



Guernsey Financial  
Services Commission

# **New discretionary financial penalties**

## **FEEDBACK PAPER**

**November 2017**

## Background

On the 26<sup>th</sup> January 2016, the States of Deliberation approved proposals to revise “The Financial Services Commission (Bailiwick of Guernsey) Law, 1987” as follows: -

1. to increase the maximum level of financial penalties available to the Guernsey Financial Services Commission for licensees and former licensees (other than personal fiduciary licensees) from the current level of £200,000 to £4,000,000, with any fine over £300,000 being limited to a maximum of 10% of the turnover of the licensee/former licensee in question;
2. to increase the maximum level of financial penalty available for relevant officers and personal fiduciary licensees from £200,000 to £400,000 together with the inclusion of an additional criterion for consideration by the Guernsey Financial Services Commission, namely emoluments arising in respect of the relevant officer's or personal fiduciary licensee's position;
3. to empower the Policy Council to make regulations which it considers to be appropriate in relation to discretionary financial penalties, and by way of example, these should include the meanings of “turnover” and “emoluments”; and the bandings of financial penalties within the new maximum levels taking into account the factors specified in section 11D(2) of the Law;
4. to require the Guernsey Financial Services Commission to issue and publish guidance as to its general approach to enforcement; and
5. to include an enabling provision permitting the States to revise the provisions on financial penalties powers in the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, by Ordinance.

The legislation (Projet de Loi) to give effect to the above proposals was approved by the States of Deliberation at their meeting on 2<sup>nd</sup> March 2016. The Financial Services Commission (Bailiwick of Guernsey) (Amendment) Law, 2016 received Royal Sanction before the Privy Council on 11 October 2017 and was registered by the Royal Court on 13 November 2017.

## Consultation process

Following the States decisions set out above and in light of the requirement placed upon the Commission to issue and publish guidance as to its general approach to enforcement (see 4 above), the Commission published a Guidance Note in April 2016. **(Click here to see a copy).**

On 29 April 2016, the Commission published a Consultation Paper proposing a schedule of bandings as a guide to how it intends, in general terms, to apply the revised levels of discretionary financial penalties set out in 1 and 2 above, in a proportionate manner. **(Click here to see a copy).** The consultation period closed on 17 June 2016.

The Commission received 9 responses from licensees, individuals and industry associations and is very grateful to those who contributed their views.

The schedule, which was published as part of the Consultation Paper, is reproduced as an appendix to this feedback paper and has been amended to take into account comments received during the consultation process.

## Commission's conclusions

The Commission will publish and maintain a schedule setting out bandings for the revised discretionary financial penalties (as per attached appendix). The schedule will be published on the Commission's website under the section entitled "Enforcement Policy".

The Commission would emphasise that the schedule is only intended as guidance and as such must be read in conjunction with all relevant legislation including any regulations which are in force. As such, there is no need to repeat within the schedule the various legislative provisions relating to discretionary financial penalties, including those factors specified in section 11D(2) of "The Financial Services Commission (Bailiwick of Guernsey) Law, 1987", which the Commission must take into consideration when considering imposing a discretionary financial penalty, as well as the rights of appeal.

Similarly, the schedule deals only with the imposition of discretionary financial penalties and consequently there is no need to reference the fact that the Commission can also impose general or specific prohibitions and issue public statements. For the avoidance of doubt, the schedule assumes that a prior decision has already been taken that a discretionary financial penalty should be imposed.

Given the status of the schedule (guidance only), the Commission does not intend to define all of the terms used within it. There is an overriding legal obligation placed upon the Commission to act reasonably and proportionately when imposing discretionary financial penalties.

The increased penalties will only be applied in new enforcement cases which are commenced on or after 13 November 2017 and where the alleged breaches also took place on or after that date.

## Changes made to the schedule

The schedule has been amended to take account of the following: -

- Clarification that consideration will be given to the total emoluments earned by a 'Relevant Officer' (that is a director, controller, partner, manager, general representative or authorised insurance representative of a licensee or former licensee) **across all of the Bandings rather than just Banding 4.**
- The caveat in bold at the bottom of the schedule has been amended to read: *"\*Supervisory action will often be more appropriate for failings identified in Band 1 and as such we will not seek to enforce on the characteristics within this band where supervisory action is deemed to be sufficient."*
- The fines for individuals now refer to the maximum rather than a range.
- For Bands 3 and 4 the wording in relation to fines for firms has been amended to provide greater clarity about the relevance of a firm's turnover.

