists in a number of the Supervisory Laws, but there is no statutory definition that applies across the sectors.

5.8.15 **Do you think it would be useful to have a standardised definition of a sophisticated investor? If so, what do you suggest it should be?**

5.8.16 **Should a term other than “sophisticated” be used? If so, what?**

*Any others?*

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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5.8.17 **Are there any other definitions that you would find it helpful to have in your sector law, or applied across all the Supervisory Laws? If so, what are they?**

## 6 Supporting the financial services industry and looking to the future

### 6.1 Issues raised outside the scope of this project

6.1.1 The Commission is mindful of the known NRFSB Law limitations and the potential opportunities arising from FinTech. Consequently, it is engaged with a parallel track focusing on the NRFSB Law and FinTech issues.

#### *The NRFSB Law and FinTech*

6.1.2 The world and business opportunities have evolved since the introduction of the NRFSB Law. The legislation arguably now registers firms that it was not designed to capture, and consequently does not provide a fit for purpose supervisory regime. The Commission is also aware of opportunities to strengthen the Bailiwick's position in respect of innovative businesses and consumer protection.

6.1.3 The Commission's initial tentative proposals suggest that the NRFSB population of firms could be divided as follows:

- Low risk local businesses to the existing Prescribed Business regime<sup>36</sup>;
- Lending firms to a new consumer credit regime; and
- Innovative businesses that do not naturally fall within other existing mature regulatory legislation to a new FinTech legislation.

6.1.4 Work on the NRFSB Law review and FinTech issues is in its initial stages. If you have any FinTech or NRFSB issues or suggestions you would like to raise, or if you would like to volunteer to be involved with this work stream, please contact the Fiduciary Supervision Policy and Innovations Division on [Fiduciary&Innovation@gfsc.gg](mailto:Fiduciary&Innovation@gfsc.gg).

#### *AML/CFT and KYC issues*

6.1.5 A separate work stream is already underway to review and update the Handbook. The Commission is working with industry representatives on this initiative and it is hoped that by engaging and involving a cross-section of industry representatives the review will address the comments and feedback received on the current version of the Handbook. For this reason consideration of AML/CFT and KYC issues are outside the scope of the Revision of Laws project.

6.1.6 If you have any additional AML/CFT or KYC issues you can raise these directly with Steve Chandler on [SChandler@gfsc.gg](mailto:SChandler@gfsc.gg)

### 6.2 The approach to new markets and new products

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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6.2.1 As noted in section 1.4, one of the key aims of the Revision of Laws project is to work with the financial services industry is to "future-proof" the Supervisory Laws. In the initial stages of this project the Commission engaged in open conversations with a number of representatives of the wider financial sector who emphasised the perceived flexibility of the Bailiwick's regulatory laws. A

<sup>36</sup> The regime under the *Prescribed Businesses (Bailiwick of Guernsey) Law, 2008 (as amended)*.

number of people suggested that one of the key strengths of the Bailiwick's regime is that it can be used to embrace new opportunities or markets without the need to develop product- or market-specific schemes.

- 6.2.2 Equally, however, others suggested that some of those seeking to bring business to the Bailiwick can be put off if there is not a clearly labelled law or set of regulations that specifically covers a new activity. They suggest that those considering doing business with the Bailiwick prefer to see a "pigeon-hole" in which their product or service sits.
- 6.2.3 The Commission's view is not yet firm. It is not convinced that the practice of creating legislation specific to individual products is one that provides for a responsive or flexible regulation, and is concerned that such an approach might be expensive for a regulator to operate. A more appropriate approach may be to provide formalised rules appropriate to specific products, and where this may be necessary future proof by incorporation of enabling legislation in the relevant base Supervisory Laws.
- 6.2.4 **Where do you see the balance between these two points of view?**
- 6.2.5 **Can the aim of "future-proofing" the finance sector's continued development and success be met without introducing bespoke regulatory regimes for specific products?**
- 6.2.6 **What are the commercial drivers that would generically support introduction of separate rules or regulations for a specific product?**
- 6.2.7 **What (if any) financial services products do you think could benefit from the clarity of a bespoke regulatory framework?**
- 6.2.8 **What (if any) changes would you like to see made to the Supervisory Laws that you consider would "future-proof" them?**

### 6.3 Insurance Linked Securities

Sectors proposed to be affected: Insurance

- 6.3.1 As discussed in the previous section, there has been a call from some sectors of the industry for bespoke regulatory regimes for specific products. The case of Insurance Linked Securities ("ILS") is one manifestation of this issue. The ability to create and provide ILS products using existing regulatory laws, regulations and rules has been cited as a key catalyst in the recent growth of these products in the Bailiwick. However, some stakeholder groups have suggested that there is a need to formalise a specific legal framework, citing competitor jurisdictions' creation of bespoke legal frameworks as providing those jurisdictions with a competitive advantage.
- 6.3.2 **Do you think there is a need for a separate ILS framework? If so, why?**
- 6.3.3 **If there is a need for a separate ILS framework, does it require revision of the Supervisory Laws, or would a set of rules or regulations suffice?**
- 6.3.4 Guernsey already provides opportunities for ILS business, not least through protected cell companies ("PCCs"). In this context the Commission has a fast-track regime in place and has plans to augment this. However, the Commission is also interested in ensuring a more varied menu for

ILS business so that extra business can be brought to the Bailiwick. In particular, it is understood that other jurisdictions make extensive use of special purpose vehicles (“SPVs”) in ILS business.

6.3.5 **What are the advantages and disadvantages of using an SPV regime to conduct ILS business?**

6.3.6 **Do you think the Bailiwick would benefit from the introduction of other types of ILS offering?**

6.3.7 **If so, what changes do you think are necessary to the Bailiwick’s regulatory regime?**

## 6.4 Private trust companies

Sectors proposed to be affected: **Fiduciaries**

6.4.1 A private trust company (“PTC”) is a company that acts as trustee to a trust (or group of trusts) for families, and for other groups who share a common interest.

### *The current position*

6.4.2 As acting as a trustee is a regulated activity, where a PTC operates by way of business<sup>37</sup>, it will either require a fiduciary licence, or a discretionary exemption under s3(1)(y) of the Fiduciaries Law. Where a PTC does not operate by way of business it falls completely outside the scope of the Fiduciaries Law and neither a licence nor an exemption is required.

6.4.3 The Commission understands that industry is seeking clarification as to how the current position applies in practice. The Commission therefore proposes to issue guidance that reflects the following position:

- A PTC will not require a licence or an exemption where it is not acting by way of business.
- If the PTC does receive a fee (even if it is merely acting as a conduit and paying it out to a third party) then it will need to apply for a specific discretionary exemption.
- A PTC may be eligible for a discretionary exemption where it meets the following criteria:
  - the PTC acts as trustee for one family or group that shares a common interest;
  - the PTC does not advertise or market its services in any way;
  - the PTC is administered by a company or partnership that holds a full fiduciary licence; and
  - the administrator maintains an executive presence on the board of the PTC<sup>38</sup>.

6.4.4 **Are there any matters which you would like to see covered in the guidance issued by the Commission in relation to PTCs?**

### *Reform in the future?*

6.4.5 As mentioned in section 5.7, the Commission is currently reviewing the application of the statutory exemptions in the Fiduciaries Law. One possibility is to create a new statutory exemption whereby

<sup>37</sup> By way of business is defined in s58(3) of the Fiduciaries Law as including where any income, fee, emolument or other consideration in money or money’s worth is received.

<sup>38</sup> This requirement is currently imposed as a condition on the grant of the discretionary exemption.

acting as a PTC by way of business would be exempted from the requirement to be licensed under the Fiduciaries Law where:

- the PTC acts as trustee for one family or group that shares a common interest;
- the PTC does not advertise or market its services in any way;
- the PTC is administered by a company or partnership that holds a full fiduciary licence; and
- the administrator maintain an executive presence on the board of the PTC.

6.4.6 The Commission does not consider that it would be necessary or proportionate to create a registration regime for PTCs in light of the above proposals.

6.4.7 **Are you in favour of the creation of a specific exemption for PTCs? Do you foresee any issues arising with the use of this exemption?**

## 6.5 Balancing certainty and flexibility under the Protection of Investors Law

Sectors proposed to be affected: **Investment**

6.5.1 Discussions with stakeholders raised both a desire to increase certainty as regards the application of the Protection of Investors Law regime, but also to retain flexibility. It was felt by many that the flexibility of the current regime is part of its advantage, as is the general nature of definitions that can be applied to a variety of arrangements as the detail of financial structures evolve. Concern was expressed that an attempt to precisely define what type of currently-available investments are within/outside the regime could restrict the Bailiwick's ability to develop nimbly in the future.

6.5.2 The Commission accepts that clarity and certainty in the application of a regulatory regime is desirable. It does not, however, want to provide certainty at the expense of the flexibility that it understands is part of the Bailiwick's success in this sector.

6.5.3 One suggestion is to empower the Commission to make declarations in a particular case that an arrangement is, or is not, an investment fund. The Commission could then issue guidance to the industry as to what factors it takes into account when assessing a particular type of arrangement. This would not constitute an exemption as the direction would reflect the Commission's view from the outset that the scheme or arrangement is not a collective investment scheme.

6.5.4 Declarations would be issued on the basis of certain facts as disclosed and would be conditional upon the continued application of those facts. A declaration would be valid for a specified period (say three or five years), after which the applicant may apply to renew the declaration after confirming that there the material facts remained such that the declaration was valid. The Commission proposes that a fee would be charged for consideration of an application for such a declaration.

6.5.5 One of the conditions of a declaration would be that the recipient has an obligation to advise the Commission if any of the factors supporting the declaration either change or no longer apply. In order to ensure that such a scheme is not abused the Commission would also need the ability to

request information from recipients of a declaration to ensure that the circumstances giving rise to the declaration continue.

- 6.5.6 **Do you think that introducing the ability for the Commission to make a declaration that a given arrangement is not a collective investment scheme would be of assistance to the industry?**
- 6.5.7 **If so do you think a declaration should have a validity of three or five years?**
- 6.5.8 **What information do you think it would be reasonable for the Commission to be able to require from recipients of a declaration?**

## 6.6 Prime brokerage arrangements

- 6.6.1 Currently the use of prime brokers in open-ended investment funds is addressed through a flexible policy for hedge funds and funds of hedge funds.
- 6.6.2 The Commission does not consider that removing the requirement to state the name of the designated trustee or designated custodian<sup>39</sup> on the authorisation or registration of an investment fund could cause any prejudice to the interest of investors. It therefore suggests that the requirement be repealed<sup>40</sup>. The applicant for registration or authorisation will still be required to identify the designated trustee or custodian on the application and this information will remain relevant to the Commission's consideration of the application. Any change of designated trustee or custodian would also still require the prior approval of the Commission<sup>41</sup>.
- 6.6.3 The Commission believes that this proposed change will facilitate the use of prime brokers in any open-ended scheme.
- 6.6.4 **Do you agree that removal of the requirement to state the name of the designated trustee or custodian on the authorisation or registration of an investment fund would not prejudice the interests of investors?**
- 6.6.5 **Do you think there could be any risk to the reputation of the Bailiwick if it offered an open-ended investment fund in which custodial facilities did not have to be carried out in the Bailiwick?**

## 6.7 Reforming the personal fiduciary licence regime

Sectors proposed to be affected: **Fiduciaries**

### *The current position*

- 6.7.1 An individual who has a single trustee (or related) appointment or more than six directorships requires either a personal fiduciary licence ("PFL") or an exemption under the Fiduciaries Law. As the regime currently stands, a personal fiduciary licensee must comply with the minimum criteria for licensing and have the same compliance procedures, manuals and internal management processes as a corporate entity with a full fiduciary licence.

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<sup>39</sup> Section 8(5)(c), POI Law.

<sup>40</sup> The possibility of also removing the requirement to state the name of the designated manager (administrator) is considered in paragraph 6.12.5.

<sup>41</sup> See Class A Rules, rule 4.3.10 (prior approval or one month) and Class B Rules 2013, rules 2.10 and 4.06 (trustees).

6.7.2 However, a PFL is limited in that it only allows an individual to act as<sup>42</sup>:

- a director of a company or a partner of a partnership;
- a co-trustee of a trust;
- a protector or enforcer of a trust;
- a foundation official<sup>43</sup>; and
- an executor of a will or the administrator of an estate.

6.7.3 The limited scope of the above activities means that a personal licensee is not able to carry out activities such as the formation, management, provision of advice in respect of, or administration of trusts, partnerships, companies or foundations. A personal licensee cannot act by way of business as a sole trustee or a company secretary. A personal licensee is also not permitted to advertise his or her fiduciary services.

6.7.4 Personal licensees are subject to the Proceeds of Crime Law and are required to comply with the requirements of the Proceeds of Crime Regulations<sup>44</sup> and the rules in the Handbook.

### *Reform in the future?*

6.7.5 It has been suggested that the current regime is not fit for purpose, and actively discourages individuals seeking a PFL or taking on new roles where the effect of doing so would be to require them to obtain a PFL.

6.7.6 The Commission accepts in principle that the PFL regime should be fair and proportionate. One option could be to assess the impact of removing personal fiduciary licensees who are acting in respect of entities already licensed, authorised or regulated under one of Supervisory Laws from regulation under the Fiduciaries Law, and instead including them as a class of prescribed business under the Prescribed Businesses Law. Before considering such a change the Commission would need to be satisfied that fit and proper requirements continued to be met.

6.7.7 **What would you consider to be the key elements of a workable, safe and attractive personal fiduciary licence regime?**

## **6.8 New types of investment funds**

Sectors proposed to be affected: **Investment**

6.8.1 The Protection of Investors Law currently allows the Commission to declare an investment fund to be an authorised or registered investment fund of a specified class<sup>45</sup>. In order to facilitate development of different types of fund in the future, the Commission suggests that section 8(1) could be replaced with a statement that the Commission shall issue such designation in respect of investment funds as may be provided for by regulation. This would enable further designations to

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<sup>42</sup> Section 4(3), Fiduciaries Law.

<sup>43</sup> Within the meaning of foundation official as defined in the *Foundations (Guernsey) Law, 2012* (s2(1)(d), Fiduciaries Law).

<sup>44</sup> *The Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations, 2007 (as amended)*

<sup>45</sup> Section 8(1), POI Law.

be developed and accommodated within the Protection of Investors regime, without the need to amend primary legislation.

6.8.2 **Do you think the Commission should have the power to extend by regulation the designations that can be applied to investment funds?**

6.8.3 **Do you think that the Bailiwick should currently be considering extending the scope of investment fund designations beyond authorised and registered? If so, in what way?**

## 6.9 Credit rating agencies

Sectors proposed to be affected: 

Investment	Banking	Insurance
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6.9.1 While there are currently no credit rating agencies operating from the Bailiwick, the ability for the States to introduce regulation for credit rating agencies in the future would enable compliance with IOSCO Principle 22 (see paragraphs 3.4.3 and 3.4.4).

## 6.10 Regulation of pensions

Sectors proposed to be affected: 

Fiduciaries	Investment	Insurance
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6.10.1 Pension regulation in the Bailiwick is limited to regulation of Pension Fund trustees through their role as licensed entities, and the application of the domestic Retirement Annuity Trust schemes (“the RATS Rules”)<sup>46</sup>. During various consultations in the summer and autumn some industry groups have suggested that broader supervision of pensions would better position them to market their services and products globally. As any such a move would likely require a revision to present laws, the issue is raised for discussion.

