



Guernsey Financial  
Services Commission

## **GUERNSEY FINANCIAL SERVICES COMMISSION**

### **WINDING UP OF A BUSINESS**

**January 2013**

**Contents**

- 1. GLOSSARY .....3
- 2. EXECUTIVE SUMMARY .....4
- 3. INTRODUCTION .....4
- 4. RELEVANT LEGISLATIVE PROVISIONS .....5
- 5. THE COMMISSION’S APPROACH .....5
- 6. PUBLICATION .....6
- APPENDIX .....7

## 1. GLOSSARY

Unless the context requires otherwise:

“**Applicable Laws**” means the Companies (Guernsey) Law, the Companies (Alderney) Law, the Prescribed Businesses Law, the Banking Supervision Law, the Insurance Business Law, the IMII Law, the Fiduciaries Law and the Registered Businesses Law,

“**Commission**” means the Guernsey Financial Services Commission,

“**Companies (Alderney) Law**” means The Companies (Alderney) Law, 1994, as amended,

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

“**contravention**” includes failure to comply,

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

“**Enforcement Policy**” means the Guernsey Financial Services Commission’s Enforcement Policy dated 13 June 2011,

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

“**Note**” means this Explanatory Note,

“**regulatory Laws**” means:

- (a) The Banking Supervision (Bailiwick of Guernsey) Law, 1994 (“**Banking Supervision Law**”),
- (b) The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 (“**Fiduciaries Law**”),
- (c) The Insurance Business (Bailiwick of Guernsey) Law, 2002 (“**Insurance Business Law**”),
- (d) The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 (“**IMII Law**”),
- (e) The Protection of Investors (Bailiwick of Guernsey) Law, 1987 (“**POI Law**”),
- (f) The Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 (“**Registered Businesses Law**”),
- (g) The Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (“**FSC Law**”),

(h) The Prescribed Businesses (Bailiwick of Guernsey) Law, 2008 (“**Prescribed Businesses Law**”), and

(i) any other enactment or statutory instrument prescribed for the purposes of the above laws by regulations of the Commission,

all, as amended,

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

“**Winding-Up Order**” means an order granted by the Court pursuant to the Applicable Laws for the winding up of a company.

## 2. EXECUTIVE SUMMARY

This document sets out the Commission’s approach and methodology in relation to seeking a Winding-Up Order from the Court under the Companies (Guernsey) Law, the Companies (Alderney) Law, the Prescribed Businesses Law, the Banking Supervision Law, the Insurance Business Law, the IMII Law, the Fiduciaries Law and the Registered Businesses Law.

## 3. INTRODUCTION

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

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

It is important that the Commission is able to fulfill its regulatory objectives and apply its Enforcement Policy. However, the Commission is also aware of the serious detrimental



effect that a Winding-Up Order may have on the reputation, livelihood or business of the firm or individuals involved with that firm.

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

The Commission recognises that because winding-up of a Licensee brings the company to an end, its impact may be particularly severe. For this reason a Winding-Up Order will usually be sought in the most serious cases. However, as the circumstances in which the Commission may apply for a Winding-Up Order vary considerably, this may not always be the case.

#### **4. RELEVANT LEGISLATIVE PROVISIONS**

Under the Applicable Laws, the Commission has the power to apply to the Court to seek a Winding-Up Order. The Commission therefore does not have the power itself to compel a Licensee or former Licensee to wind-up its business. Further details regarding the grounds upon which a Winding-Up Order may be sought and other issues can be found at the Appendix to this Note.

The right of appeal against a Winding-Up Order is as prescribed by the Bailiwick's court procedures.

#### **5. THE COMMISSION'S APPROACH**

The Applicable Laws vary as to the circumstances and the grounds on which the Commission may apply to the Court for a Winding-Up Order. In deciding whether to apply for a Winding-Up Order, the Commission will have regard to the relevant provisions of the Applicable Law. Apart from these matters, none of the Applicable Laws prescribe any criteria that the Commission must take into consideration in determining whether to make an application for a Winding-Up Order. It is not possible nor would it be appropriate for the Commission to try and produce a definitive list of matters that the Commission might take into account.

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

- a) The protection of the public interest,
- b) The protection and enhancement of the reputation of the Bailiwick as a financial centre, and

c) Any matter which it considers appropriate.

In considering whether to make an application for a Winding-Up Order, the Commission will take into account all relevant circumstances including the seriousness of any contravention or misconduct. Apart from insolvency, examples of the types of circumstance in which this may be appropriate are:

- Where for some reason it is appropriate for the protection of the public or of its customers that the company and its business should be brought to an end, and
- Where it is desirable in the interests of customers or creditors that the affairs of the company should be placed under the control of an independent person.

## **6. PUBLICATION**

Details of a Winding-Up Order granted by the Court under the Applicable Laws will be published on the Register of Companies maintained by the Registrar of Companies. This Register of Companies is published on the Guernsey Registry website and is available for inspection on that website.

