



Guernsey Financial  
Services Commission

## **GUERNSEY FINANCIAL SERVICES COMMISSION**

### **EXPLANATORY NOTE ON THE COMMISSION'S GENERAL APPROACH TO ENFORCEMENT AND ENFORCEMENT MEASURES**

**This Explanatory Note is intended to inform on the way in which the Guernsey Financial Services Commission (the “Commission”) will generally approach the exercise of its statutory enforcement powers.**

**An Explanatory Note does not hold force of law: each case will be considered on its own merits and in accordance with the requirements of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020. Whilst the processes set out in this note will generally be followed, in exceptional circumstances the Commission may depart from the process described.**

May 2024

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# PART 1 INTRODUCTION TO ENFORCEMENT

## 1.1 Introduction

- (1) The Commission previously published a range of documents and guidance in relation to its approach to enforcement and its enforcement powers. The implementation of The Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 (the “Enforcement Powers Law”) provided the opportunity to revise and consolidate these documents and the Explanatory Note on the Commission’s General Approach to Enforcement and Enforcement Measures guidance note dated September 2022 was published. This publication aims to update the September 2022 Explanatory Note.
  
- (2) In this document, the Regulatory Laws referred to include the following –
  - (a) The Banking Supervision (Bailiwick of Guernsey) Law, 2020 (the “Banking Law”);
  
  - (b) The Protection of Investors (Bailiwick of Guernsey) Law, 2020 (the “POI Law”);
  
  - (c) The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 (the “Fiduciaries Law”);
  
  - (d) The Insurance Business (Bailiwick of Guernsey) Law, 2002 (the “IB Law”);

- (e) The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 (the “IMII Law”);
- (f) The Financial Services Business (Enforcement Powers)(Bailiwick of Guernsey) Law, 2020;
- (g) The Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 – repealed on 1 July 2023<sup>1</sup>;
- (h) The Financial Services Commission (Bailiwick of Guernsey) Law, 1987;
- (i) The Lending, Credit and Finance (Bailiwick of Guernsey) Law, 2022 (the “LCF Law”);

and “prescribed Laws” has the meaning given to it in Schedule 1 to the Enforcement Powers Law.

## **1.2 The Commission’s general approach to enforcement**

### **1.2.1 The Enforcement Process**

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<sup>1</sup> Despite being repealed, this Law is referred to in this Explanatory Note as it is still relevant, for example, where reference is made to the pre-2020 Regulatory Laws.

- (1) The Commission has a risk-based approach to the supervision of its licensees. Where appropriate, the Commission will address contraventions or misconduct by agreement with the licensee, or individuals concerned, through ordinary supervisory processes and will endeavour to agree the implementation of a remedial action plan to restore compliance as soon as possible. This may involve agreement to changes in corporate governance, management and internal controls, or agreement to discontinue some or all of the person's operations or areas of activity or amended or additional licence conditions framed to encourage or ensure compliance.
- (2) However, that approach is not always possible.
- (3) The Commission recognises that it is important to strike the right balance between ensuring that, on the one hand the Bailiwick's regulatory regime is underpinned by an effective and proportionate approach to enforcement, and, on the other, that good quality candidates are not deterred from seeking positions.
- (4) Further information on the investigation process, and subsequent decision-making process, is set out in "Investigation and Decision-Making Process Relating to the Use of Enforcement Powers", which can be found on the Commission's website.

### **1.2.2 The Commission's general approach to enforcement**

- (1) The Commission, being a statutory body incorporated under The Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (the “FSC Law”), must abide by the objectives laid out for it under that law.
  
- (2) The Commission is committed to a fair, proportionate, and consistent application of its enforcement powers to achieve its outcomes; being mindful of the particular circumstances pertinent to the case.
  
- (3) By making enforcement outcomes public, the Commission can raise awareness of regulatory standards and demonstrate its commitment to regulation, in accordance with agreed international standards, thereby helping the Bailiwick’s firms to access third country markets<sup>2</sup>.
  