6.10.2 **Should there be broader regulation of pensions?**

6.10.3 **Could pension regulation be brought within one of the existing regulatory laws?**

6.10.4 **What should be the nature of pensions regulations?**

## 6.11 Recognition of specific jurisdictions

### *Designated territories and new markets*

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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6.11.1 Section 6.2 discusses some different possible approaches to future-proofing the Supervisory Laws. Under the Protection of Investors Law activities and schemes can be exempted if they are supervised in territories that have been designated exempt under the law. The introduction of the *Alternative Investment Fund Managers Directive 2011/61/EU* (“AIFMD”) has shown a mechanism that can operate in a cross-border situation. The Commission is interested in views as to whether a power of designation for either products, services or jurisdictions could be beneficial.

6.11.2 **To what extent might such a mechanism help address the issue of “pigeon-holing” referred to in paragraph 6.2.2?**

<sup>46</sup> A consultation on possible revisions to the RATS Rules recently closed, and the responses that were received are now being reviewed by the Commission.

**6.11.3 Do you think that extending a power of mutual recognition similar to that in the Protection of Investors Law<sup>47</sup> to the other Supervisory Laws would be beneficial?**

*Designated territories and promotion of cross-border services under AIFMD*

Sectors proposed to be affected: **Investment**

6.11.4 The Commission recognises the Bailiwick is seeking to engage proactively with Europe under AIFMD. Accordingly, where EEA jurisdictions are prepared to recognise the marketing of the Bailiwick Alternative Investment Funds (“AIFs”) within their jurisdiction, the Commission would request the Policy Council to extend the designated territories under section 29(3) of the Protection of Investors Law<sup>48</sup>.

6.11.5 The Commission also recognises that the implementation of AIFMD requires clarification of the rules relating to promotion and marketing into the Bailiwick. The Commission anticipates undertaking this during the course of 2015.

**6.12 Identification of designated managers**

Sectors proposed to be affected: **Investment**

6.12.1 It has been suggested that the requirement in the Protection of Investors Law<sup>49</sup> for an authorisation or registration issued by the Commission to specifically identify the designated manager (which the Commission has proposed should be renamed as a “*designated administrator*”<sup>50</sup>), is no longer fit for purpose following the introduction of AIFMD.

6.12.2 The Commission does not consider that the omission of this information could cause any prejudice to the interest of investors. It therefore suggests that the requirement to state the name of the designated administrator (manager) on the notice of authorisation or registration should be repealed. The applicant for registration or authorisation will still be required to identify the designated administrator (manager) on the application, and this information will remain relevant to the Commission’s consideration of the application. Any change of designated administrator (manager) post authorisation would also still require the prior approval of the Commission<sup>51</sup>.

6.12.3 The Commission believes that this proposal would provide scope for the introduction of an AIF Regime. It would enable a Bailiwick designated administrator to carry out relevant, and possibly limited, administration functions, whilst simultaneously giving de facto approval to additional administrators being appointed that operate outside the Bailiwick.

**6.12.4 Do you agree that removal of the requirement to state the name of the designated administrator (manager) on the authorisation or registration of an investment fund would not prejudice the interests of investors?**

**6.12.5 Do you support the changes suggested in this section?**

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<sup>47</sup> Section 29, POI Law.

<sup>48</sup> Section 29(3), POI Law provides that the Policy Council may amend the list of designated countries or territories by regulation.

<sup>49</sup> Section 8(5)(b), POI Law.

<sup>50</sup> See paragraphs 5.8.2 to 5.8.5.

<sup>51</sup> Class B Rules 2013, rule 4.07.

## 6.13 Spread betting

Sectors proposed to be affected: **Investment**

- 6.13.1 The Protection of Investors Law as currently drafted does catch spread betting when it is undertaken in relation to sporting activities (“sporting spread betting”). It is not the Commission’s intention that it should have any part in the regulation of sporting spread betting. It is proposed to legislate to make the position of the Commission clear and otherwise leave sporting spread betting within in the existing framework of legislation across the Bailiwick that governs betting and gaming.
- 6.13.2 For the avoidance of doubt, the provision of services relating to spread betting across financial markets will remain within the regulatory net.
- 6.13.3 **Do you agree with this proposal?**

## 7 Protecting the consumer

### 7.1 Empowering the Commission to refuse consent to surrender of a licence in certain circumstances

Sectors proposed to be affected: **Fiduciaries** **Investment** **Banking**

7.1.1 The Insurance Business Law and the Insurance Managers and Insurance Intermediaries Law both empower the Commission to refuse consent to surrender of a licence<sup>52</sup> if:

- in the Commission's opinion, the liabilities of the licensee have not been discharged or transferred;
- the Commission believes that the surrender would not be in the best interests of the public, the licensee's customers or potential customers or the reputation of the Bailiwick as a finance centre; or
- if the name of the licensee would not, immediately after the surrender, comply with the restrictions on the use of descriptions and names.

7.1.2 The Commission does not currently have the power to refuse the surrender of a licence under the Fiduciaries Law, Protection of Investors Law or Banking Supervision Law. In order to protect the consumer and ensure the Commission considers that the powers in the insurance laws should be adopted.

7.1.3 The Insurance Business Law and the Insurance Managers and Insurance Intermediaries Law both also expressly empower the Commission to refuse to allow the surrender of a licence to be withdrawn<sup>53</sup>. One of the purposes of this power is to protect the interests of the customers of the licensee. Although there is no requirement for the Commission to consent to surrender of a banking licence, the Commission does have the power to refuse consent to the withdrawal of a banking licence surrender<sup>54</sup>. It is also proposed that these powers should also be included in the Fiduciaries Law and the Protection of Investors Law.

7.1.4 **Do you agree with the above proposals?**

### 7.2 Prohibitions in relation to investment funds

Sectors proposed to be affected: **Investment**

7.2.1 The Protection of Investors Law enables the Commission to make prohibition orders in relation to licensees<sup>55</sup>, but the Commission does not currently have the ability to make prohibition orders against individuals in relation to restricted activities in connection with investment funds where those individuals are not licensees. The Commission believes that this is a significant handicap to its ability to protect the interests of investors. Historically there have been cases where prohibition of a person associated with an investment fund would have been the appropriate sanction to use.

<sup>52</sup> Sections 15(5) and 15(6), IBL; sections 10(5) and 10(6), IMIIL.

<sup>53</sup> Section 15(4), IBL; section 10(4), IMIIL.

<sup>54</sup> Section 11(3), Banking Supervision Law.

<sup>55</sup> Section 34E, POI Law.

It is therefore proposed that the application of prohibition orders should be extended to directors of investment funds.

- 7.2.2 **Do you think that the interests of investors will be better protected if the Commission has the power to make prohibition orders against directors of investment funds? Why?**
- 7.2.3 **Do you think that the Commission should have the power to make prohibition orders against the directors of investment funds? Why?**
- 7.2.4 **Do you consider that the possibility of prohibition orders being made against individuals in relation to restricted activities in connection with investment funds could pose a risk to the Bailiwick's status as an international finance centre? If so, in what way?**

### 7.3 Personal liability for breach of prohibition orders

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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- 7.3.1 Each of the Supervisory Laws contain powers to make prohibition orders<sup>56</sup>. The NRFSB Law contains an additional level of consumer protection where a disqualification order has been obtained against an individual. It provides that a person who contravenes such an order is not only guilty of an offence, but also personally liable for the debts and liabilities of the business incurred when he was acting in contravention of the disqualification order<sup>57</sup>. This enhances the level of protection available to consumers, and it is therefore proposed that such a provision should be included in any new enforcement law to apply to all relevant officers across the supervisory sectors.
- 7.3.2 **Should this protection be extended to the Supervisory Laws?**
- 7.3.3 **Should the personal liability only be granted by court order?**

### 7.4 Protecting “whistle-blowers”

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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- 7.4.1 The Supervisory Laws do not currently include any provision concerning information provided by individuals concerning regulatory non-compliance (“whistle-blowers”), and the protection to which those whistle-blowers may be entitled. This is in contrast to the position in other jurisdictions where whistle-blowers have a degree of statutory protection.
- 7.4.2 The Commission considers that a level of statutory protection should be afforded to a whistle-blower providing information to the Commission in respect of a financial services business or a business breaching the regulatory perimeter.
- 7.4.3 The provisions should clarify what protections are to be offered to those who contact the Commission. The Commission considers that the protection should also extend to the exclusion of an individual from civil liability for appropriate disclosures made to the Commission. The provisions should also prescribe the manner in which such information may be relied upon by the Commission in the fulfilment of its supervisory and enforcement functions.

<sup>56</sup> Section 17A, BSL; section 17A, Fiduciaries Law; section 28A, IBL; section 18A, IMIII; section 34E, POI Law.

<sup>57</sup> Section 26(5)(b), NRFSB Law.

- 7.4.4 **Do you think that the current lack of statutory provisions deters potential whistle-blowers from acting?**
- 7.4.5 **Do you agree that statutory provisions should be introduced to provide protection for whistle blowers, and provisions for what the Commission can do with information received from whistle-blowers?**

## 7.5 Extending access to restitution

Sectors proposed to be affected: 

Fiduciaries	Banking	Insurance
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- 7.5.1 Section 33 of the Protection of Investors Law empowers the court to make an order for restitution, if it is satisfied that a person has contravened certain provisions of the Law or any directions, regulations or rules under the Law, and that (a) profits have accrued to any person; or (b) any investor has suffered loss or been adversely affected, as a result of the contravention. The court may order that person to pay such sum as appears to the court to be just, having regard to the extent of the profit, loss or adverse effect.
- 7.5.2 This ability for the court to make a restitution order is not included in the other Supervisory Laws. The Commission believes this is a major gap in creditor and customer protection. It is therefore proposed that the power should be extended to apply uniformly across all supervisory sectors. This could be achieved by including provisions similar to section 33 of the Protection of Investors Law in a new enforcement law.
- 7.5.3 It should be noted that restitution would be entirely separate from the Bailiwick Banking Deposit Compensation Scheme and is in addition to, and not in derogation from, that scheme. It would not affect any other right of any person to bring proceedings. In a similar way, this is not intended to derogate from the power of the courts in respect of trusts and foundations.
- 7.5.4 **What are your views on extending court ordered restitution to breaches of the other Supervisory Laws, or any direction, regulation or rule made thereunder? Do you think that this would improve the international reputation of the Bailiwick?**

## 7.6 Personal liability for fraudulent trading

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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- 7.6.1 The Insurance Business Law, uniquely among the Supervisory Laws, contains express provision as to responsibility for fraudulent trading<sup>58</sup>. If, in the course of the winding up of a licensed insurer, it appears that any insurance business has been carried on with any fraudulent purpose, the court may declare that any person who was knowingly party to the carrying on of that business in that manner shall be personally responsible for all or any of the liabilities of the insurer. The Insurance Business Law further provides that a person who was knowingly party to the fraudulent act is guilty of an offence. These specific provisions are not contained in the other Supervisory Laws, although the Guernsey Companies Law<sup>59</sup> and the Alderney Companies Law<sup>60</sup> contain similar provisions that

<sup>58</sup> Section, 56 IBL.

<sup>59</sup> Sections 433 and 434, Guernsey Companies Law.

<sup>60</sup> Section 138, Alderney Companies Law.

allow the court to require a person to make a contribution to the assets of a company or cell in the event of fraud.

7.6.2 It seems anomalous that a person who was engaged in a licensed insurance business can be held personally liable for making good the debts and liabilities of the insurer, while persons who have defrauded creditors and customers in the course of a business governed by some of the other Supervisory Laws cannot be held accountable on the same terms. One option to achieve consistency would be to simply delete the provision in the Insurance Business Law. Reduction of the remedies available to consumers does not, however, seem consistent with the prevailing international focus on consumer protection following the global financial crisis. Bearing in mind that this provision only applies if a court is satisfied that an individual was knowingly a party to fraudulent conduct, the Commission suggests that each of the other Supervisory Laws should be amended to include an equivalent provision to section 56 of the Insurance Business Law.

7.6.3 **Do you think there is any basis for differentiating the protection available to consumers in the event of fraudulent conduct based on the type of regulated activity being carried out?**

7.6.4 **Do you agree that the protection to consumers currently contained in the Insurance Business Law should be extended across all the Supervisory Laws?**

## 7.7 Investigation of market abuse

Sectors proposed to be affected: Investment

7.7.1 The current provisions of the Protection of Investors Law give rise to an inconsistency in respect of the Commission's powers to investigate market abuse, depending upon whether the investigation arises following a request from an overseas authority, or of the Commission's own initiative. Where a request for assistance is received from a relevant overseas authority<sup>61</sup>, the Commission's general power to require information and production of documents from any "relevant person"<sup>62</sup> is extended to apply in relation to any "person involved"<sup>63</sup>.

7.7.2 The definition of a person involved is potentially wider than the statutory definition of a relevant person. This leads to a situation where the Commission's investigatory powers can be exercised more widely following a request for assistance from an overseas authority than if the Commission itself suspects market abuse. The Commission proposes that the scope of its investigatory powers in respect of market abuse should be the same however the suspicion was first raised, and whether or not an overseas authority is also conducting an investigation.

7.7.3 At present where a request for information is sought from a person involved and that person is completely outside the Commission's regulatory framework, the powers may only be used with the agreement of a majority of the Commissioners<sup>64</sup>. It is suggested that in these circumstances this should be amended to require the agreement of a single Commissioner.

7.7.4 **To what extent should the Commission have powers to seek information from unlicensed parties in respect of suspected market abuse? What safeguards do you think would be appropriate?**

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<sup>61</sup> Defined in s44(1) of the POI Law as "a body in another country or territory which carries out any similar function to the Commission".

<sup>62</sup> Section 27, POI Law. "Relevant person" is defined in s27(1).

<sup>63</sup> As defined in s41(7), POI Law.

<sup>64</sup> Section 41(1)(b), POI Law.

- 7.7.5 The Commission also believes that the market abuse provisions need to be clarified and brought up to date to ensure that they cover market manipulation; misrepresentation of information and other fraudulent or manipulative practices relating to controlled investments (including solicitation practices); handling of investor funds; customer orders; multilateral trading facilities; trades undertaken outside of a regulated market; and benchmarks.
- 7.7.6 The Commission intends to also develop a Market Abuse Code to give guidance as to the application whether or not behaviour amounts to market abuse<sup>65</sup>. The Commission expects that such a code would only be developed with the assistance of industry and would be the subject of a full consultation process.
- 7.7.7 **What forms of market abuse do you believe have the most potential to damage the Bailiwick’s reputation as a well-regulated international finance centre?**

## 7.8 Mind and management in the Bailiwick

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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- 7.8.1 The minimum criteria for licensing under the Banking Supervision Law and the Fiduciaries Law currently require that the business of an institution or a licensee be directed by two individuals who are resident in the Bailiwick. This requirement is fulfilled by the presence of two residents who are of sufficient seniority and are sufficiently independent from each other.
- 7.8.2 It is proposed that this requirement should be extended to all licensed businesses. This requirement would not be applicable to:
- personal fiduciary licensees;
  - licensed insurers who have delegated executive powers to a licensed insurance manager and who have appointed a Bailiwick resident independent non-executive director; or
  - licensed insurers, insurance intermediaries or investment intermediaries who are not incorporated in the Bailiwick and have no physical presence in the Bailiwick, provided they are supervised in a jurisdiction with equivalent standards to the Bailiwick and, for an insurer, provided they have a Bailiwick resident general representative or, for an insurance intermediary, provided they have a Bailiwick resident appointed person.

7.8.3 **Do you have any comments in relation to the above proposal?**

## 7.9 Restrictions on descriptions and use of names

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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- 7.9.1 Currently the Supervisory Laws each provide for various restrictions on descriptions and the use of certain names. The use of restricted names is generally an offence under the Supervisory Laws. However, each of the laws contains different provisions and there is currently no centralised list of

<sup>65</sup> The power to make a code containing provisions the Commission considers will give appropriate guidance to those determining whether or not behaviour amounts to market abuse is contained in s41B of the POI Law.

restricted descriptions or names. Further, the Commission does not currently have the ability to add names to these lists. This is particularly relevant in relation to emerging products and areas.