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

**APPENDIX**

		What are the grounds on which a Court may grant a Winding-Up Order?			
Entities for which a Winding-Up Order may be sought?	Solvency <sup>i</sup>	Default <sup>ii</sup>	Just & Equitable <sup>iii</sup>	Other Grounds	
The Companies (Guernsey) Law	Yes <sup>iv</sup>	NA	Yes <sup>v</sup>	Section 410 of the Companies (Guernsey) Law allows, inter alia, the Commission to make an application to the Court to wind up a company for the protection of the public or of the reputation of the Bailiwick.  In addition there are other grounds on which an application for compulsory Winding-Up Order can be made under section 406 of the Companies (Guernsey) Law.	
The Companies (Alderney) Law	Yes <sup>vi</sup>	NA	Yes <sup>vii</sup>	Section 127 of the Companies (Alderney) Law allows the Commission to make an application to the Court under section 125(k) to wind up a company for the protection of the public or of the reputation of the Bailiwick of Guernsey.  In addition there are other grounds on which an application for a compulsory Winding-Up Order can be made under section 125 of the Companies (Alderney) Law.	

What are the grounds on which a Court may grant a Winding-Up Order?				
Entities for which a Winding-Up Order may be sought?	What are the grounds on which a Court may grant a Winding-Up Order?			
	Solvency <sup>i</sup>	Default <sup>ii</sup>	Just & Equitable <sup>iii</sup>	Other Grounds
The Banking Supervision Law	Yes <sup>viii</sup>	Yes <sup>ix</sup>	Yes <sup>x</sup>	None
A Guernsey or Alderney company which is a licensed institution, a former licensed institution or an institution (licensed or not) that is guilty of any such contravention as described in section 35(1)(a) of the Banking Supervision Law.				



What are the grounds on which a Court may grant a Winding-Up Order?				
	Entities for which a Winding-Up Order may be sought?	What are the grounds on which a Court may grant a Winding-Up Order?		
		Solvency <sup>i</sup>	Default <sup>ii</sup>	Just & Equitable <sup>iii</sup>
The IMII Law	A Guernsey or Alderney company which is an insurance intermediary.	No	No	No
				<p>If, after investigation, it appears to the Commission that a licensed insurance intermediary:</p> <p>(a) has breached a condition of its licence, or</p> <p>(b) is contravening, has contravened or is likely to contravene any provision of the IMII Law (or any Ordinance, regulation or rule under it) or of any Conduct of Business Rules or code (including, without limitation, a provision requiring the insurance intermediary to ensure that its authorised insurance representatives comply with any such provision),</p> <p>the Commission may apply for the winding up of the licensed insurance intermediary:</p> <p>(i) in accordance with the Companies (Guernsey) Law, where the Licensee is a Guernsey company, or</p> <p>(ii) in accordance with the Companies (Alderney) Law, where the Licensee is an Alderney company,</p> <p>on the ground that it has persistently, wilfully or seriously contravened any such provision or breached any condition of its licence.<sup>xi</sup></p>

What are the grounds on which a Court may grant a Winding-Up Order?				
	Entities for which a Winding-Up Order may be sought?	What are the grounds on which a Court may grant a Winding-Up Order?		
		Solvency <sup>i</sup>	Default <sup>ii</sup>	Just & Equitable <sup>iii</sup>
The Insurance Business Law <sup>xii</sup>	A Guernsey company or Alderney company which is a licensed insurer. In addition there are limited provisions which apply to licensed insurers which are unincorporated Bailiwick bodies in relation to winding up insurers with long term business. <sup>xiii</sup>	Yes <sup>xiv</sup>	No	Yes <sup>xv</sup>
				<p>The Commission may present an application for the winding up in accordance with the Companies (Guernsey) Law, of a licensed insurer which is a Guernsey company, or in accordance with the Companies (Alderney) Law, of a licensed insurer which is an Alderney company, on the ground that:</p> <p>(a) The insurer has failed to satisfy an obligation to which it is or was subject by virtue of the Insurance Business Law or any ordinance, regulation or rule under it.</p> <p>(b) The insurer has failed to satisfy an obligation imposed by section 37 or 41(1)(b) or has contravened any condition or direction imposed under section 12 or 16.</p> <p>(c) The Commission is unable to ascertain the financial position of the insurer.</p> <p>(d) That the Royal Court (in the case of a Guernsey company) or the Court of Alderney (in the case of an Alderney company) is of the opinion that it is just and equitable that the company should be wound up.<sup>xvi</sup></p> <p>The Commission may also apply for the wind-up of a party whose licence application has been refused where the minimum licensing criteria are not fulfilled in relation to the company of in relation to any person who is a director or controller of the</p>

		What are the grounds on which a Court may grant a Winding-Up Order?			
Entities for which a Winding-Up Order may be sought?		Solvency <sup>i</sup>	Default <sup>ii</sup>	Just & Equitable <sup>iii</sup>	Other Grounds
					company. <sup>xvii</sup>
The POI Law <sup>xviii</sup>	-	No	No	No	None
The Fiduciaries Law	A Guernsey company or an Alderney company which is a licensed fiduciary or former licensed fiduciary or, whether licensed or not, is guilty of any such contravention as is described in section 33(1)(a) of the Fiduciaries Law.	Yes <sup>xix</sup>	Yes <sup>xx</sup>	Yes <sup>xxi</sup>	None