- (4) The Commission’s use of its enforcement powers is an important component in the delivery of its regulatory objectives which are to –
  - (a) provide effective supervision of the financial services sector;
  
  - (b) make recommendations to the States on schemes for the statutory regulation of finance business;
  
  - (c) counter financial crime and the financing of terrorism;
  
  - (d) maintain confidence in the Bailiwick’s financial services sector;
  
  - (e) ensure the safety, soundness, and integrity of the Bailiwick’s financial services sector; and

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<sup>2</sup> E.g. - Basel Committee on Banking Supervision – Core Principles for Effective Banking Supervision and Basel III Capital Standards; IAIS – Insurance Core Principles, Standards, Guidance and Assessment Methodology; IOSCO – Objectives and Principles of Securities Regulation; FATF – International Standards on Combating Money Laundering and the Financing of Terrorism; GIFCS – Standard on Trust and Company Provider Supervision.

- (f) ensure the protection of the public and the protection and enhancement of the reputation of the Bailiwick as a financial centre.
- (5) The Commission will always consider whether it is appropriate to use its enforcement powers in relation to more serious or repeated breaches of the law. Although, it should be noted that the Commission is able to exercise its enforcement powers in respect of any breach.
- (6) In addition, it may be appropriate for the Commission to take further steps aimed at protecting the public.

### 1.2.3 Public announcements of enforcement proceedings<sup>3</sup>

- (1) The Commission may make a public announcement that enforcement proceedings are being undertaken, with the prior written notice of the Director General, providing that such an announcement is necessary or desirable to do so in the interests of –
  - (a) the public; or
  - (b) the reputation of the Bailiwick as a finance centre,or for the purpose of performing its functions.
- (2) A public announcement may include –
  - (a) the name of any firm subject to enforcement proceedings;

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<sup>3</sup> Section 41, Enforcement Powers Law.

- (b) the name of any individual subject to enforcement proceedings;
  - (c) confirmation that the firm or individual is the subject of proceedings, other than enforcement action or sanction (civil, criminal or administrative) under the Enforcement Powers Law, the FSC Law, the supervisory Laws or any other enactment specified by the Enforcement Powers Law by regulations of the Policy and Resources Committee;
  - (d) confirmation that the firm or individual is the subject of a suspected contravention of non-fulfilment of any provisions referred to in (c) above, any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under any of those provisions or any of the applicable minimum criteria for licensing;
  - (e) any further information that the Commission deems necessary.
- (3) A public announcement will remain on the Commission's website until such time as the Commission sees fit.
  - (4) Where the circumstances have changed, (e.g. the Commission has reached a final decision in the matter or an appeal has been launched against a final decision), the Commission may make a further statement updating the situation. Such an update will only be made on receipt of a request, made to the Commission, by the subject of the original announcement.



## PART 2 ENFORCEMENT MEASURES

### 2.1 Introduction

- (1) From time to time, there will be a need for the Commission to undertake enforcement action, for example -
  - (a) where action by remediation is not considered to be either sufficient or appropriate;
  - (b) where the firm, or relevant individuals, have failed to deal with the Commission in an open and cooperative manner; and/or
  - (c) where the contravention, or misconduct, is such that a deterrence response is deemed necessary.
- (2) It is important that the Commission can fulfil its regulatory objectives and apply its Enforcement Policy.
- (3) However, the Commission is also aware of the serious detrimental effect that any enforcement measures may have on the reputation, livelihood, or business of the firm or relevant individuals.
- (4) The Commission may use these regulatory sanctions either alone or in addition to any other regulatory sanction which it is empowered to impose under the Enforcement Powers Law. This is separate from any action the Commission may take on a supervisory basis.
- (5) Every sanctions determination will be made on a case-by-case basis.

## 2.2 Licence Suspension or Revocation

### 2.2.1 Suspension of licence

- (1) The suspension of licences, previously dealt with under the pre-2020 Regulatory Laws, now comes under section 28 of the Enforcement Powers Law. Suspension effectively halts the ongoing operation of a regulated financial services business in the Bailiwick<sup>4</sup>.
- (2) The provision or continuation of the relevant operations, by the financial services business, during the period of suspension of the licence is an offence under the Regulatory Law under which the licence was issued<sup>5</sup>. However, it should be noted that the licensee remains a licensee, for the purposes of the law, throughout the suspension period.
- (3) The Commission may, by notice in writing served on the licensee, suspend a license for a specified period, until the occurrence of a specified event, or until prohibitions, requirements, or specified conditions are complied with.