7.9.2 It is proposed that, to ensure that the list of restricted words can be updated to keep pace with the development of emerging products and services, each of the Supervisory Laws be amended to include a power to make regulations in relation to restricted descriptions and names. Then a regulation could be issued under the Supervisory Laws which would set out the restricted descriptions and names. It is anticipated that, for the protection of customers or potential customers, the list of regulated words should include bank, banker, banking, savings, deposit, credit, mortgage, loan, insurance, assurance, adviser, broker or consultant in combination with insurance or assurance, asset manager, asset management, fund manager, fund management, investment, investment manager, investment management, fund administrator, fund administration, investment fund, investment service, fund, trust, trustee, fiduciary, executor, nominee, custody, guaranteed and capital certain or any cognate expression. In addition the words foundation, protector, enforcer, guardian should also be included on the list but only where the use of such words might be understood as providing activities supervised by the Commission.

7.9.3 **What is your view of the proposal to provide the restricted descriptions and names in regulation rather than within the Supervisory Laws? Do you have any comments in relation to the list set out above?**

7.9.4 The provisions relating to changes of company name contained in the Supervisory Laws as they do not reflect the current process for the registration of a Guernsey company. It is proposed that these be amended to reflect the current procedures under the Guernsey Companies Law and the Alderney Companies Law.

7.9.5 The Commission does not currently have the power under all of the Supervisory Laws to apply to the court for a direction to require an unlicensed entity using a name that includes a restricted word, or that otherwise indicates it is licensed, to change its name. It is proposed that such a power be included in each of the Supervisory Laws.

7.9.6 **Do you have any views in relation to this proposal?**

7.9.7 The Commission also proposes that the Supervisory Laws should each include standardised provisions which make it an offence for a person to adopt, or use, a name that includes a designated or regulated word, a restricted description, any cognate expression, or that otherwise falsely suggests or implies that the person is licensed without first obtaining confirmation that the Commission does not object to its use.

7.9.8 **Do you have any views in relation to this proposal?**

## 7.10 Protecting depositors and policyholders in an insolvency

Sectors proposed to be affected: 

Banking	Insurance
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7.10.1 The economic and financial crisis has concentrated significant attention on whether bank depositors and policyholders of insurance companies are adequately protected should either a bank or insurance company become insolvent. In 2011 the IMF found that the Bailiwick law did not

provide that policyholders and insurance policy beneficiaries were given legal priority in the event of insolvency of an insurer. This is contrary to the international insurance standards.

- 7.10.2 The Commerce and Employment Department has commenced consultation on reform of the Bailiwick's insolvency laws. The Commission will continue to liaise with the Department with a view to the development of an insolvency regime that provides the best possible outcome for customers of supervised financial services businesses.
- 7.10.3 The Commission considers ensuring that depositors and policyholders making claims in an insolvency have the highest preference after secured creditors to be of great importance.
- 7.10.4 The Commission currently imposes a standard licence condition on insurers writing long-term business in relation to policyholder protection requirements. The condition requires at least 90% of assets representing policyholder liabilities to be held in trust, with certain reporting requirements to the Commission. It is suggested instead of this requirement being imposed as a standard condition, it should be included in the Insurance Business Law.
- 7.10.5 It is therefore proposed that the Insurance Business Law be amended to require insurers writing long-term business to hold at least 90% of assets representing policyholder liabilities in trust and that certain reporting requirements be imposed in relation to this requirement.
- 7.10.6 **Does the inclusion of this requirement in the Insurance Business Law (as compared to as a condition) give rise to any concerns?**

## **8 Distinguishing between supervision and enforcement**

### **8.1 What is the current situation?**

- 8.1.1 It is acknowledged by the Commission that confusion has arisen over its approach to enforcement in the last few years. In response to this, the Commission created a dedicated Enforcement Division and now considers that separating its supervisory powers from its enforcement powers would give greater clarity and understanding.
- 8.1.2 As an example, at present the Commission uses conditions in both a supervisory context and as a sanction; equally it collects information for supervisory purposes under the same provisions as it uses when it is investigating.

### **8.2 How could this be improved?**

- 8.2.1 As with much in business, certainty is important so that the business can invest and grow. Following discussions with the members of the Project Board and representative committees of the States of Guernsey, the Commission considers that the introduction of a single enforcement law will aid in establishing certainty. This proposal is addressed in more detail in parts 9 and 10.

## 9 Creating certainty in supervision

### 9.1 The goal of effective supervision

9.1.1 The Commission aims to exercise “good and effective” regulation. By this it means that it works to ensure that the Commission delivers high-quality prudential, financial crime and conduct regulation and supervision within the Bailiwick of Guernsey. The Commission is mindful of the need to protect the Bailiwick’s reputation and position. In all that it does, it has regard to the needs of the Bailiwick, its residents and of international regulatory expectations.

9.1.2 The Commission recognises the need to use finite resources efficiently and adopts a risk-based approach to its supervisory, enforcement and policy creation activities. It seeks to form judgements as to the risks that the firms it regulates present to the Bailiwick and to mitigate those risks that it reasonably regards as unacceptable. A discerning regulator fosters an environment in which good firms want to do good business in its jurisdiction. The Commission believes that a more efficient and certain supervisory regime will facilitate innovation, whilst discouraging poor quality ventures.

### 9.2 Make directions more generally available

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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9.2.1 Currently each of the Supervisory Laws include powers to impose conditions. All of the Supervisory Laws other than the Protection of Investors Law also contain the power for the Commission to impose or issue directions:

- in connection with the surrender, revocation or expiry of a licence<sup>66</sup>;
- in relation to advertising and advertisements in certain circumstances<sup>67</sup>; and
- for the purpose of verifying information provided to the Commission<sup>68</sup>.

9.2.2 In addition, directions can be issued under all of the Supervisory Laws in relation to shares held by a person who has become a shareholder controller without obtaining confirmation of no objection from the Commission to their acquisition or appointment, or who continue to be a shareholder controller after a notice of objection has been served by the Commission. The direction may impose certain restrictions in relation to that person's shares, for example, that no voting right shall be exercisable in respect of the shares or that (except in a liquidation) no payment shall be made of any sum due on the shares from the licensee, whether in respect of capital or otherwise.

9.2.3 The Commission has the power under the Supervisory Laws to publish the imposition of a condition. However, the Commission only has the power under the Insurance Business Law<sup>69</sup> and the Insurance Managers and Insurance Intermediaries Law<sup>70</sup> to publish information in relation to the imposition of a direction.

<sup>66</sup> Section 12, Fiduciaries Law; section 16, IBL; section 12, Banking Supervision Law; section 11, IMIIL.

<sup>67</sup> Section 11(1) of IMIIL enables the Commission to give directions prohibiting a licensed insurance manager/intermediary from soliciting business. Control of advertising is by regulation under section 61.

<sup>68</sup> Section 96, IBL; section 52, BSL; section 73, IMIIL; section 73, Fiduciaries Law.

<sup>69</sup> Section 16(8), IBL.

<sup>70</sup> Section 11(8), IMIIL.

9.2.4 The Commission considers that the availability of directions as a supervisory tool should be consistent across all the Supervisory Laws.

9.2.5 It is proposed that:

- Directions should continue to have effect after the termination of a licence, authorisation or registration.
- The scope of directions should be broadened so that they apply to licensees, investment funds and relevant officers.
- Where the scope of directions is extended to apply to licensees, investment funds and relevant officers, a contravention of the condition or direction would be an offence and may trigger the Commission’s ability to apply other regulatory sanctions in relation to the person who breaches the condition or direction.
- The Commission would be able to publish information in relation to the imposition of directions where it thinks it desirable or expedient.
- Without prejudice to other penalties and remedies, the Commission be given the ability to apply to the court for an order that a direction should be complied with, when non-compliance is evidenced by the party in question.

9.2.6 **Do you agree with the proposals in section 9.2.5?**

9.2.7 **Do you think it would be acceptable that conditions and directions apply to licensees, investment funds and relevant officers?**

### 9.3 Skilled persons / inspectors

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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9.3.1 The Commission currently has the power under a number of Supervisory Laws to appoint one or more one or more competent persons (inspectors) to investigate and report to the Commission on certain matters<sup>71</sup>. It may also impose a condition requiring a licensee to appoint an independent person to provide a report to the Commission<sup>72</sup>. However, the inspector and independent persons provisions vary as between the Supervisory Laws, and this power can be utilised by the Commission for supervisory as well as enforcement matters. Under all of the Supervisory Laws other than the Banking Supervision Law the Commission may recover the costs, fees and expenses relating to an investigation and report (relating to an appointed inspector) as a civil debt.

9.3.2 As set out in section 8, it is suggested that it would be appropriate for the Commission take a different approach to supervisory matters as against enforcement matters, but that a consistent approach should be taken across all sectors. Accordingly it is proposed that, in respect of a supervisory matter, the Commission have the power to appoint, or require a licensee to appoint, a “skilled person” to provide a report of certain matters. Regulators in other jurisdictions have the power to either: (a) require that a regulated entity appoint a “skilled person” to undertake a review; or (b) enter into a contract with a skilled person to undertake a review in relation to a

<sup>71</sup> Section 24, Fiduciaries law; s69 IBL; section 37, Banking Supervision Law; section 46, IMIIL.

<sup>72</sup> For example section 9, Fiduciaries Law.

regulated entity. Further, where the regulator engages the skilled person, that the cost is recoverable from the licensee. This ensures that the costs of any increased supervision are more properly borne by the relevant licensee, and not instead included in the costs that are ultimately shared amongst all other licensees through the imposition of license fees.

- 9.3.3 Foreign regulators have used this power to obtain an independent view of aspects of a firm’s activities that, for example, cause them concern, or where further analysis is required. The Commission suggests that repealing the various provisions relating to inspectors and independent persons and replacing them with a standardised provision relating to the appointment of a skilled person would simplify the legislation and ensure consistency across the sectors.
- 9.3.4 In relation to enforcement matters, it is proposed to retain a Commission-appointed inspector regime, and this is addressed in section 10.5 below.
- 9.3.5 **Do you foresee any significant difficulties with introducing “skilled persons” reports in relation to supervisory matters and retaining an inspector regime in relation to matters which are enforcement related?**
- 9.3.6 **What is your view on having the costs of a skilled person’s report borne by the relevant licensee?**
- 9.3.7 **Do you have any other comments in relation to the above proposals?**

## 9.4 “Minded to” notices - supervisory

Sectors proposed to be affected:

Fiduciaries	Investment	Banking	Insurance
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- 9.4.1 Under the Supervisory Laws, before the Commission makes some decisions, it must serve on the person(s) concerned a notice in writing stating what decision the Commission is proposing to take and the grounds for the proposed decision<sup>73</sup>. These are known colloquially as “minded to” notices. A “minded to” notice is not however consistently required in respect of the same decisions under the different Supervisory Laws, and the detail of the provisions requiring these notices are different. By way of example, some (but not all) of the provisions require the notice to also include the grounds of the decision as well as the terms. In practice this causes great confusion and leads to inconsistent treatment of different types of licensee in the same circumstances. It can be particularly problematic when an entity is subjected to more than one type of licence.
- 9.4.2 It is proposed that requirement to issue “minded to” provisions should be retained for matters under enforcement (see section 10.9). In the context of supervisory actions, however, it is suggested that the minded to notices should be removed to ensure consistency across the Supervisory Laws.
- 9.4.3 The Commission proposes to introduce a consistent requirement to provide reasons for decisions. None of the above will change the existing rights of appeal.

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<sup>73</sup> Section 17C, Fiduciaries Law; section 61, IBL; s41, IMIIL.

## 10 A consistent approach to enforcement

### 10.1 The current regime

10.1.1 There are currently a range of enforcement procedures and powers across the regulatory laws. The differing approaches lead to confusion. Standardisation of these powers and procedures would provide clarification and eliminate confusion, thereby creating efficiencies for both industry and the Commission.

### 10.2 Proposal for a single law

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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10.2.1 As discussed in section 8 above, in discussions with industry representatives it was suggested to the Commission that the confusion arising out of the different enforcement approaches could be eliminated by the introduction of a single statutory enforcement regime. This would ensure consistency of approach, be simpler to follow and allow the Commission to operate more efficiently.

10.2.2 The Commission believes that there is merit in this suggestion and supports further exploration of the possibility. If the proposal was pursued it would involve repealing a number of provisions in the Supervisory Laws and introducing a single new law that applied to all businesses overseen by the Commission.

10.2.3 It is proposed that as part of the introduction of a single enforcement law the various powers currently held by the Commission (including public statements, fines, penalties and prohibitions) could be gathered together and re-enacted in the proposed enforcement law. In conjunction, in advance of any legal reforms the Commission is also considering modifying internal procedures to improve clarity as to when an individual or regulated entity moves from supervision to enforcement.

10.2.4 Further detail about some of the suggested provisions that could be included in a new enforcement law is set out in more detail below.

### 10.3 Compulsory interviews

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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10.3.1 All the Supervisory Laws include powers to require a relevant person or licensed institution to attend before the Commission, but the circumstances in which these powers apply are different across the various sectors<sup>74</sup>. The power in the Protection of Investors Law<sup>75</sup> applies in respect of information that is relevant to any restricted activity or any investigation of an offence under the Protection of Investors Law. The power in the remaining Supervisory Laws is, however, limited to investigating certain specified offences. In the Banking Supervision Law these offences are unlicensed or fraudulent deposit taking<sup>76</sup>.

<sup>74</sup> See section 27, POI Law; section 25, Fiduciaries Law; section 28, Banking Supervision Law; section 70, IBL; section 47, IMIIL.

<sup>75</sup> Section 27, POI Law.

<sup>76</sup> Section 28, Banking Supervision Law.

10.3.2 The Commission does not think the different approach under the different laws can be justified, and therefore proposes that a new enforcement law contain a compulsory interview provision of general application. This power would enable the Commission to require a relevant person to attend before the Commission (or someone duly appointed by the Commission) to answer questions relevant to the carrying on of any licensed activity or the investigation of any suspected offence under the Supervisory Laws.

10.3.3 **Do you consider there are reasonable grounds for continuing to have a more limited power of compulsory interview in respect of the banking, fiduciary or insurance sectors?**

## 10.4 Prohibition orders

### *Prohibition orders in connection with investment funds*

Sectors proposed to be affected: 

Investment
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10.4.1 The issues in relation to this topic has been set out earlier at section 7.2. Please refer to this section for further details.

### *Variation and revocation of prohibition orders*

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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10.4.2 Each of the Supervisory Laws contains provisions in relation to prohibition orders<sup>77</sup>. In the past the Commission has received a number of queries in relation to the circumstances in which an individual can make an application to vary or revoke an order. Currently revocation or variation can only be considered on the application of the individual who is subject to the order.

10.4.3 The Commission suggests that the sections in the new enforcement law relating to prohibition orders should include provisions to the effect that:

- applications to vary or revoke the prohibition orders can only be made where new information or evidence comes to light;
- the Commission may vary or revoke a prohibition order of its own initiative; and
- the Commission may specify that the prohibition order is of a specified duration.

10.4.4 **Do you foresee any other circumstances in which the Commission should consider the revocation or variation of a prohibition order?**

## 10.5 Power to appoint inspectors

10.5.1 Section 9.3 above refers to the Commission's proposal to remove the provisions relating to inspectors and independent persons from each of the Supervisory Laws, and replace them with a standardised provision for Skilled Persons reports. In relation to enforcement matters, it is however, proposed to retain a Commission appointed inspector regime, on terms consistent with

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<sup>77</sup> Section 34E, POI Law; section 17A, Fiduciaries Law; section 28A IBL; section 17A, Banking Supervision Law; section 18A, IMIIL.

those currently contained in the Insurance Business Law<sup>78</sup> and the Insurance Managers and Insurance Intermediaries Law<sup>79</sup>.