What are the grounds on which a Court may grant a Winding-Up Order?				
The Prescribed Businesses Law	Entities for which a Winding-Up Order may be sought?	What are the grounds on which a Court may grant a Winding-Up Order?		
		Solvency <sup>i</sup>	Default <sup>ii</sup>	Just & Equitable <sup>iii</sup>
	Guernsey companies or Alderney companies carrying on a registered prescribed business in the Bailiwick of Guernsey.	No	No	No
				<p>The Court has the power to make an order for the winding up on the grounds that:</p> <p>(a) The person carrying on the registered prescribed business has:</p> <p>(i) contravened in a material particular any provision of, or made under:</p> <p>(A) The Prescribed Business Law, or</p> <p>(B) Any of the relevant enactments, or</p> <p>(ii) Committed an offence under such a provision, in respect of that business, or</p> <p>(b) The winding up appears to be necessary in order to counter:</p> <p>(i) Financial crime, or</p> <p>(ii) The financing of terrorism,<sup>xxii</sup> in the Bailiwick, or elsewhere.</p>



What are the grounds on which a Court may grant a Winding-Up Order?				
Entities for which a Winding-Up Order may be sought?	What are the grounds on which a Court may grant a Winding-Up Order?			
	Solvency <sup>i</sup>	Default <sup>ii</sup>	Just & Equitable <sup>iii</sup>	Other Grounds
The Registered Businesses Law	No	No	No	<p>The Commission may present an application for the winding up of a registered financial services business, or a person carrying on a registered financial services business:</p> <p>(a) on the ground that the financial services business has contravened in a material particular a provision of, or made under, the Registered Business Law or the prescribed Laws<sup>xxiii</sup>, or has committed an offence under such a provision, or</p> <p>(b) Where such winding up appears to be necessary:</p> <p>(i) For the protection of the public against the effects of dishonesty, incompetence or malpractice, or</p> <p>(ii) To counter financial crime and the financing of terrorism in the Bailiwick or elsewhere, or</p> <p>(iii) For the maintenance of confidence in the finance sector in the Bailiwick, or</p> <p>(iv) To protect or enhance the reputation of the Bailiwick as a finance centre.<sup>xxiv</sup></p>

<sup>i</sup> The business is unable to pay its debts within the meaning of the applicable corporate legislation. The Commission does not have to be a creditor to apply for an order on this ground. Under the Insurance Business Law, a company carrying on general business is deemed to be unable to pay its debts if at any time it does not comply with the margin of solvency requirement applicable to it.

- ii The business has defaulted in an obligation to pay any sum due and payable in respect of regulated activity conducted by it.
- iii It is just and equitable that the business should be wound up. This is regardless of whether or not the body is able to pay its debts. The Commission may consider, depending upon the circumstances of the case under review, whether to apply for an order on this ground alone or in addition to other grounds.
- iv The Commission may make an application under section 406(e) of the Companies (Guernsey) Law where it is a creditor of the Company or an “interested party” (section 408 of the Companies (Guernsey) Law).
- v The Commission may make an application under section 406(i) of the Companies (Guernsey) Law where it is an “interested party” (section 408 of the Companies (Guernsey) Law).
- vi The Commission may make an application under section 125(e) of the Companies (Alderney) Law where it is a creditor of the Company or where it is able to prove to the satisfaction of the Court that it has a legitimate and substantial interest in making the application (Section 127(1) of the Companies (Alderney) Law).
- vii The Commission may make an application under section 125(j) of the Companies (Alderney) Law where it is able to prove to the satisfaction of the Court that it has a legitimate and substantial interest in making the application (Section 127(1) of the Companies (Alderney) Law).
- viii Banking Supervision Law, section 36(a).
- ix Banking Supervision Law, section 36(b).
- x Banking Supervision Law, section 36(c).
- xi JMI Law, section 29(1).
- xii Insurance Business Law, section 50.
- xiii See Insurance Business Law provisions concerning long-term insurance business - sections 54 and 55.
- xiv Insurance Business Law, section 53(1)(a).
- xv Insurance Business Law, section 53(1)(d).
- xvi Insurance Business Law, section 53(1). Evidence regarding solvency – section 53(2).
- xvii Insurance Business Law, section 58.
- xviii POI Law does not have a specific provision concerning wind-up. However, companies regulated pursuant to POI Law and incorporated in Guernsey or Alderney can be the subject of a winding-up application if brought by the Commission pursuant to Companies (Guernsey) Law or Companies (Alderney) Law, as relevant.
- xix Fiduciaries Law, section 34(i).
- xx Fiduciaries Law, section 34(ii).
- xxi Fiduciaries Law, section 34(iii).
- xxii Prescribed Business Law, section 3(1) and (2).
- xxiii As defined in Registered Businesses Law.
- xxiv Registered Business Law, section 14(1).