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<sup>4</sup> Licensees may also request the suspension of their licence.

<sup>5</sup> Section 1(4), POI Law; section 1(3), Fiduciaries Law; section 1(7), Banking Law; section 1(4), IMII Law; section 1(6), IBL; sections 2(1), 16(1), 17(1) and 26(1), LCF Law.

### 2.2.2 Revocation of licence

- (1) The revocation of licences, previously dealt with under the pre-2020 Regulatory Laws, now comes under section 29 of the Enforcement Powers Law. Revocation effectively halts the ongoing operation of a regulated financial services business in the Bailiwick<sup>6</sup>.
- (2) The provision or continuation of the relevant operations, by the financial services business, following revocation of the licence is an offence under the Regulatory Law under which the licence was issued<sup>7</sup>.
- (3) The Commission may, by notice in writing served on a licensee, revoke a licence.

### 2.2.3 Grounds for the suspension or revocation of a licence

- (1) Under sections 28(1)(b) and 29 of the Enforcement Powers Law the Commission can suspend or revoke a licence when it becomes aware that the licensee or, where applicable, the holder of a supervised role, or an officer, or employee of the licensee has<sup>8</sup> –
  - (a) failed to fulfil the minimum criteria for licensing;
  - (b) contravened or committed an offence under the Regulatory Laws;

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<sup>6</sup> A licensee may also apply to the Commission to surrender a licence under the relevant Supervisory Law.

<sup>7</sup> Section 1(4), POI Law; section 1(3), Fiduciaries Law; section 1(7), Banking Law; section 1(4), IMII Law; section 1(6), IBL; sections 2(1), 16(1), 17(1) and 26(1), LCF Law.

<sup>8</sup> A licensee may also apply to the Commission to surrender or suspend a licence under the relevant Supervisory Law.

## ENFORCEMENT EXPLANATORY NOTE

- (c) contravened any prohibition, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under the Regulatory Laws;
- (d) appointed a person to an approved supervised role or vetted supervised role in contravention of the Regulatory Laws;
- (e) remained in an approved supervised role or vetted supervised role after being given notice of objection;
- (f) provided the Commission, or allowed the Commission to be provided with, false, deceptive, misleading, inaccurate, or incomplete information;
- (g) failed to pay any fee, penalty, or interest within the required period or when otherwise due;
- (h) had an authorisation corresponding to a license under a Supervisory Law removed by a relevant supervisory authority;
- (i) not carried out regulated business, of the class or description to which the licence relates, for 12 consecutive months;
- (j) been subject to a winding up event;
- (k) in the case of a licensed insurer, the insurer's general representative has failed to satisfy an obligation under the provisions of the IB Law;
- (l) in the case of a licensed insurance intermediary, the intermediary's authorised insurance representative has failed to satisfy an obligation under the IMII Law; or
- (m) if it is in the interests of the public or in the interests of the Bailiwick as a finance centre.

- (2) The Commission may also consider any matters which it may have regard to, set out in the relevant Regulatory Laws, when considering whether to grant a licence application.

#### **2.2.4 Appeals against suspension or revocation**

- (1) Decisions to revoke or suspend a licence can be appealed to the Royal Court<sup>9</sup> within 28 days following the date of notice of the Commission's decision<sup>10</sup>.

#### **2.2.5 The Commission's Approach**

- (1) In considering whether to suspend or revoke a licence, the Commission will consider the seriousness of the contravention, or misconduct, and all of the relevant circumstances when deciding whether to exercise its powers.
- (2) The Commission recognises that because suspension and revocation of a licence brings the business to a halt its impact is likely to be severe. For this reason, suspension or revocation will usually only be applied in the most serious cases. However, each decision will be taken on a case-by-case basis.

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<sup>9</sup> Section 106(1)(a), Enforcement Powers Law.

<sup>10</sup> Section 106(4), Enforcement Powers Law; by summons served on the Chairman of the Commission stating the grounds and material facts on which the appeal relies.