- 10.5.2 An inspector may, if he thinks it necessary for the purposes of his investigation, investigate the business of any person who is or has, at any relevant time, been an associated party of the licensee, subject to the Commission giving notice in writing to the party of the proposed investigation. The Commission suggests that the provisions should be extended to also be applicable in respect of investment funds and former licensees. The exercise of this power should be subject to a right of appeal, as is currently the case under the Insurance Business Law<sup>80</sup>.

## 10.6 Enforceable undertakings – a more proportionate response?

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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- 10.6.1 During recent work on enforcement cases the Commission has become conscious that it would be consistent with a responsive approach to supervision for the Commission to be able to consider and accept undertakings made by persons to take remedial measures to rectify non-compliant aspects of their activities or conduct. An enforceable undertaking would be a binding agreement entered into between the Commission and a licensee, former licensee or relevant officer and was initially proposed in the consolidation consultation.
- 10.6.2 Enforceable undertakings are seen as an important and proportionate alternative to seeking a civil order from the court or taking other administrative action such as the imposition of a discretionary penalty or prohibition order. Enforceable undertakings would require agreement between the Commission and the person concerned (the “**promisor**”) and so the Commission would not be able to impose them unilaterally. They could also be proposed by a licensee, former licensee, relevant officer or the Commission. An example of a basic undertaking would be to undertake certain remedial action by a specified date.
- 10.6.3 Enforceable undertakings need not be limited to licensees. They could also be entered into by a person who is not a licensee – for example a director, officer or manager of a licensee or (in exceptional cases) even a shareholder or controller of a licensee (where the shareholder or controller is a person who can effectively bring about compliance with the undertaking). Thus the Commission believes that an enforceable undertaking is a particularly valuable measure for aiding remediation work. For the avoidance of doubt, it would see these as an enforcement tool used alongside an appropriate public statement, not as something which would attach to the confidential risk mitigation programmes which the Commission regularly delivers to firms following periodic supervisory inspection visits.
- 10.6.4 **Do you think the Commission should have the ability to enter into enforceable undertakings?**
- 10.6.5 **Who do you think should be able to enter into an enforceable undertaking with the Commission?**

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<sup>78</sup> Section 69, IBL.

<sup>79</sup> Section 36, IMIIL.

<sup>80</sup> Section 63(1)(k), IBL.

## 10.7 Introduction of private reprimands

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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10.7.1 The NRFSB Law and the Prescribed Business Law both contain the power to issue private reprimands. A private reprimand is a statement by the Commission that a person has failed to comply with a requirement under a Supervisory Law, rule, regulation etc. It is a reprimand that is not publically published but is communicated to the person concerned. In that manner it is substantially different to a public statement. However, the imposition will still form part of the regulatory history of the relevant person and, where appropriate, the regulatory history of those individuals involved in its control and direction at the time the private reprimand was issued. It is considered that this should be added to the list of possible sanctions at the Commission's discretion.

10.7.2 **Do you think the Commission should expand the ability to issue private reprimands for those under Supervisory Laws?**

## 10.8 Introduction of enforcement requirements

10.8.1 At present conditions and directions are used in both a supervisory and enforcement context. In order to establish a clear distinction between the differing functions of supervision and enforcement, it is proposed that "*enforcement requirements*" be introduced in the new enforcement law where previously conditions or directions may have been used.

10.8.2 For example, enforcement requirements could include requiring:

- a licensee to undertake remediation of its procedures;
- a licensee to provide its staff with training in relation to specified areas;
- a licensee to cease undertaking business.

10.8.3 **Do you think the Commission should have the ability to impose enforcement requirements?**

## 10.9 Minded to notices - enforcement

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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10.9.1 As noted in section 9.4, it is proposed that the current regime of "minded to" notices and representation periods should be retained in the enforcement context. The Commission suggests that the regime should apply to all sanctions imposed under the enforcement law. As is currently the case, the imposition of these sanctions would also subject to a right of appeal to the Royal Court.

10.9.2 To reduce administrative process and improve efficiencies it is proposed that the "minded to" notice and representation period processes would not, however, apply in relation to the exercise of investigatory powers (for example the appointment of an inspector, a requirement to provide information or documents or a requirement to attend a compulsory interview), however, as is currently the case, the exercise of an investigatory power would be subject to appeal to the Royal Court.

10.9.3 **Are there any sanctions to which you feel the “minded to” notice and the accompanying provisions should not apply?**

#### *Actions in extremis*

10.9.4 In respect of urgent cases where the Commission needs to act immediately (for example, to protect the interests of the public or the reputation of the Bailiwick) it is proposed that the Commission should be able to shorten or dispense with the “minded to” notice procedure.<sup>81</sup>

10.9.5 The ability to dispense with the “minded to” provisions in cases of urgency would only be for occasions where the circumstances are such that immediate action must be taken, for example, to protect customers, potential customers or creditors. In that case the respondent to the Commission's action would still have a right of appeal to the court.

#### *The representation period*

10.9.6 The current “minded to” provisions each require the notice to state that, within a period of 28 days beginning on the day of the notice, representations can be made to the Commission in respect of the decision and that the Commission shall consider any such representations before giving further consideration to the proposed decision. It is proposed that a modified representation period should apply for the proposed imposition of sanctions under any new enforcement law.

10.9.7 While the Supervisory Laws generally provide for the representation period to be reduced, there is currently no ability for the period to be extended. This is inflexible and the Commission recognises that 28 days may be too short in a complex matter.

10.9.8 It is therefore proposed that the standard representation period would be 28 days, but that the Commission be able to extend, as well as reduce, the representation period.

10.9.9 **Do you agree that the standard representation period could be extended or reduced in certain circumstances?**

10.9.10 **Are there any decisions in respect of which you feel the representation period should not be able to be reduced or the procedure dispensed with? If so what is your view on how risks should be dealt with in the representation period?**

## **10.10 Warrants**

Sectors proposed to be affected: **Investment**

10.10.1 The Commission currently has powers to obtain a warrant in certain circumstances under each of the Fiduciaries Law<sup>82</sup>, the Banking Supervision Law<sup>83</sup>, the Insurance Business Law<sup>84</sup> and the Insurance Managers and Insurance Intermediaries Law<sup>85</sup>. No such power exists within the Protection of Investors Law. This may result in the Commission being unable to obtain information and documents to support an investigation into breaches of the Protection of Investors Law should

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<sup>81</sup> This power is currently included in certain sections of the POI Law, IBL and IMIIL.

<sup>82</sup> Section 36, Fiduciaries Law.

<sup>83</sup> Section 26, Banking Supervision Law.

<sup>84</sup> Section 71, IBL.

<sup>85</sup> Section 48, IMIIL.

a licensee not comply with a notice. This is particularly important when dealing with independent financial advisers working with investment vehicles from their home address.

10.10.2 There is no apparent justification for the Commission not having the same powers in respect of activities covered by the Protection of Investors Law. It is therefore proposed that a new enforcement law would include a standardised power to seek warrants.

10.10.3 **Can you see any reason for not extending the power to obtain a warrant to activities covered by the Protection of Investors Law?**

## 10.11 Injunctions

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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10.11.1 Under section 33 of the Protection of Investors Law, the Court can grant an injunction if it is satisfied that a person will contravene, or has contravened, any provision of sections 1, 7, 38A or 41A of the Protection of Investors Law or any directions, rules or regulations made under the Protection of Investors Law.

10.11.2 Similar provisions are contained in the other Supervisory Laws, but the Court can only grant an injunction if it is satisfied that a person will contravene or has contravened certain sections of *the law* and not any directions, rules or regulations made under the relevant Supervisory Law<sup>86</sup>. The scope for injunctions under the other Supervisory Laws is therefore narrower.

10.11.3 It is recommended that the enforcement law include powers of injunctions along the lines of what is currently contained in section 33 of the Protection of Investors Law.

10.11.4 **Do you consider that the proposed standardisation of the injunctive powers could cause significant difficulties or detriment?**

## 10.12 Policing the perimeter

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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10.12.1 Policing the perimeter refers to the Commission's role to monitor the perimeter of regulated activities, and instigate and pursue enforcement actions against any individual or business that carries out regulated activities without the appropriate licence, authorisation or registration. This is required so that those undertaking lawful financial services business are not disadvantaged by those who seek to flout appropriate standards, to the detriment of the public and their commercial counter-parties.

10.12.2 In order to be able to police the perimeter the Commission must be able to obtain information from entities, and persons connected with entities, that are not licensed, authorised or registered, but that are suspected of undertaking activities for which they are required to be licensed, authorised or registered. The Commission should also be able to obtain information from persons connected with entities to which it has granted an exemption from licensing and those entities themselves in order to ensure the exemption remains appropriate. The issues of obtaining and sharing information, including from unsupervised and exempted entities and persons is discussed more generally in section 11 below.

<sup>86</sup> For example see section 35 of the Banking Supervision Law.

10.12.3 At present the Commission can investigate potential offences and in some cases obtain an injunction to restrain unlicensed activities. The emergence of more web-based providers of financial services means that there is greater scope for the perimeter to be breached and additional powers may therefore be needed.

10.12.4 It is proposed to align the Commission's powers in respect of any individual or business that carries out regulated activities without the appropriate licence, authorisation or registration with other areas of enforcement, in order to deliver effective protection of consumers and the reputation of the Bailiwick's financial services sector. The Commission therefore believes that enforceable undertakings should be available in this context, as well as the power to obtain injunctions.

10.12.5 Where the court grants an injunction the Commission considers that this should then empower the Commission to issue enforcement requirements in respect of the entity concerned, in order to protect those who have contracted with it or for safeguarding the reputation of the Bailiwick as a financial services centre. The concept of enforcement requirements is discussed in section 10.8 above.

#### *Public statements in respect of persons who should be licensed, authorised or registered*

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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10.12.6 The Supervisory Laws contain specific provisions allowing the Commission to issue public statements in relation to licensees, former licensees and relevant officers<sup>87</sup>. These statements can be made when a person has materially contravened the supervisory law or does not fulfil any of the applicable minimum criteria for licensing.

10.12.7 The majority of the Supervisory Laws also contain an express power for the Commission to publish the fact that a particular person has been refused a licence, or that a particular person does not hold, or has not held, a licence<sup>88</sup>. However, these provisions differ in some respects and do not apply to all of the Supervisory Laws. In order to improve consistency across the sectors it is proposed that a standardised power to make public statements in relation to persons who have been refused a licence, or do not hold or have not held a licence be included in the enforcement law. This is an important safeguard for investor protection and protection of the reputation of the Bailiwick.

**10.12.8 Do you agree that the Commission should be able to publish statements in respect of persons who are not licensed, authorised or registered?**

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<sup>87</sup> Section 11C, Financial Services Commission Law. Section 11C(3) defines "relevant officer" as a person who when the contravention or non-fulfilment in question took place was a director, controller, partner, manager, general representative or authorised insurance representative of a licensee or former licensee.

<sup>88</sup> Section 13(4), Fiduciaries Law; section 13(4), Banking Supervision Law; section 12(6), IMIL; section 17(6), IBL.

## 11 Gathering information and keeping things confidential

### 11.1 The current situation

11.1.1 The Commission's power to obtain information varies across the Supervisory Laws often leads to confusion. The Commission believes that the powers to obtain information and the processes to be followed should be standardised. There should also be a standard straight-forward, approach to confidentiality of information across all the Supervisory Laws. Some changes are necessary to enable and safeguard exchanges with foreign regulatory authorities, European authorities and some self-regulatory organisations and stock exchanges.

### 11.2 Purpose for which information and documents may be obtained

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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11.2.1 The Commission must be able to obtain information and documents in respect of any of its functions under the Supervisory Laws or any other legislation and on behalf of a foreign supervisory authority, other regulators and relevant international organisations. The Financial Services Commission Law specifies the factors that the Commission should take into account before assisting a foreign supervisory authority, and these issues are considered in more detail in section 11.7.

11.2.2 The power to obtain documents and information from licensees and "relevant persons" is very important in order to enable the Commission to fulfil its international obligations. A number of issues arise in relation to this in the Supervisory Laws. Further the Commission currently has few powers in respect of investment funds, and this issue is addressed in section 11.4.

11.2.3 A specific issues arises in relation to the Banking Supervision Law and the restrictions in that law relating to the Commission's power to require the provision of information and documents. Section 25 of the Banking Supervision Law allows the Commission to issue notices to obtain information and documents being such information or documents as the Commission may reasonably require for the performance of its functions under the Banking Supervision Law.

11.2.4 The equivalent sections in the other Supervisory Laws state that the Commission may obtain information and documents that it may reasonably require for the performance of its functions, and are not restricted to the Commission's functions under any specific law. This means the Commission can obtain, for example, information from a fiduciary licensee in relation to the Commission's functions under the Protection of Investors Law. However, it is not clear that this can be done with banks.

11.2.5 It is therefore recommended that the Banking Law be amended to remove reference to the Commission's functions under the Banking Law to bring it into line with the other Supervisory Laws.

11.2.6 **Do you see any reason why the Commission should have more restricted information powers in respect of banking licensees than licensees under any other sector?**

## 11.3 Who should the Commission be able to get information from?

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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11.3.1 The ability to obtain information from and in respect of licensees and associated parties can be crucial to its supervision of licensees and funds. The Commission is of the view that it should be able to obtain information and documents from:

- applicants for licences, authorisations and registrations;
- external auditors and actuaries of applicants so that it can fully consider applications;
- persons holding, or who have formerly held, a licence, consent, authorisation, registration or permission granted by the Commission; and
- relevant officers or employees of such persons.

The Commission is of the view that the power to obtain information should be standardised across the Supervisory Laws.

11.3.2 **Do you have any objection to, or comments on, the proposals set out above?**

### *Information from “relevant persons”*

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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11.3.3 Some of the Supervisory Laws contain provisions that allow the Commission to require a “*relevant person*” to provide information and /or documents. This power does not, however, exist in all the Supervisory Laws. There are also inconsistencies between the various powers to obtain information from relevant persons that do exist. Obtaining information and/documents from relevant persons is an important power that allows the Commission to better understand matters relating to the areas that it regulates.

11.3.4 The Commission believes that the provisions relating to obtaining information and documents from “*relevant persons*”, including the definitions of “*relevant persons*”, should be made consistent across the Supervisory Laws. It is proposed that “*a relevant person*”, in relation to a licensee, would mean:

- any person who is, or who has at any time been, directly or indirectly employed (whether or not under a contract of service) by the licensee, and
- any person who has, or who has at any time had, any direct or indirect proprietary, financial or other interest in or connection with the licensee.

11.3.5 **Do you disagree with having consistent powers to obtain documents and/or information from “*relevant persons*” across the Supervisory Laws?**

11.3.6 **Do you agree that the types of persons to whom this power would apply should be consistent?**

11.3.7 **Do you think that there are additional persons who should be included as a “*relevant person*”?**

## 11.4 Information in respect of investment funds

Sectors proposed to be affected: **Investment**

11.4.1 The Commission has few powers in relation to investment funds. In order to enable the Commission to supervise these entities appropriately, it is proposed that the Protection of Investors Law be amended to extend the provisions in relation to obtaining information and documents and to require a person to attend and answer questions in connection with investment funds.