## Discretionary Financial Penalties – schedule of bandings

## Appendix

Please note that:

- The below only applies in the event that it has been determined that it is appropriate to impose a discretionary financial penalty under section 11D of the FSC Law.
- In determining which band a firm or individual may fall under, the behaviour of the firm and individual (as relevant) will be considered. Accordingly, where financial penalties are imposed upon both a firm and an individual (e.g. a director) for the same set of circumstances, these persons may, due to their differing obligations and in consideration of their behaviour, fall under different bands. However, each situation will be considered as appropriate in a) arriving at a decision whether or not to impose a discretionary financial penalty and b) the amount of any such penalty (including the matters which must be considered under section 11D(2)(e) of the FSC Law).

Band 1	Band 2	Band 3	Band 4
<b>Potential Sanctions – Firms</b>			
*Up to £50,000	Up to £200,000	Up to £500,000  (where it is proposed to impose a fine of more than £300,000, such fine shall not exceed 10% of a firm's turnover in the relevant accounting period, up to £500,000)	Up to £4 million  (where it is proposed to impose a fine of more than £300,000, such fine shall not exceed 10% of a firm's turnover in the relevant accounting period, up to £4 million)
<b>Potential Sanctions – Individuals</b>			
*Up to £25,000 (with consideration to the total emoluments the individual has received during their connection to the firm)	Up to £100,000 (with consideration to the total emoluments the individual has received during their connection to firm)	Up to £250,000 (with consideration to the total emoluments the individual has received during their connection to the firm)	Up to £400,000 (with consideration to the total emoluments the individual has received during their connection to the firm)
<b>Characteristics</b>			
Small number of regulatory failings, none of which are serious in nature.	Several regulatory failings, which may or may not be serious in nature.	Significant failings but not systemic, which may or may not be serious in nature.	Systemic failings, which may or may not be serious in nature.
Licensee was open and co-operative with the Commission	Risk of loss to clients of the licensee	Risk of loss to clients of the licensee	Significant risk of loss to clients or actual loss to clients
Small risk of financial crime or being used to facilitate financial crime	Risk to the reputation of the Bailiwick	Significant risk to the reputation of the Bailiwick	Significant risk to the reputation of the Bailiwick
Licensee brought breaches to the Commission's attention	Licensee was open and co-operative with the Commission	Licensee was not open and co-operative with the Commission	Licensee was not open and co-operative with the Commission
Steps taken to rectify breach(es) and prevent recurrence	Risk of financial crime or being used to facilitate financial crime	Significant risk of financial crime or being used to facilitate financial crime	Financial crime committed or licensee used to facilitate financial crime
	Licensee acknowledged, straight away, or within a short time, breaches when brought to their attention	Licensee failed to acknowledge breaches	Licensee deliberately withheld the breaches from the Commission in order to either obtain a benefit or mitigate a loss
	Steps taken to rectify breach(es) and prevent recurrence but insufficient	Few steps taken to rectify breach(es) and prevent recurrence and steps insufficient	No steps taken to rectify breach(es)
	Previous unconnected regulatory breaches	Previous regulatory breaches which may or may not be connected	Poor regulatory history which may or may not be connected

**\*Supervisory action will often be more appropriate for failings identified in Band 1 and as such we will not seek to enforce on the characteristics within this band where supervisory action is deemed to be sufficient.**

The schedule above is only a guide and the sanctions recommended in individual cases may differ. Each case will be assessed on its own merits taking into account Section 11D of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 which includes the characteristics outlined in the schedule as well as any other aggravating or mitigating factors such as the financial consequences to the firm/individual (taking into consideration the total emoluments an individual has received from a firm during the time they have been connected with them) and, most importantly, the reputational risk to the Bailiwick. Whether the proposed sanction(s) will have the appropriate deterrent effect is also a consideration. The relevant person of a licensee will be assessed against the failings of the licensee and the role that they may have played in that process. In essence, they will be assessed against the minimum criteria for licensing on whether they, as an individual, are fit and proper. In doing so, consideration will be given, amongst other things, to their probity, competence, experience, and soundness of judgement and the integrity and skill in which they carried out their duties. Dependent upon the severity of the findings made against the firm, consideration will then be given to who held the key responsibilities and should be accountable for the failings identified.