## 2.2.6 Conduct of business post-suspension/post-revocation

### *POST SUSPENSION*

- (1) During the period during which a licence is suspended the licensee must not carry on, or hold itself out as carrying on, business of the description to which the licence relates.
- (2) The suspension of a licence is a regulatory sanction that is applied because of regulatory non-compliance or the licensee's behaviour. The lifting of a suspension of a licence will not expunge the suspension from the individual, or firm's regulatory history with the Commission.
- (3) During the period of suspension a licensee remains a licensee for the purposes of the Supervisory Laws.
- (4) The Commission reserves its rights to take the suspension into account should regulatory concerns arise in the future.

### *POST REVOCATION*

- (5) A decision to revoke a licence does not come into effect until after the end of the period in which an appeal can be brought against that decision<sup>11</sup>.
- (6) Once a licence has been revoked, it is no longer possible to legally conduct business, or engage in activities for which a licence is required, under the Regulatory Laws. The Commission has the power to impose other regulatory sanctions upon those who engage in unlawful business.

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<sup>11</sup> Section 29 (3), Enforcement Powers Law. Although, in matters of public interest or in the interest of the reputation of the Bailiwick as a finance centre, the Commission may apply to the Court for immediate revocation and the Court may make an order subject to such terms and conditions as it thinks just. Such an application may, with the approval of the appropriate Court, and subject to such terms and conditions as the Court may direct, be made *ex parte* – section 29(4).

- (7) The conduct of business, following a licence revocation, is unlawful and an offence under the Regulatory Laws.
- (8) The revoking of a licence is a regulatory sanction and is applied because of regulatory non-compliance. The Commission reserves its right to take the revocation into account should regulatory concerns arise in the future in relation to the licensee or persons connected with the licensee.

### **2.2.7 Publication**

- (1) The Commission must maintain a list of all persons who are licensed under the Regulatory Laws and is also required to publish the fact that a person has ceased to hold a licence, or that a licence has been suspended, and to amend the list as necessary. This list must be published on the Commission's website.
- (2) The list will be updated to reflect that a person has ceased to hold a licence or that a licence has been suspended at the time which this occurs.

## 2.3 Imposing a Licence

### 2.3.1 Enforcement Powers Law Provisions<sup>12</sup>

- (1) Under provisions introduced in the Enforcement Powers Law, the Commission may impose a licence on any person who it has reasonable grounds to suspect that a person –
  - (a) is carrying on a regulated business;
  - (b) has carried on a regulated business;
  - (c) are holding themselves out to be a regulated business; or
  - (d) have held themselves out to be a regulated business.
- (2) In considering whether to impose a licence the Commission will have regard to the provisions of the Regulatory Laws.
- (3) Decisions to impose a licence may be appealed to the Royal Court<sup>13</sup>.

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<sup>12</sup> Section 31, Enforcement Powers Law.

<sup>13</sup> Section 106(1)(g), Enforcement Powers Law.



### 2.3.2 The Commission's approach

- (1) The Laws clearly set out business which is 'regulated business'<sup>14</sup>. These definitions will be taken into consideration, by the Commission, when determining whether a business should be a 'regulated business' or whether it falls under one of the exemptions<sup>15</sup> also set out in the Regulatory Laws.
- (2) The Commission will consider, in each case, whether the imposition of a licence is consistent with the Enforcement Policy and the Commission's functions.
- (3) In considering whether to impose a licence the Commission will consider all relevant circumstances, and this will include the seriousness of any alleged contravention or misconduct.
- (4) Where a licence is imposed it should be noted that the normal application process has not been followed. Such an imposition cannot be taken as any form of acceptance, by the Commission, that the licensee has fulfilled the required standards to receive a licence through the normal application procedures or confirmation that the licensee or persons holding supervised roles in connection to the licensee fulfil the relevant minimum criteria for licensing.

### 2.3.3 Consequences of the imposition of a licence

- (1) The imposition of a licence reflects the fact that regulated business has been carried out by an unlicensed entity or person. The imposition of the licence ensures that the business is properly regulated.

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<sup>14</sup> Section 1 and Schedule 2, POI Law; Section 2, Fiduciaries Law; Sections 1-3, Banking Law; Sections 1 and 2, IMII Law; Sections 1-4 IB Law; Sections 2, 16, 17, 26 and Schedule 1, LCF Law.

<sup>15</sup> Section 44, POI Law; Section 3, Fiduciaries Law; Sections 2(3) and 3(5) of the Banking Law; Section 5 IB Law; Section 9, LCF Law.