11.4.2 **What is your view on this proposal?**

## 11.5 Information from unsupervised entities

Sectors proposed to be affected: **Fiduciaries** **Investment** **Banking** **Insurance**

### *Unsupervised group entities and special purpose vehicles*

11.5.1 The Commission believes that, in order to properly fulfil its supervisory and prudential functions, it must be able to obtain information from unsupervised entities of groups where one or more other entities in the group undertakes financial services business, and special purpose vehicles used by such groups, where the Commission reasonably considers the information to be necessary for the performance of the Commission's functions, or on behalf of another supervisory authority.

11.5.2 Currently the Commission has limited powers in relation to whom it can require to provide information or documents (please refer to 10.12 for further discussion of this issue). The global financial and economic crisis highlighted the differences in jurisdictional powers and requirements over unsupervised entities of financial groups. These differences lead to increased difficulties assessing the group, its risks and its strategies, and in taking appropriate action to mitigate any risk. The Commission is aware that there are unsupervised group entities, including special purpose vehicles, present in the Bailiwick, but neither the Commission nor any other supervisory authority has any knowledge of the activities of these entities. This lack of knowledge presents potentially significant risks to the Bailiwick.

11.5.3 Accordingly, the Commission proposes that the Supervisory Laws be amended to enable the Commission to obtain information from unsupervised entities in the Bailiwick of groups where one or more other entities in the group undertakes financial services business, and from special purpose vehicles used by such groups, where it reasonably considers the information to be necessary for the performance of the Commission's functions.

11.5.4 The Commission considers that unsupervised entities could include holding companies; any officer of a licensee; subsidiaries; branches; affiliates and joint ventures. Some, but not all, of these entities may already be captured by the concept of "*associated parties*" of licensees.

11.5.5 The Commission also considers that it should be able to obtain information from this category of unsupervised entities on behalf of another supervisory authority that reasonably considers the information to be necessary. The Commission would consider the appropriateness of any request and take into account the factors set out in the Financial Services Commission Law in relation to

assisting a foreign supervisory authority. See also the discussion about providing information to foreign supervisory authorities at section 11.7.

### *Unsupervised entities suspected of undertaking regulated activities*

- 11.5.6 As discussed in section 10.12, in order to adequately safeguard consumers and the reputation of the Bailiwick as a well-regulated financial services jurisdiction, the Commission must be able to effectively “police the perimeter” of regulation. To do this, the Commission should be able to obtain information from entities, and persons connected with those entities, that are not licensed, authorised or registered, but that are suspected of undertaking activities for which they are required to be licensed, authorised or registered.
- 11.5.7 Accordingly, the Commission proposes that the ability to obtain information and documents from these persons and entities should be included in each of the Supervisory Laws.
- 11.5.8 **Can you see a reason why the Commission should not have power to obtain information from unsupervised group entities and special purpose vehicles where the Commission reasonably considers the information to be necessary for the performance of its functions?**

## 11.6 Information from exempted entities

Sectors proposed to be affected: 

Fiduciaries	Investment
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- 11.6.1 Another power that is key to the Commission’s ability to effectively police the regulatory perimeter<sup>89</sup> is the ability to obtain information from exempted entities. When the Commission grants an exemption it does so on the basis of the facts presented, and generally only does so for as long as they are administered by the same service provider. The exemption from the licensing regime often means no further involvement with the Commission. Circumstances can, however, change so that it would be appropriate to bring a matter back within the Commission’s direct supervision. The Commission should therefore be able to obtain information from persons connected with entities to which it has granted an exemption from licensing, and those entities themselves, in order to ensure the exemption remains appropriate.
- 11.6.2 The Commission proposes that:
- there be an obligation on all exempted entities to immediately notify the Commission if the circumstances justifying the exemption change;
  - the Commission have the power to obtain information from persons connected with entities to which it has granted an exemption from licensing and those entities themselves in order to ensure the exemption remains appropriate.
- 11.6.3 **Do you see a reason why the Commission should not have a power to obtain information from unsupervised entities suspected of undertaking regulated activities?**
- 11.6.4 In addition, the Commission considers that protection of the Bailiwick’s reputation may be best achieved by requiring discretionary exemptees to confirm regularly (perhaps every three or five years) that the circumstances justifying the exemption remain unchanged. Alternatively,

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<sup>89</sup> Policing the perimeter is discussed more generally in section 10.12.

discretionary exemptions could have a limited life (again, perhaps three or five years), after which a fresh application would be required.

#### 11.6.5 Do you agree with these proposals?

##### *Exempted company directors*

Sectors proposed to be affected: **Fiduciaries**

11.6.6 The Fiduciaries Law currently contains an exemption from licensing for individuals who hold six or few directorships. The Commission contends that in order to properly exercise its supervisory functions, including determining whether the exemption should be disapplied in any given case, it must have the ability to require relevant information. It is therefore proposed to introduce a power into the Fiduciaries Law to enable the Commission to obtain information and documents and interview individuals for these purposes.

#### 11.6.7 Do you agree with this proposal?

### 11.7 Disclosure of information to foreign authorities and self-regulatory organisations

Sectors proposed to be affected: **Fiduciaries** **Investment** **Banking** **Insurance**

##### *Foreign supervisory authorities*

11.7.1 As already discussed, there are currently certain statutory limitations on the purpose for which the Commission may require an entity to provide information or attend before the Commission. Some of these impact upon the Commission's ability to provide cooperation to foreign supervisory authorities. For example, the limitation in section 25 of the Banking Supervision Law (see paragraph 11.2, could present difficulties to obtaining information from a bank on behalf of a foreign supervisory authority. In addition, the current provisions in the Supervisory Laws do not explicitly allow the Commission to disclose information to a foreign supervisory authority or any other authority when it is acting as a resolution authority.

11.7.2 It is important to the Commission's international obligations that it should, in appropriate circumstances, be able to obtain information on behalf of, and share information with, foreign supervisory authorities.

#### 11.7.3 Do you agree with these proposals?

##### *Self-regulatory organisations*

11.7.4 In the context of securities markets, self-regulatory organisations and stock exchanges perform licensing functions to enable firms or individuals to carry on activities connected with the listing or trading of securities on a market. Those organisations often undertake vetting activities prior to permitting a security to be listed or traded and on-going checks in relation to the security to seek to ensure that the market's requirements are not breached. The legal provisions that enable the Commission to disclose confidential information to a foreign supervisory authority, refer to an authority that appears to the Commission to exercise functions corresponding to any of the functions of the Commission under those Laws. It is not clear, therefore, that those Laws would

allow the Commission to pass confidential information to self-regulatory organisations and stock exchanges, even when such disclosure would be likely to protect investors.

11.7.5 It is therefore proposed that the Supervisory Laws be amended to specifically allow the Commission to disclose confidential information to such organisations, subject to the same checks and balances that would apply to other disclosures of confidential information to a foreign supervisory authority.

11.7.6 **Do you agree with these proposals?**

#### *European authorities*

11.7.7 While day-to-day supervision of financial services businesses in the European Union remains with the 27 national supervisors, the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (ESMA) (collectively “the European Authorities”) have an active role in relation to financial sector supervision across the EU. The European Authorities also have powers to issue instructions to national supervisors. In addition, ESMA has exclusive responsibility for the registration and supervision of credit rating agencies in the EU.

11.7.8 The European Systemic Risk Board (“**ESRB**”) sits above the European Authorities and is responsible for the macro-prudential oversight of the financial system in the EU. The European Central Bank (“**ECB**”) will have an important supervisory role in respect of banks in the eurozone.

11.7.9 In certain circumstances, the existing provisions in relation to the sharing of information with foreign supervisory authorities in the Supervisory Laws *could* potentially be used by the Commission to disclose confidential information to the European Authorities, the ESRB or the ECB. However, the drafting of the existing provisions is not explicit that this is the case. It is important that the Commission be able to provide information to these bodies because:

- the Commission attends EU supervisory colleges<sup>90</sup> at which it may need to disclose confidential information, but might not be able to do so if a representative of the European Authorities is present;
- many financial services business in the Bailiwick operate in a number of EU Member States and, as a result, circumstances may arise in which the European Authorities or the ECB would have a legitimate interest in confidential information held by the Commission;
- the Commission needs to be able to pass confidential information to ESMA (and potentially the ESRB) to meet – and to demonstrate that the Bailiwick can meet – its international obligations. Particularly the third country requirements in the EU Directive on Alternative Investment Fund Managers and under the new MiFID regime.

11.7.10 Accordingly, to avoid any doubt, it is recommended that each of the Supervisory Laws should include an explicit provision enabling disclosure to the European Authorities, the ESRB, the ECB and any other equivalent organisations.

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<sup>90</sup> Supervisory colleges are coordinating bodies for those supervisory bodies that supervise, in particular, bank and insurance groups that operate in more than one jurisdiction. They may be attended by representatives of various national supervisory authorities, as well as representatives of the European Authorities.

### 11.7.11 Do you agree with these proposals?

## 11.8 Audit requirements

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking
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11.8.1 The audit provisions vary across the Supervisory Laws. This has resulted primarily from the introduction of differing international standards in respect of the relevant areas over time. Some changes are required to meet international standards (see section 3, particularly in relation to the amendments to the Fiduciaries Law and the Banking Supervision Law). Indications are also that the next IMF assessment team will be specifically looking to ensure that there are “*demonstrably independent*” auditors.

11.8.2 It is suggested that the Commission amend the current provisions and implement new provisions, as necessary to provide consistency across the regulatory areas and to ensure that new international standards are met. However, the Commission recognises that absolute consistency is not possible, or desirable, in certain circumstances.

11.8.3 The Commission is considering:

- Ensuring that there are clear and consistent audit requirements for the appointment of auditors, notification, the keeping of and access to accounting records and the preparation, audit and submission of accounts, along the lines of the requirements in the Insurance Business Law and the Insurance Managers and Insurance Intermediaries Law.
- Requiring auditors of licensees to be qualified under the Guernsey Companies Law or the Alderney Companies Law.
- Introducing powers enabling the Commission to remove external auditors in appropriate circumstances (and after following an appropriate procedure). The Commission recognises that this would not be appropriate or desirable in relation to licensed banks where auditors generally conduct group-wide audits.
- Introducing into the Protection of Investors Law, the Fiduciaries Law and the Banking Supervision Law the ability for the Commission to request a meeting with a licensee’s auditors or actuaries (as applicable), along the lines of the provisions already contained in the Insurance Business Law and the Insurance Managers and Insurance Intermediaries Law<sup>91</sup>. As well as achieving consistency of treatment across the sectors, the introduction of these provisions into the Banking Supervision Law would support the implementation of Basel Core Principle 27, Essential Criteria 8<sup>92</sup>.

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<sup>91</sup> Section 83(1) of the Insurance Business Law provides:

“(1) *The Commission may, whenever it thinks fit, and –*  
(a) *with a view to the performance of its functions under this Law and the regulatory Laws, or*  
(b) *if it consider (sic) it desirable to do so for the protection of the interest of the public or the policyholders, potential policyholders or clients of a licensed insurer or the reputation of the Bailiwick as a finance centre, request that a meeting be held, at such time, place and for such purpose as may be mutually agreed, with a licensee’s auditors, actuaries or general representatives, at which the Commission may discuss any aspect of the operation, regulator or licensing of the licensee.”*

The remaining provisions of s83 relate to the procedure for calling, and the conduct of, such a meeting. An equivalent provision is contained in s60 of IMILL.

<sup>92</sup> See paragraphs 3.2.10 to 3.2.11

- Amending the Fiduciaries Law in the following manner:
  - Extending the requirement of auditors to communicate to the Commission any matters that they have reasonable cause to believe is, or likely to be of, material significance for determining whether a person is fit and proper, or whether the Commission should exercise its powers in order to protect customers from a significant loss. An equivalent provision is already contained in each of the other Supervisory Laws<sup>93</sup>.
  - Giving the Commission the power to refuse to allow a licensee to appoint a proposed auditor<sup>94</sup>.
  - Giving the Commission the power to require audited financial statements of parent entities<sup>95</sup>.

11.8.4 **In what circumstances do you think the Commission should have the power to remove an external auditor?**

11.8.5 **If the Commission has the power to remove an external auditor, what safeguards do you think should be in place to ensure the power is exercised in a proportionate way?**

11.8.6 **Do you think the qualification requirements relating to auditors under the Guernsey Companies Law or the Alderney Companies Law are appropriate?**<sup>96</sup>

11.8.7 **Do you foresee any serious issues relating to the Commission implementing clear and consistent audit requirements for the appointment of auditors, notification, the keeping of and access to accounting records and the preparation, audit and submission of accounts, along the lines of the requirements in IBL and IMIIL?**

11.8.8 **Do you foresee any serious concerns regarding a requirement that auditors communicate to the Commission any matters that they have reasonable cause to believe is, or is likely to be of material significance for determining whether a person is fit and proper, or whether the Commission should exercise its powers in order to protect customers from a significant loss?**

11.8.9 **Where this concern may relate to confidentiality issues, would you consider the introduction of protections from civil claims for auditors in relation to information provided to be adequate to address this concern?**

11.8.10 **Do you foresee any other issues with the proposals set out above?**

## 11.9 Retention of information

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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11.9.1 Currently the Commission has under certain Supervisory Laws, the ability to require the retention of documents by a licensee or persons connected with it for a certain period after the entity or

<sup>93</sup> Section 82 IBL; section 59, IMIIL; section 33, BSL (although section 33 does not specifically refer to “fit and proper”).

<sup>94</sup> Needed to ensure compliance with GIFCS Standard Part 3, G-3.7. See paragraph 3.3.10.

<sup>95</sup> Needed to ensure compliance with GIFCS Standard Part 3, C-3.9. See paragraph 3.3.10.

<sup>96</sup> Please refer to section 260 of the Guernsey Companies Law and section 78 of the Alderney Companies Law.

individual ceases to be licensed. In addition, the Handbook and the Proceeds of Crime Regulations requires licensees to retain documents for five years.

- 11.9.2 The Commission proposes that there should a standard requirement across the Supervisory Laws that a licensee, or person connected with a licensee, must retain information and documents for six years after which they cease to be licensed in line with the Commission's general power to require a former licensee to provide information and documents. Further the Commission proposes that it have the ability to extend this period by notice in writing at any time within the six year period.
- 11.9.3 **Do you think that the Commission should be able to require the retention of documents for 6 years after a person ceases to be licensed? If not, why?**
- 11.9.4 **What practical issues (if any) do you consider might be raised by such a requirement?**
- 11.9.5 **Would you be happy for the relevant period to be specified by regulation or rules and the Supervisory Laws contain a power to make regulation or rules in relation to this matter?**

## 12 Miscellaneous and administrative changes

### 12.1 The ability to introduce of codes of conduct in relation to licensees under the Protection of Investors Law

Sectors proposed to be affected: **Investment**

- 12.1.1 The Protection of Investors Law does not currently allow the Commission to issue codes of conduct in relation to persons related to licensees. This was noticeable when preparing for the implementation of GFAS. While the Insurance Managers and Insurance Intermediaries Law provides for codes of conduct to be issued in relation to authorised insurance representatives, there is no similar power under the Protection of Investors Law in relation to persons providing advice. As a result, implementation of a common standard (GFAS) was not able to be achieved by the introduction of a single code that applied across the sectors<sup>97</sup>. This is an inefficient process, and the results are potentially cumbersome.
- 12.1.2 To avoid a similar situation arising in the future, it is proposed to introduce provisions into the Protection of Investors Law allowing the Commission to issue codes of conduct in relation to investment advisers. The introduction of any such codes would follow the same procedures as are currently followed for introduction of a code under any of the other sector laws.
- 12.1.3 **Do you feel that there are any other types of persons connected with persons licensed under the Protection of Investors Law in relation to whom codes of conduct should be able to be issued?**
- 12.1.4 **Do you have any comments on the proposed inclusion of this power?**

### 12.2 Suspension of a licence

Sectors proposed to be affected: **Fiduciaries** **Banking** **Insurance**

- 12.2.1 It has also been suggested that the Commission should have the ability to suspend (rather than revoke) licences on request from the licensee or by the Commission under certain circumstances. This would effectively allow a licence to be held in abeyance and reactivated at a later date, without the need to make a fresh application. This power already exists in the Protection of Investors Law<sup>98</sup>. The Commission cannot see an immediate use for this power, aside from circumstances involving serious illness affecting a licensee, and notes that suspension of a licence may lead to particular issues in relation to reinsurance contracts and professional indemnity insurance.
- 12.2.2 **Do you think there may be circumstances in which it would be helpful for the Commission to be able to suspend licences?**

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<sup>97</sup> It is currently proposed that GFAS will apply to the insurance sector via the introduction of the Insurance Intermediaries (Conduct of Business) Rules, the Insurance Managers (Conduct of Business) Rules (which replace the IMIIL Conduct of Business Rules currently in force) and the Code of Conduct for Financial Advisers and amendment to the Code of Conduct for Authorised Insurance Representatives. The same provisions will apply to the investment sector by the introduction of a new POI Licensees (Conduct of Business) Rules.

<sup>98</sup> Section 6, POI Law.

## 12.3 Application of Fiduciaries Law to enforcer of a trust

Sectors proposed to be affected: **Fiduciaries**

12.3.1 The *Trusts (Guernsey) Law, 2007* introduced the concept of an enforcer of a non-charitable purpose trust. It is proposed that the definition of regulated activities for fiduciaries under the Fiduciaries Law should now be amended to specifically include acting as the enforcer of a trust. The Commission is of the view that acting as an enforcer of a purpose trust already comes within the definition of regulated activities by virtue of constituting acting as a protector for trusts<sup>99</sup>. This amendment would therefore clarify, but not extend, the scope of regulated activities under the fiduciaries regime.

12.3.2 **Do you agree with the proposal?**

## 12.4 Annual reviews by licensed banks

Sectors proposed to be affected: **Banking**

12.4.1 The provisions relating to the requirements for licensed banks to carry out annual reviews are currently contained in section 36C of the Banking Supervision Law. The Commission considers that these requirements lack the appropriate level of flexibility in setting out the specific content of the review and impose an obligation on the licensees to provide the Commission with information that is no longer required on a blanket basis under the risk and impact based approach to supervision that the Commission has adopted.

12.4.2 It is therefore proposed that section 36C be replaced with an obligation to undertake an annual review in a form prescribed by rules made by the Commission, and provide confirmation to the Commission that the review has been completed. It would no longer be necessary for each licensee to provide the Commission with a copy of the annual review, although the Commission would retain the power to seek evidence of performance of the review upon request.

12.4.3 The Commission suggests that the relevant rules would, in the first instance, provide for an annual review to be carried out in the same manner as is currently required. Changes to the rules in the future would only be able to be made following proper consultation with industry. Proposed wording for an amended section 36C is attached as Appendix F to this paper.

12.4.4 **Do you support the changes proposed to section 36C of the Banking Supervision Law?**

## 12.5 General rule making power around all applications

Sectors proposed to be affected: **Fiduciaries** **Investment** **Banking** **Insurance**

12.5.1 The Commission does not currently have the power to make rules in relation to all types of licence, authorisation or registration applications. It would be valuable and beneficial for applicants if the Commission had the power to issue rules relating to the application process. Accordingly, it is proposed that the Supervisory Laws be amended to include this power.

12.5.2 **Do you agree with the proposal?**

<sup>99</sup> Section 2(1)(a)(i), Fiduciaries Law.

## 12.6 Dissolution etc. of entities other than companies

Sectors proposed to be affected: 

Fiduciaries	Investment	Banking	Insurance
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12.6.1 The Commission proposes that the provisions relating to the winding up of companies in each of the sector laws should be extended to encompass the dissolution or winding down, etc. of entities other than companies (for example foundations, partnerships and limited partnerships (whether with or without legal personality)).

12.6.2 **Do you agree with the proposal?**

## 12.7 Information relating to money laundering and financing of terrorism

12.7.1 The Commission currently obtains statistical information relating to financial crime issues in an ad-hoc manner. Information relating to this topic is extremely important to enable the Commission to fulfil its supervisory duties. The Commission proposes to include additional questions relating to financial crime issues in each of the sector annual returns.

12.7.2 **What are your views in relation to this proposal?**

## Appendix A: Form of discussion paper response

### Revision of Laws Discussion Paper Response

To be returned to [revisionoflaws@gfsc.gg](mailto:revisionoflaws@gfsc.gg) by no later than 5pm on 19 December 2014.

Date:

Respondent Name:

Organisation:

Contact Details:

Paragraph number(s) to which the comment relates	Comment

## Appendix B: Complete list of discussion questions

PARAGRAPH	QUESTION	SECTORS PROPOSED TO BE AFFECTED
3.2.9	Do you foresee any problems arising as a result of the provisions of paragraph 6B of Schedule 3 being moved to the body of the Banking Supervision Law?	Banking
3.2.11	Do you have any comments on the practice or the principle of applying a common sectorial approach to bilateral meetings with auditors?	Banking
3.3.7	Do you agree with a change to the legal status of joint licensees?	Fiduciaries
3.4.5	Do you agree that enabling provisions should be included in the Protection of Investors Law as described?	Investment
4.2.8	What proportion of your current business do you think could be considered to fall under the EU definition of investment services?	Fiduciaries, Investment, Banking, Insurance
4.3.5	How feasible is the formation of branches in EU jurisdictions? Where in the EU would these be?	Fiduciaries, Investment, Banking, Insurance
4.3.6	What are your views on the requirement for a firm to belong to an EU equivalent investor compensation scheme?	Fiduciaries, Investment, Banking, Insurance
4.4.3	What impact (if any) do you think that the imposition of EU levels of capital adequacy could have on businesses in the Bailiwick?	Fiduciaries, Investment, Banking, Insurance
4.4.6	The main areas of direct relevance in the Regulation's proposed rules are in the following three areas: <ul style="list-style-type: none"> <li>• requirements applicable to shareholders and members of management bodies;</li> <li>• organisational requirement in the area of internal control functions; and</li> </ul>	Fiduciaries, Investment, Banking, Insurance

	<ul style="list-style-type: none"> <li>conduct of business rules.</li> </ul> <p>What issues could you foresee in requirements making the Bailiwick's approach in these areas equivalent to the EU?</p>	
4.4.11	How much of your current business directly or indirectly originates from the EU (including the UK)?	Fiduciaries, Investment, Banking, Insurance
4.4.12	How contingent are business development plans on direct or indirect business from the EU (including the UK)?	Fiduciaries, Investment, Banking, Insurance
4.4.14	Can you identify market opportunities from the provision of MIFIR compliant services from the Bailiwick or from the provision of non-MIFIR compliant services to the rest of the world?	Fiduciaries, Investment, Banking, Insurance
5.2.5	Do you have any comments in relation to the above proposals?	Fiduciaries, Investment, Banking, Insurance
5.2.6	Do you have any view on who should be responsible for notification to the Commission that a relevant person has become or ceased to be a director, shareholder controller, significant shareholder, etc. of a licensee?	Fiduciaries, Investment, Banking, Insurance
5.2.9	Do you foresee any commercial issues arising out of the approval of persons related to investment funds?	Investment
5.2.12	Do you have any concerns regarding the above proposal?	Investment
5.3.3	Do you agree that the ability to deem an application to have been withdrawn should be introduced?	Fiduciaries, Investment, Banking, Insurance
5.4.5	Do you support the introduction of substantially standardised/consistent minimum criteria for licensing across all sectors?	Fiduciaries, Investment, Banking, Insurance
5.4.6	Do you think there are any minimum criteria for licensing that should apply to one or more, but not all, sectors? If so, what criteria and to what sector(s)?	Fiduciaries, Investment, Banking, Insurance
5.4.8	Do you consider that the introduction of minimum criteria for registration or authorisation of investment funds would pose a risk or a benefit to the Bailiwick's status as an international finance centre? If so, in what way(s)?	Fiduciaries, Investment, Banking, Insurance
5.5.3	Can you identify a good reason why the investment and banking regimes should have different powers and liabilities relating to receivers than in the insurance and fiduciary regimes?	Investment, Banking

5.6.4	Do you agree with the principle that the need to apply for discretionary exemptions in the private equity context should be removed?	Fiduciaries, Investment
5.6.5	Do you believe that a common ownership test would be sufficiently wide to capture all such structures?	Fiduciaries, Investment
5.6.6	How would you define common ownership?	Fiduciaries, Investment
5.7.4	Do you think the current exemptions regime works? What problems, if any, have you encountered?	Fiduciaries
5.7.5	Do you think the regime would benefit from the development of additional statutory exemptions within the law to cover the most common activities that currently require a discretionary exemption?	Fiduciaries
5.7.6	What specific changes, if any, do you suggest should be made to the current list of statutory exemptions?	Fiduciaries
5.7.7	Do you think the regime would benefit from a development in the Protection of Investors Law that enables the Investment Division to supervise related entities that are closely associated or adjunct to an investment fund already supervised under the Protection of Investors Law?	Fiduciaries
5.8.5	Do you think there are any circumstances in which substitution of the term designated administrator for what is currently the designated manager could cause confusion or potentially mislead investors?	Investment
5.8.8	Would you agree with this amendment?	Banking
5.8.10	Is the guidance clear enough and, if not, what changes do you suggest?	Fiduciaries, Investment, Banking, Insurance
5.8.11	Do you think the guidance should be added to the definitions in the Supervisory Laws, or remain as guidance?	Fiduciaries, Investment, Banking, Insurance
5.8.13	Would you find it useful to have a standardised definition of “by way of business” that applied across all the Supervisory Laws? If so, what do you suggest it should be?	Fiduciaries, Investment, Banking, Insurance
5.8.15	Do you think it would be useful to have a standardised definition of a sophisticated investor? If so, what do you suggest it should be?	Fiduciaries, Investment, Banking, Insurance
5.8.16	Should a term other than “sophisticated” be used? If so, what?	Fiduciaries, Investment, Banking, Insurance

5.8.17	Are there any other definitions that you would find it helpful to have in your sector law, or applied across all the Supervisory Laws? If so, what are they?	Fiduciaries, Investment, Banking, Insurance
6.2.4	Where do you see the balance between these two points of view?	Fiduciaries, Investment, Banking, Insurance
6.2.5	Can the aim of “future-proofing” the finance sector’s continued development and success be met without introducing bespoke regulatory regimes for specific products?	Fiduciaries, Investment, Banking, Insurance
6.2.6	What are the commercial drivers that would generically support introduction of separate rules or regulations for a specific product?	Fiduciaries, Investment, Banking, Insurance
6.2.7	What (if any) financial services products do you think could benefit from the clarity of a bespoke regulatory framework?	Fiduciaries, Investment, Banking, Insurance
6.2.8	What (if any) changes would you like to see made to the Supervisory Laws that you consider would “future-proof” them?	Fiduciaries, Investment, Banking, Insurance
6.3.2	Do you think there is a need for a separate ILS framework? If so, why?	Insurance
6.3.3	If there is a need for a separate ILS framework, does it require revision of the Supervisory Laws, or would a set of rules or regulations suffice?	Insurance
6.3.5	What are the advantages and disadvantages of using an SPV regime to conduct ILS business?	Insurance
6.3.6	Do you think the Bailiwick would benefit from the introduction of other types of ILS offering?	Insurance
6.3.7	If so, what changes do you think are necessary to the Bailiwick’s regulatory regime?	Insurance
6.4.4	Are there any matters which you would like to see covered in the guidance issued by the Commission in relation to PTCs?	Fiduciaries
6.4.7	Are you in favour of the creation of a specific exemption for PTCs? Do you foresee any issues arising with the use of this exemption?	Fiduciaries

6.5.6	Do you think that introducing the ability for the Commission to make a declaration that a given arrangement is not a collective investment scheme would be of assistance to the industry?	Fiduciaries
6.5.7	If so do you think a declaration should have a validity of three or five years?	Fiduciaries
6.5.8	What information do you think it would be reasonable for the Commission to be able to require from recipients of a declaration?	Fiduciaries
6.6.4	Do you agree that removal of the requirement to state the name of the designated trustee or custodian on the authorisation or registration of an investment fund would not prejudice the interests of investors?	Investment
6.6.5	Do you think there could be any risk to the reputation of the Bailiwick if it offered an open-ended investment fund in which custodial facilities did not have to be carried out in the Bailiwick?	Investment
6.7.7	What would you consider to be the key elements of a workable, safe and attractive personal fiduciary licence regime?	Fiduciaries
6.8.2	Do you think the Commission should have the power to extend by regulation the designations that can be applied to investment funds?	Investment
6.8.3	Do you think that the Bailiwick should currently be considering extending the scope of investment fund designations beyond authorised and registered? If so, in what way?	Investment
6.10.2	Should there be broader regulation of pensions?	Fiduciaries, Investment, Insurance
6.10.3	Could pension regulation be brought within one of the existing regulatory laws?	Fiduciaries, Investment, Insurance
6.10.4	What should be the nature of pensions regulations?	Fiduciaries, Investment, Insurance
6.11.2	To what extent might such a mechanism help address the issue of “pigeon-holing” referred to in paragraph 6.2.2?	Fiduciaries, Investment, Banking, Insurance
6.11.3	Do you think that extending a power of mutual recognition similar to that in the Protection of Investors Law to the	Fiduciaries, Investment,

	other Supervisory Laws would be beneficial?	Banking, Insurance
6.12.4	Do you agree that removal of the requirement to state the name of the designated administrator (manager) on the authorisation or registration of an investment fund would not prejudice the interests of investors?	Investment
6.12.5	Do you support the changes suggested in this section?	Investment
6.13.3	Do you agree with this proposal?	Investment
7.1.4	Do you agree with the above proposals?	Fiduciaries, Investment, Banking
7.2.2	Do you think that the interests of investors will be better protected if the Commission has the power to make prohibition orders against directors of investment funds? Why?	Investment
7.2.3	Do you think that the Commission should have the power to make prohibition orders against the directors of investment funds? Why?	Investment
7.2.4	Do you consider that the possibility of prohibition orders being made against individuals in relation to restricted activities in connection with investment funds could pose a risk to the Bailiwick's status as an international finance centre? If so, in what way?	Investment
7.3.2	Should this protection be extended to the Supervisory Laws?	Fiduciaries, Investment, Banking, Insurance
7.3.3	Should the personal liability only be granted by court order?	Fiduciaries, Investment, Banking, Insurance
7.4.4	Do you think that the current lack of statutory provisions deters potential whistle-blowers from acting?	Fiduciaries, Investment, Banking, Insurance
7.4.5	Do you agree that statutory provisions should be introduced to provide protection for whistle blowers, and provisions for what the Commission can do with information received from whistle-blowers?	Fiduciaries, Investment, Banking, Insurance
7.5.4	What are your views on extending court ordered restitution to breaches of the other Supervisory Laws, or any direction, regulation or rule made thereunder? Do you think that this would improve the international reputation of the Bailiwick?	Fiduciaries, Banking, Insurance