- (2) Following the imposition of a licence, and in accordance with the relevant supervisory law under which the licence has been issued, the entity or person will be a licensee, in accordance with the provisions of that law, and will be regulated as such.
- (3) On the imposition of a licence the licensee will become liable to pay, to the Commission, the relevant fee in accordance with the appropriate Fees Regulations<sup>16</sup>. Additional fees may also be incurred<sup>17</sup>.
- (4) The Commission reserves its right to take the requirement to impose a licence, on an entity or business, into account should regulatory concerns arise in the future in relation to the licensee or any holder of a supervised role, officer or employee related to a licensee.

#### 2.3.4 Appeals against the imposition of a licence

- (1) Decisions to impose a licence can be appealed to the Royal Court<sup>18</sup> within 28 days following the date of notice of the Commission's decision<sup>19</sup>.
- (2) The imposition of a licence will come into effect seven days after the date which the decision is handed down, unless the decision specifically states an alternative date.

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<sup>16</sup> Section 31(4), Enforcement Powers Law.

<sup>17</sup> Section 31(4), Enforcement Powers Law.

<sup>18</sup> Section 106(1)(a), Enforcement Powers Law.

<sup>19</sup> Section 106(4), Enforcement Powers Law; by summons served on the Chairman of the Commission stating the grounds and material facts on which the appeal relies.

- (3) Parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision.

## 2.4 Suspension or Revocation of Authorisation or Registration of an Authorised or Registered Collective Investment Scheme

### 2.4.1 Suspension of authorisation or registration

- (1) The suspension of authorisation or registration, previously dealt with under the pre-2020 Regulatory Laws, now comes under section 30 of the Enforcement Powers Law. Suspension effectively halts the ongoing operation of the scheme and no payments can be made during this time.
- (2) If the scheme remains operational during the period of suspension, the persons carrying on, or holding themselves out as carrying on of the authorised or registered collective investment scheme will be guilty of an offence under the Regulatory Law under which the scheme was issued<sup>20</sup>. However, it should be noted that the scheme remains a scheme, for the purposes of the law, throughout the suspension period and as such subject to all relevant laws, rules and regulations.
- (3) The Commission may, by notice in writing served on the designated administrator, designated trustee, or custodian of the scheme, suspend an authorisation or registration for a specified period, until the occurrence of a specified event, or until prohibitions, requirements, or specified conditions are complied with<sup>21</sup>.

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<sup>20</sup> Section 1(4), POI Law; section 1(3), Fiduciaries Law.

<sup>21</sup> The designated administrator or the designated trustee or custodian of an authorised or registered scheme may also request that the authorisation or registration of a scheme is suspended or revoked under section 30 of the Enforcement Powers Law.

#### 2.4.2 Revocation of authorisation or registration

- (1) The revocation of authorisation or registration, previously dealt with under the pre-2020 Regulatory Laws, now comes under section 30 of the Enforcement Powers Law. Revocation effectively halts the ongoing operation of the scheme.
- (2) If the scheme remains operational, following the revocation of the authorisation or registration, the persons carrying on, or holding themselves out as carrying on of the authorised or registered collective investment scheme will be guilty of an offence under the Regulatory Law under which the scheme was issued<sup>22</sup>.
- (3) The Commission may, by notice in writing served on a designated manager, a designated trustee, or a custodian of the scheme, revoke an authorisation or registration.

#### 2.4.3 Grounds for the suspension or revocation of an authorisation or registration

- (1) Under section 30 of the Enforcement Powers Law, the Commission can suspend or revoke an authorisation or registration when it becomes aware that –
  - (a) there has been a failure to fulfil the requirements for authorised or registered collective investment schemes<sup>23</sup>;
  - (b) the designated administrator, designated trustee, or custodian has contravened or committed an offence under the Regulatory Laws;

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<sup>22</sup> Section 1(4), POI Law; section 1(3), Fiduciaries Law.

<sup>23</sup> Schedule 3, POI Law.

- (c) the designated administrator, designated trustee, or custodian has contravened any prohibition, condition, etc. issued or arising under the Regulatory Laws;
  - (d) the scheme, designated administrator, designated trustee, or custodian has been subject to a winding up event; or
  - (e) it is in the interests of the public or in the interests of the Bailiwick as a finance centre.
- (2) The Commission may also consider any matters which it may have regard to, set out in section 8 of The Protection of Investors (Bailiwick of Guernsey), 2020 Law (the “POI Law”), when considering whether to grant an application for authorisation or registration.