7.6.3	Do you think there is any basis for differentiating the protection available to consumers in the event of fraudulent conduct based on the type of regulated activity being carried out?	Fiduciaries, Investment, Banking, Insurance
7.6.4	Do you agree that the protection to consumers currently contained in the Insurance Business Law should be extended across all the Supervisory Laws?	Fiduciaries, Investment, Banking, Insurance
7.7.4	To what extent should the Commission have powers to seek information from unlicensed parties in respect of suspected market abuse? What safeguards do you think would be appropriate?	Investment
7.7.7	What forms of market abuse do you believe have the most potential to damage the Bailiwick's reputation as a well-regulated international finance centre?	Investment
7.8.3	Do you have any comments in relation to the above proposal?	Fiduciaries, Investment, Banking, Insurance
7.9.3	What is your view of the proposal to provide the restricted descriptions and names in regulation rather than within the Supervisory Laws? Do you have any comments in relation to the list set out above?	Fiduciaries, Investment, Banking, Insurance
7.9.6	Do you have any views in relation to this proposal?	Fiduciaries, Investment, Banking, Insurance
7.9.8	Do you have any views in relation to this proposal?	Fiduciaries, Investment, Banking, Insurance
7.10.6	Does the inclusion of this requirement in the Insurance Business Law (as compared to as a condition) give rise to any concerns?	Banking, Insurance
9.2.6	Do you agree with the proposals in section 9.2.5?	Fiduciaries, Investment, Banking, Insurance
9.2.7	Do you think it would be acceptable that conditions and directions apply to licensees, investment funds and relevant officers?	Fiduciaries, Investment, Banking, Insurance
9.3.5	Do you foresee any significant difficulties with introducing "skilled persons" reports in relation to supervisory matters and retaining an inspector regime in relation to matters which are enforcement related?	Fiduciaries, Investment, Banking, Insurance
9.3.6	What is your view on having the costs of a skilled person's report borne by the relevant licensee?	Fiduciaries, Investment, Banking, Insurance

9.3.7	Do you have any other comments in relation to the above proposals?	Fiduciaries, Investment, Banking, Insurance
10.3.3	Do you consider there are reasonable grounds for continuing to have a more limited power of compulsory interview in respect of the banking, fiduciary or insurance sectors?	Fiduciaries, Investment, Banking, Insurance
10.4.4	Do you foresee any other circumstances in which the Commission should consider the revocation or variation of a prohibition order?	Fiduciaries, Investment, Banking, Insurance
10.6.4	Do you think the Commission should have the ability to enter into enforceable undertakings?	Fiduciaries, Investment, Banking, Insurance
10.6.5	Who do you think should be able to enter into an enforceable undertaking with the Commission?	Fiduciaries, Investment, Banking, Insurance
10.7.2	Do you think the Commission should expand the ability to issue private reprimands for those under Supervisory Laws?	Fiduciaries, Investment, Banking, Insurance
10.8.3	Do you think the Commission should have the ability to impose enforcement requirements?	Fiduciaries, Investment, Banking, Insurance
10.9.3	Are there any sanctions to which you feel the “minded to” notice and the accompanying provisions should not apply?	Fiduciaries, Investment, Banking, Insurance
10.9.9	Do you agree that the standard representation period could be extended or reduced in certain circumstances?	Fiduciaries, Investment, Banking, Insurance
10.9.10	Are there any decisions in respect of which you feel the representation period should not be able to be reduced or the procedure dispensed with? If so what is your view on how risks should be dealt with in the representation period?	Fiduciaries, Investment, Banking, Insurance
10.10.3	Can you see any reason for not extending the power to obtain a warrant to activities covered by the Protection of Investors Law?	Investment
10.11.4	Do you consider that the proposed standardisation of the injunctive powers could cause significant difficulties or detriment?	Fiduciaries, Investment, Banking, Insurance
10.12.8	Do you agree that the Commission should be able to publish statements in respect of persons who are not licensed, authorised or registered?	Fiduciaries, Investment, Banking, Insurance
11.2.6	Do you see any reason why the Commission should have more restricted information powers in respect of banking	Fiduciaries, Investment, Banking, Insurance

	licensees than licensees under any other sector?	
11.3.2	Do you have any objection to, or comments on, the proposals set out above?	Fiduciaries, Investment, Banking, Insurance
11.3.5	Do you disagree with having consistent powers to obtain documents and/or information from “relevant persons” across the Supervisory Laws?	Fiduciaries, Investment, Banking, Insurance
11.3.6	Do you agree that the types of persons to whom this power would apply should be consistent?	Fiduciaries, Investment, Banking, Insurance
11.3.7	Do you think that there are additional persons who should be included as a “relevant person”?	Fiduciaries, Investment, Banking, Insurance
11.4.2	What is your view on this proposal?	Investment
11.5.8	Can you see a reason why the Commission should not have power to obtain information from unsupervised group entities and special purpose vehicles where the Commission reasonably considers the information to be necessary for the performance of its functions?	Fiduciaries, Investment, Banking, Insurance
11.6.3	Do you see a reason why the Commission should not have a power to obtain information from unsupervised entities suspected of undertaking regulated activities?	Fiduciaries, Investment
11.6.5	Do you agree with these proposals?	Fiduciaries, Investment
11.6.7	Do you agree with this proposal?	Fiduciaries
11.7.3	Do you agree with these proposals?	Fiduciaries, Investment, Banking, Insurance
11.7.6	Do you agree with these proposals?	Fiduciaries, Investment, Banking, Insurance
11.7.11	Do you agree with these proposals?	Fiduciaries, Investment, Banking, Insurance
11.8.4	In what circumstances do you think the Commission should have the power to remove an external auditor?	Fiduciaries, Investment, Banking
11.8.5	If the Commission has the power to remove an external auditor, what safeguards do you think should be in place to	Fiduciaries, Investment, Banking

	ensure the power is exercised in a proportionate way?	
11.8.6	Do you think the qualification requirements relating to auditors under the Guernsey Companies Law or the Alderney Companies Law are appropriate?	Fiduciaries, Investment, Banking
11.8.7	Do you foresee any serious issues relating to the Commission implementing clear and consistent audit requirements for the appointment of auditors, notification, the keeping of and access to accounting records and the preparation, audit and submission of accounts, along the lines of the requirements in IBL and IMIIL?	Fiduciaries, Investment, Banking
11.8.8	Do you foresee any serious concerns regarding a requirement that auditors communicate to the Commission any matters that they have reasonable cause to believe is, or is likely to be of material significance for determining whether a person is fit and proper, or whether the Commission should exercise its powers in order to protect customers from a significant loss?	Fiduciaries, Investment, Banking
11.8.9	Where this concern may relate to confidentiality issues, would you consider the introduction of protections from civil claims for auditors in relation to information provided to be adequate to address this concern?	Fiduciaries, Investment, Banking
11.8.10	Do you foresee any other issues with the proposals set out above?	Fiduciaries, Investment, Banking
11.9.3	Do you think that the Commission should be able to require the retention of documents for 6 years after a person ceases to be licensed? If not, why?	Fiduciaries, Investment, Banking, Insurance
11.9.4	What practical issues (if any) do you consider might be raised by such a requirement?	Fiduciaries, Investment, Banking, Insurance
11.9.5	Would you be happy for the relevant period to be specified by regulation or rules and the Supervisory Laws contain a power to make regulation or rules in relation to this matter?	Fiduciaries, Investment, Banking, Insurance
12.1.3	Do you feel that there are any other types of persons connected with persons licensed under the Protection of Investors Law in relation to whom codes of conduct should be able to be issued?	Investment

12.1.4	Do you have any comments on the proposed inclusion of this power?	Investment
12.2.2	Do you think there may be circumstances in which it would be helpful for the Commission to be able to suspend licences?	Fiduciaries, Banking, Insurance
12.3.2	Do you agree with the proposal?	Fiduciaries
12.4.4	Do you support the changes proposed to section 36C of the Banking Supervision Law?	Banking
12.5.2	Do you agree with the proposal?	Fiduciaries, Investment, Banking, Insurance
12.6.2	Do you agree with the proposal?	Fiduciaries, Investment, Banking, Insurance
12.7.2	What are your views in relation to this proposal?	Fiduciaries, Investment, Banking, Insurance

## Appendix C: International standards gap analysis

### I. Banking: issues arising in the international standards that require amendment of the Banking Supervision Law

#### *BCP 3, EC 5*

See paragraph 3.2.42 above.

BASEL Core Principles, Essential Criteria ("EC")	Current position	Recommendation / Proposed Action
<p>Principle 3, EC 5</p> <p>Processes are in place for the supervisor to support resolution authorities (eg central banks and finance ministries as appropriate) to undertake recovery and resolution planning and actions.</p>	<p>The Commission does not have processes in place to support resolution authorities to undertake recovery and resolution planning and actions</p>	<p>Amend the Banking Supervision Law to enable the Commission to disclose confidential information to domestic and foreign resolution authorities or third parties acting on their behalf to undertake resolution and for the purpose of resolution planning and actions.</p>

#### *BCP 6, EC 3*

See paragraph 3.2.4 above.

BASEL Core Principles, Essential Criteria ("EC")	Current position	Recommendation / Proposed Action
<p>Principle 6, EC 3</p> <p>The supervisor has the power to reject any proposal for a change in significant ownership, including beneficial ownership, or controlling interest, or prevent the exercise of voting rights in respect of such investments to ensure</p>	<p>The Commission does not have the power to reject, modify or reverse the change in significant shareholder where approval based on false information.</p> <p>Current Assessment – Partially</p>	<p>Amended to the Banking Supervision Law to provide the Commission with the power to object or provide confirmation of no objection prior to the appointment of a significant shareholder and to object to an existing significant shareholder and associated powers in the same manner as it</p>

BASEL Core Principles, Essential Criteria ("EC")	Current position	Recommendation / Proposed Action
that any change in significant ownership meets criteria comparable to those used for licensing banks. If the supervisor determines that the change in significant ownership was based on false information, the supervisor has the power to reject, modify or reverse the change in significant ownership.	Implemented	currently does for controllers.

**BCP 20, EC 1 and EC 2**

See paragraph 3.2.6 above.

BASEL Core Principles, Essential Criteria ("EC")	Current position	Recommendation / Proposed Action
<p>Principle 20, EC 1</p> <p>Laws or regulations provide, or the supervisor has the power to prescribe, a comprehensive definition of "related parties". This considers the parties identified in the footnote to the Principle. The supervisor may exercise discretion in applying this definition on a case by case basis.</p>	<p>Definition of related company in section 25(6) of the Banking Supervision Law does not include group companies. Definition of "associate" does not include directors, senior management and key staff.</p> <p>The Commission does not have discretion in applying the definition of related party on a case by case basis. Previous discretion relating to Large Exposure reporting has been removed with incomplete amendment to Principle 1/1994/24 Annex 1 paragraph 17.</p>	<p>Amended the Banking Supervision Law to ensure that the Commission complies with the requirements of Principle 20. In particular the definitions of related parties and associate will need to be amended.</p> <p>The lack of discretion in applying the definition of related party is addressed by a revised Large Exposure policy which has been published and will come into effect on 1 July 2014.</p>

BASEL Core Principles, Essential Criteria ("EC")	Current position	Recommendation / Proposed Action
<p>Principle 20, EC 2</p> <p>Laws, regulations or the supervisor require that transactions with related parties are not undertaken on more favourable terms (e.g. in credit assessment, tenor, interest rates, fees, amortisation schedules, requirement for collateral) than corresponding transactions with non-related counterparties.</p>	<p>Requirement that transactions with related parties are not undertaken on more favourable terms is limited to a narrow definition of related party.</p>	<p>Refer to Principle 20, EC 1.</p>

***BCP 27, EC 8***

See paragraph 3.2.10 above.

BASEL Core Principles, Essential Criteria ("EC")	Current position	Recommendation / Proposed Action
<p>Principle 27, EC 8</p> <p>The supervisor meets periodically with external audit firms to discuss issues of common interest relating to bank operations.</p>	<p>Regular meetings with external auditors are not held.</p>	<p>Amend the Banking Supervision Law to permit bi-lateral meetings with external auditors.</p>

## II. Fiduciary: issues arising in the international standards that require amendment of the Fiduciaries Law

### *TCSP Standard Part 3, B-4*

See paragraphs 3.3.4 to 3.3.6.

TCSP Standards	Current position	Recommendation / Proposed Action
GIFCS Standard Part 3, B – 4 Regulators shall not permit a corporate director to be on the board of a TCSP	There is no provision in the Fiduciaries Law restricting this.	Amend the Fiduciaries Law to restrict the appointment of corporate directors.

### *TCSP Standard Part 3, C-5.1*

See paragraph 3.3.8.

TCSP Standards	Current position	Recommendation / Proposed Action
GIFCS Standard Part 3, C - 5.1 The regulator should assess whether controllers of TCSPs have any existing or potential conflicts of interest and should any conflicts exist, the regulator should ensure that these are addressed appropriately.	In determining whether a person is fit and proper to be a controller the Commission would have regard to whether the interests of clients of the licensee are, or are likely to be, in any way threatened by his holding that position.  However, there is no power for the Commission to specifically consider the existing or potential conflicts of controllers.	Amend the Fiduciaries Law to require that the Commission give consideration to whether a controller has any existing or potential conflicts of interest in determining whether a controller is fit and proper.

***TCSP Standard Part 3, D-1.1 and 1.2***

See paragraph 3.3.8.

TCSP Standards	Current position	Recommendation / Proposed Action
<p>GIFCS Standard Part 3, D – 1.1</p> <p>The Regulator should assess the fit and proper standards and be required to give prior approval for the appointment of a Key Person. The Regulator should require that all Key Persons of a TCSP are fit and proper for their roles on an ongoing basis.</p>	<p>The Commission does not undertake a process of approval of persons to Key Person roles prior to their appointment.</p>	<p>Amend the Fiduciaries Law to provide for prior notification of the appointment of a Key Person and require the Commission to approve such an appointment.</p>

TCSP Standards	Current position	Recommendation / Proposed Action
<p>GIFCS Standard Part 3, D – 1.2</p> <p>The regulator should have the power to refuse approval to and remove a person from a Key Person role.</p>	<p>The Commission does not have the power under the Fiduciaries Law to refuse approval to, or remove a person from a Key Person role.</p>	<p>Amend the Fiduciaries Law to provide for prior notification of the appointment of a Key Person and allow the Commission to refuse such an appointment. Further that the Fiduciaries Law be amended to allow the Commission to remove a person from a Key Person position.</p>

***TCSP Standard Part 3, G-3.7, 3.8 and 3.9***

See paragraph 3.3.10.

TCSP Standards	Current position	Recommendation / Proposed Action
<p>GIFCS Standard Part 3, G – 3.7</p>	<p>The Commission does not currently have</p>	<p>Amend the Fiduciaries Law to provide for prior</p>

<p>The regulator should be empowered to refuse a proposed auditor and to remove auditors.</p>	<p>the power to refuse a proposed auditor or remove an auditor.</p>	<p>notification of the appointment of an auditor and allow the Commission to refuse such an appointment. Further that the Fiduciaries Law be amended to allow the Commission to remove an auditor from its position in relation to a licensee.</p>
<p>GIFCS Standard Part 3, G – 3.8</p> <p>The regulatory framework should include provisions for gateways between the regulator and the auditor. These should include an obligation for the auditor to report to the regulator on significant breaches of regulatory requirements by the TCSP, and protection from civil liability for an auditor in respect of any such information supplied to the Regulator.</p>	<p>There is currently a gateway between the Commission and auditors of licensees. However, there is no specific requirement contained in the Fiduciaries Law which requires that the auditor of a licensee to report significant breaches of regulatory requirements to the Commission.</p>	<p>Amend the Fiduciaries Law to require the auditor of a licensee to report significant breaches of regulatory requirements to the Commission.</p>
<p>GIFCS Standard Part 3, G – 3.9</p> <p>The regulatory framework should enable the regulator to require copies of financial records, including audited financial statements of parent and ultimate parent entities, particularly where the TCSP is dependent on support from its parent or group, or otherwise has significant financial exposure to the parent or group.</p>	<p>Currently the Commission is unable to require the provision of copies of financial records, including audited financial statements of parent and ultimate parent entities of TCSPs.</p>	<p>Amend the Fiduciaries Law to allow the Commission to require copies of the audited financial statements of parent entities.</p>

### III. Investment: issues arising in the international standards that require amendment of the Protection of Investors Law

#### *IOSCO Principle 22*

See paragraph 3.4.3 above.