#### **2.4.4 Appeals against suspension or revocation**

- (1) Decisions to revoke or suspend an authorisation or registration may be appealed to the Royal Court<sup>24</sup> within 28 days following the date of notice of the Commission’s decision<sup>25</sup>.

#### **2.4.5 The Commission’s Approach**

- (1) In determining whether to suspend or revoke an authorisation or registration of a collective investment scheme, the Commission will consider the seriousness of the contravention, or misconduct, and all relevant circumstances when deciding whether to exercise its powers.

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<sup>24</sup> Sections 30(4) and 106(1)(a), Enforcement Powers Law.

<sup>25</sup> Section 106(4), Enforcement Powers Law; by summons served on the Chairman of the Commission stating the grounds and material facts on which the appeal relies.

- (2) The Commission recognises that because suspension and revocation of an authorisation or registration effectively brings the scheme to a halt, its impact is likely to be severe. For this reason, it will usually only be applied in the most serious cases. However, each decision will be taken on a case-by-case basis.

#### 2.4.6 Conduct of business post-suspension/post-revocation

##### *POST SUSPENSION*

- (1) During the period during which a scheme is suspended the authorised or registered entity must not carry on, or hold itself out as carrying on, business with regards to the scheme.
- (2) Suspension, where imposed by the Commission other than at the request of the designated administrator or the designated trustee or custodian of an authorised or registered scheme, is a regulatory sanction that is applied because of regulatory non-compliance. The lifting of a suspension will not expunge the suspension from the entity's regulatory history with the Commission.
- (3) During the period of suspension, an authorised or registered collective investment scheme remains an authorised or registered collective investment scheme for the purposes of the Supervisory Laws.
- (4) The Commission reserves its rights to take the suspension into account should regulatory concerns arise in the future.

##### *POST REVOCATION*

- (5) Once a scheme's authorisation or registration has been revoked, it is no longer able to legally conduct business or engage in activities for which an authorisation or registration is required under the Regulatory Laws. The Commission has the power to impose other regulatory sanctions upon those who engage in unlawful business.

- (6) The conduct of business, following revocation, is unlawful and an offence under the Regulatory Laws.
- (7) Revocation is a regulatory sanction and is applied because of regulatory non-compliance. The Commission reserves its right to take the revocation into account should regulatory concerns arise in the future.

#### **2.4.7 Publication**

- (1) The Commission must maintain a list of all schemes which are authorised or registered under the Regulatory Laws and, under these Laws, is required to publish the fact that a scheme has ceased to hold an authorisation or registration, or that an authorisation or registration has been suspended, and to amend the list as necessary.
- (2) The list will be updated to reflect that a scheme has ceased to hold an authorisation or registration or that a scheme's authorisation or registration has been suspended at the time which this occurs.



## 2.5 Revocation and Suspension under the LCF Law

### 2.5.1 The LCF Law provisions

- (1) The Commission may revoke or suspend<sup>26</sup> a licence under the LCF Law –
  - (a) where the licensee has contravened any condition or direction imposed by the Commission<sup>27</sup>;
  - (b) the Commission has been provided with false, misleading, deceptive, or inaccurate information for the purposes of any provision of, or made under, the LCF Law –
    - (i) by or on behalf of the licensee; or
    - (ii) by or on behalf of an officer or employee of the licensee or a person who holds or is to hold a supervised role in respect of the licensee;<sup>28</sup>
  - (c) any fee, penalty or interest prescribed by regulations under the Enforcement Powers Law, or under the provisions of the FSC Law or supervisory Laws has not been paid within the required period or when otherwise due;

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<sup>26</sup> A licensee may request the suspension of its licence