IOSCO Principles	Current position	Recommendation / Proposed Action
<p>Principle 22</p> <p>Credit rating agencies should be subject to adequate levels of oversight. The regulatory system should ensure that credit rating agencies whose ratings are used for regulatory purposes are subject to registration and ongoing supervision</p>	<p>The Commission does not:</p> <ol style="list-style-type: none"> <li>1. have a definition of “credit rating” and/or “credit rating agency” or otherwise define a scope of activities for the purpose of imposing registration and supervision requirements on entities that engage in the business of determining and issuing credit ratings that are used for regulatory purposes;</li> <li>2. require the registration of any credit rating agency that establishes business in the jurisdiction;</li> <li>3. regulate credit rating agencies;</li> <li>4. undertake enforcement activities in relation to credit rating agencies;</li> <li>5. have the power to impose sanctions on credit rating agencies.</li> </ol> <p>There are no credit rating agencies located in the Bailiwick at present. Ratings from external credit rating</p>	<p>Amend the Protection of Investors Law to enable the extension by Ordinance of supervision and regulation to credit rating agencies.</p>

IOSCO Principles	Current position	Recommendation / Proposed Action
	<p>agencies are not used by the Commission for regulatory purposes, so the requirements of Principle 22 are not currently applicable to the Commission.</p> <p>However, should a potential credit rating agency look to establish in the Bailiwick the assessment would be Not Implemented.</p>	

## **Appendix D: Standard minimum criteria for registration or authorisation of investment funds suggested at appendix 2 of the consolidation consultation**

### **FIT AND PROPER APPLICANTS AND SCHEMES**

#### **Applicant or scheme to be fit and proper to hold an authorisation or registration.**

1. (1) An authorised or registered collective investment scheme or an applicant for a declaration that a scheme is an authorised or registered collective investment scheme is fit and proper to hold or to be the subject of such an authorisation or registration.

(2) In determining whether the applicant or scheme is fit and proper to hold or to be the subject of an authorisation or registration, regard shall be had to whether –

- (a) the interests of investors (or potential investors) in the scheme are, or are likely to be, in any way prejudiced by the applicant or scheme (as the case may be) holding or being the subject of an authorisation or registration;
- (b) the reputation of the Bailiwick as a finance centre is, or is likely to be, in any way prejudiced by the applicant or scheme (as the case may be) holding or being the subject of an authorisation or registration; and
- (c) every person who is, or is to be, a director, partner (for a limited partnership, the general partner only), manager, managing director, chief executive or trustee (in the case of a unit trust scheme) of an authorised or registered collective investment scheme, or of an applicant for a declaration that a scheme is an authorised or registered collective investment scheme, is a fit and proper person to hold that position in accordance with paragraph 5 below,

and in determining that question, regard shall also be had to –

- (i) paragraphs 16.2 to 16.4; and
- (ii) whether any requirement or provision of, or criterion specified in, those paragraphs is not, has not been or will or may not be or continue to be fulfilled by or in relation to the applicant or scheme.

#### **Compliance with applicable law.**

2. In determining whether the applicant or scheme is fit and proper to hold or to be the subject of an authorisation or registration, regard shall be had to the policies, procedures and controls in respect of the applicant or scheme for complying with, as well as to the effectiveness of compliance with, and the record of compliance with, any applicable provision of or under -

- (a) this Law;
- (b) the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991;

- (c) the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999;
- (d) the Drug Trafficking (Bailiwick of Guernsey) Law, 2000;
- (e) the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002;
- (f) the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003;
- (g) the Disclosure (Bailiwick of Guernsey) Law, 2007;
- (h) the Transfer of Funds (Guernsey) Ordinance, 2007, the Transfer of Funds (Alderney) Ordinance, 2007 and the Transfer of Funds (Sark) Ordinance, 2007;
- (i) the Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007;
- (j) any legislation implementing European Community or United Nations sanctions and applicable in the Bailiwick;
- (k) the Companies (Alderney) Law, 1994, the Limited Partnerships (Guernsey) Law, 1995, the Partnership (Guernsey) Law, 1995, the Trusts (Guernsey) Law, 2007, the Companies (Guernsey) Law, 2008, the Foundations (Guernsey) Law, 2012 and the Limited Liability Partnerships (Guernsey) Law, 2013;
- (l) any regulations, instructions, rules, principles, codes, standards and guidance issued under any of the above;
- (m) any legislation relating to money laundering, terrorist financing, bribery, corruption or other financial crime of the Bailiwick or of any other jurisdiction as may be applicable to it (including for the avoidance of doubt, any regulations, instructions, rules, principles, codes, standards and guidance issued by the Commission, or any relevant supervisory authority in a jurisdiction outside the Bailiwick, in relation thereto);
- (n) any legislation relating to the regulation or supervision of the applicant or scheme of the Bailiwick or of any other jurisdiction (including, for the avoidance of doubt, any regulations, instructions, rules, codes, principles, standards and guidance issued by the Commission, or any relevant supervisory authority in a jurisdiction outside the Bailiwick, in relation thereto);
- (o) any legislation of the Bailiwick or of any other jurisdiction appearing to the Commission to be designed for protecting members of the public or investors against financial loss due to –
  - (i) dishonesty, incompetence or malpractice by persons concerned in the provision of regulated activities or other financial services;
  - (ii) the conduct of discharged or undischarged bankrupts or persons who are otherwise insolvent (including persons who have been declared in a state of "désastre" or against whom an interim vesting order has been made in respect of any of their real property in the Bailiwick);

- (p) any other legislation of the Bailiwick or of any other jurisdiction prescribed for the purposes hereof by regulation of the Commission; or
- (q) such other legislation or law of any other description of the Bailiwick or of any other jurisdiction as the Commission may reasonably consider relevant in determining whether the applicant or scheme is fit and proper to hold or to be the subject of an authorisation or registration;

and in carrying on its operations and activities the applicant or scheme shall at all times act in accordance with the applicable provisions referenced in this paragraph.

**Operations and activities to be conducted in prudent manner and with integrity, diligence and skill.**

3. (1) The operations and activities of the scheme following its authorisation or registration are or will be carried on by a director, partner (for a limited partnership, the general partner only), manager, managing director, chief executive or trustee (in the case of a unit trust) of that scheme –

- (a) with prudence, probity, integrity and diligence;
- (b) with professional skill appropriate to the nature, scale and complexity of the scheme’s activities and the associated risks thereof;
- (c) in observance of proper standards of conduct, including but not limited to market conduct;
- (d) with due regard to the interests of the scheme’s investors (or potential investors) and treating them fairly and reasonably;
- (e) with due regard to the interests of any person to whom the scheme owes, or in the case of an applicant will owe, a duty at law in connection with carrying on the operations and activities regulated by this law; and
- (f) in a manner which will not tend to bring the Bailiwick into disrepute as a finance centre.

(2) The applicant or scheme or person mentioned in subparagraph (1) does not or, in the case of a person who is not yet carrying the operations or activities of the scheme, will not engage in unsafe or unsound practices or actions that have the potential to jeopardise the scheme, its investors or potential investors or the financial system or any part thereof.

**Corporate governance, risk management and internal controls.**

4. (1) The operations and activities of a scheme following its authorisation or registration is, or will be, carried on taking into account the nature, scale and complexity of the scheme’s activities and the associated risks thereof-

- (a) with an effective system of corporate governance, risk management and internal controls in relation to the activities of the scheme and other relevant matters including but not limited to –
  - (i) the maintenance of a properly controlled operating environment for the conduct of the scheme; and

- (ii) the identification, prevention, investigation and detection of criminal activities
- (b) in such a manner as to ensure that permanent and adequate risk management and compliance functions are conducted in the Bailiwick on behalf of the fund to identify, measure, evaluate and manage the risks and ensure legal and supervisory compliance of the operations and activities of the scheme conducted from or within the Bailiwick;
- (c) with due regard to the information needs of its investors and potential investors including the need to communicate information to them in a way that is clear, fair and not misleading;
- (d) with adequate record keeping in relation to accounting and other records of the scheme and adequate systems of control of the scheme and records;
- (e) with persons employed or engaged of adequate number, skills, knowledge and experience to undertake and fulfil their duties effectively, and with a sufficient number of persons employed or engaged in the Bailiwick to conduct all essential functions effectively, including without limitation corporate governance, risk management, internal control functions and record keeping, and for the purposes of this item the reference to “persons employed or engaged” includes a reference to –
  - (i) members of the Board and senior management; and
  - (ii) any person working for or engaged by the applicant or scheme, whether on a permanent or temporary basis and whether under a contract of employment, a contract for services or otherwise.
- (2) For the purposes of subparagraph (1) –
  - (a) systems, controls, records and provision in respect of staff and persons employed or engaged shall not be regarded as effective or adequate unless they are such as to enable –
    - (i) the operations and activities of the scheme to be managed with prudence, probity, integrity, diligence and skill; and
    - (ii) the scheme to comply with the duties imposed on or in respect of it by or under this Law or any applicable provision referenced in paragraph 2.
  - (b) in determining whether systems, controls, records and provision in respect of staff and persons employed or engaged are effective and adequate the Commission shall (without limitation) have regard to –
    - (i) the complaints history of the scheme;
    - (ii) where the scheme is a company, the functions and responsibilities in respect of the systems, controls and records of any of the company's directors;

- (iii) where the scheme is a unit trust, the functions and responsibilities in respect of the systems, controls and records of any of the trustees;
- (iv) where the scheme is a limited partnership, the functions and responsibilities in respect of the systems, controls and records of any of the general partners.

(3) For the purposes of subparagraph (1) risk management includes identification, measurement, evaluation, monitoring, reporting, control, mitigation and management of risks faced by the applicant or scheme and its business.

#### **FIT AND PROPER DIRECTORS, PARTNERS, ETC.**

5. (1) Every person who is, or is to be, a director, partner (for a limited partnership, the general partner only), manager, managing director, chief executive or trustee (in the case of a unit trust) of an authorised or registered collective investment scheme, or of an applicant for a declaration that a scheme is an authorised or registered collective investment scheme, is a fit and proper person to hold that position.

(2) In determining whether a person is a fit and proper person to hold a particular position, regard shall be had to –

- (a) his probity, integrity, competence, experience and soundness of judgement for fulfilling the responsibilities of that position;
- (b) the diligence with which he is fulfilling or likely to fulfil those responsibilities;
- (c) whether the interests of investors (or potential investors) of the applicant or scheme or the interests of any other persons are, or are likely to be, in any way prejudiced by his holding that position;
- (d) whether the reputation of the Bailiwick as a finance centre is, or is likely to be, in any way prejudiced by his holding that position;
- (e) his educational and professional qualifications, his membership of professional or other relevant bodies and any evidence of his continuing professional education or development;
- (f) the effectiveness of his compliance and his record of compliance with the rules, standards, principles and guidance of any relevant professional, governing, regulatory or supervisory authority;
- (g) his knowledge and understanding of the legal and professional obligations to be assumed or undertaken; and
- (h) the effectiveness of his compliance and his record of compliance with any applicable provision referenced in paragraph 2.

(3) Where the person who holds or is to hold the particular position referred to in subparagraph (1) is a company, then, in relation to the performance of the functions of that position –

- (a) the criteria specified in that subparagraph must be complied with by; and

(b) the matters to which regard must be had under subparagraph (2) must be assessed by reference to the individuals who perform those functions for and on behalf of the company.

(4) Subparagraph (3) is without prejudice to the application of subparagraphs (1) and (2) to the company itself.

#### **ADDITIONAL FACTORS COMMISSION MAY HAVE REGARD TO**

6. (1) Without prejudice to the generality of the provisions of the preceding paragraphs, the Commission may also have regard to the conduct and activities, and the previous conduct and activities, of the person in question and, in particular, to any evidence that –

- (a) he is committing or has committed any offence, and in particular any offence involving fraud or other dishonesty;
- (b) he is contravening or has contravened any applicable provision referenced in paragraph 2;
- (c) he is engaging or has engaged in any business practices (whether unlawful or not) –
  - (i) appearing to the Commission to be deceitful or oppressive or otherwise improper; or
  - (ii) which otherwise reflect discredit on his method of conducting business or his suitability to carry on activities regulated by this Law;
- (d) he is engaging or is associated with, or has engaged in or been associated with, any other business practices, or otherwise is conducting or has conducted himself in such a way as to cast doubt on his competence and soundness of judgement;
- (e) he is or has been persistently in default in relation to any applicable provisions referenced in paragraph 2 requiring any validation, return, account or other document to be filed, delivered or sent;
- (f) he is acting or has acted inappropriately in connection with any legal person or legal arrangement that has gone into insolvent liquidation, winding up, dissolution, receivership, administration, or any event which has an analogous effect;
- (g) he is engaging or has engaged in any misfeasance or is breaching or has breached any fiduciary or other duty owed by him in relation to a legal person or legal arrangement; or
- (h) he is or has been disqualified, by reason of misconduct or unfitness, from being concerned with the management, direction or auditing of, or the provision of company secretarial or actuarial services to, a Guernsey or Alderney company or an overseas company under the law of any jurisdiction.

## Interpretation.

7. Except where the context requires otherwise, and for the avoidance of doubt –
- (a) “**conduct**” and “**activities**” includes any conduct, activity or omission in the Bailiwick or elsewhere;
  - (b) “**enactment**” means a Law, an Ordinance, and an Act of Parliament extending to the Bailiwick or any part thereof;
  - (c) “**legislation**” includes any enactment or subordinate legislation and any primary, secondary or other description of legislation of any jurisdiction outside the Bailiwick;
  - (d) “**offence**” includes an offence under the law of another jurisdiction which would be an offence in the Bailiwick if the conduct, activity or omission constituting the offence occurred in the Bailiwick; and
  - (e) “**subordinate legislation**” means any regulation, rule, order, rule of court, resolution, scheme, byelaw or other instrument (nor being an Ordinance) made under any enactment, or under any customary or inherent powers, and having legislative effect.

## Appendix E: Proposed amended section 36C of the Banking Supervision Law

### Annual review by licensed institutions.

**36C.** (1) Without prejudice to any other requirement of or under this Law, a licensed institution shall conduct an annual review in a form acceptable to the Commission, in connection with business carried on in or from within the Bailiwick by the institution or by any subsidiary thereof, not less than once in every financial year.

(2) Not more than fifteen months shall elapse between the completion of any two successive annual reviews.

(3) A licensed institution shall, within such period as the Commission may require, provide the Commission with a confirmation of the completion of the annual review, in such form as the Commission may require.

(3A) A licensed institution shall provide the Commission upon request with such evidence of the performance of the annual review as the Commission may reasonably require to assess the institution's compliance with its obligations under this section.

(4) If an annual review reveals shortcomings or deficiencies in respect of any of the matters considered as part of the annual review, the licensed institution shall immediately report the shortcomings or deficiencies to the Commission together with details of the steps it proposes to take to remedy the position.

(5) In this section –

“**annual review**” means the review required to be carried out by a licensed institution under this section;

“**financial year**” means the period covered by a licensed institution's accounts in respect of its business.

(6) For the avoidance of doubt, and without limitation to the generality of section 33A, any rules relating to the annual review may prescribe:

(a) the manner in which licensed institutions are to conduct the annual review;

(b) the matters to be reviewed, including but not limited to the institution's compliance with any regulation, rule, code, guidance or enactment applicable to the institution; and

(c) the form of confirmation to be provided to the Commission pursuant to subsection (3).