<sup>27</sup> Sections 14(8), 24(8), 35(8), 39(11), LCF Law

<sup>28</sup> As set out in Section 29, Enforcement Powers Law

- (d) a relevant supervisory authority has withdrawn from the licensee an authorisation corresponding to a licence under the provisions of the supervisory Laws;
- (e) the licensee has not carried on regulated business of the class or description to which the licence relates for a period of 12 consecutive months;
- (f) a winding up event has occurred in respect of the licensee;
- (g) any of the applicable minimum criteria for licensing are not or have not been fulfilled in relation to the licensee;
- (h) whether the licensee has contravened or committed an offence under any of the provisions of the Enforcement Powers Law, the Financial Services Commission Law or the supervisory laws or the licensee has contravened any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under any such provision;
- (i) a person has become a holder of an approved supervised role or vetted supervised role in respect of the licensee in contravention of the provisions of the supervisory laws;
- (j) a person has become or continued to be a holder of an approved supervised role or vetted supervised role in respect of the licensee after being given notice of objection under the provisions of the supervisory laws or the Enforcement Powers Law;
- (k) it appears to the Commission necessary or desirable to do so in the interests of the public or the reputation of the Bailiwick as a finance centre;
- (l) any other ground for the revocation of the licence specified by the provisions of the LCF Law or which the States may by Ordinance specify has arisen or is fulfilled.

2. The Commission may have regard to any matter to which it may have regard under the LCF Law when considering whether or not to grant an application for a licence<sup>29</sup>;
3. The Commission may have regard to any applicable codes of practice or guidance.

### **2.5.2 The Commission's Approach**

- (1) The Commission must consider in each case whether, consistent with its Enforcement Policy, any condition, event, prohibition, or requirement prescribed in relation to the revocation or suspension are reasonable and appropriate.
- (2) The Commission will consider the seriousness of the contravention or misconduct and all of the relevant circumstances when deciding whether to exercise its powers.
- (3) The Commission recognises that because suspension and revocation of a licence brings the business to a halt, its impact is likely to be severe. For this reason, it will usually only be applied in the most serious cases. However, each decision will be taken on a case-by-case basis.

### **2.5.3 Conduct of business post-suspension**

- (1) During the period during which a licence is suspended, the licensee must not carry on, or hold itself out as carrying on, business of the description to which the licence relates either in or from within the Bailiwick, or if the licensee is a Bailiwick body, in or from within any jurisdiction whatsoever.

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<sup>29</sup> Sections 14(8), 24(8), 35(8), 39(11), LCF Law

- (2) To discourage others from assisting licensees to circumvent a suspension or revocation, the Enforcement Powers Law prohibits payments made by or to the licensee, or any person acting on its behalf without the Commission's prior written approval.

#### **2.5.4 Appeal and the effective date of suspension or revocation**

- (1) A decision to revoke or suspend a licence can be appealed to the Royal Court<sup>30</sup> within 28 days following the date of the notice of the Commission's decision<sup>31</sup>.
- (2) The Commission's decision to revoke or suspend a licence will not have effect until the end of the period within which an appeal can be brought or, if an appeal is brought, until the appeal is disposed of or withdrawn.
- (3) However, where the Commission is of the view that it is necessary or desirable, for the protection of the public or for the protection or enhancement of the reputation of the Bailiwick as a finance centre, the Commission may apply to the Court for an order directing that its decision should, without prejudice to any appeal, have immediate effect<sup>32</sup>.

#### **2.5.5 Consequences of lifting or expiration of suspension**

- (1) Suspension is a regulatory sanction that is applied because of regulatory non-compliance or the licensee's behaviour. The lifting of a suspension will not expunge it from the individual, or licensee's regulatory history with the Commission.

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<sup>30</sup> Section 49(1), LCF Law.

<sup>31</sup> Section 49(4), LCF Law.

<sup>32</sup> Section 29(4), Enforcement Powers Law.

- (2) Similarly, revocation is a regulatory sanction that is applied because of regulatory non-compliance. A revocation will not be expunged from a licensee's regulatory history; nor from the regulatory history of those involved in its control and direction.
- (3) The Commission reserves its right to take the revocation or suspension into account should regulatory concerns arise in the future.

### 2.5.6 Publication<sup>33</sup>

- (1) The Commission must maintain a list of all persons who hold licences under the LCF Law and is required to publish the fact that a person has ceased to hold a licence, whether by virtue of revocation, surrender or expiry of the licence or otherwise, or has had its licence suspended.
- (2) The list will be updated to reflect that a person has ceased holding a licence or that the licence has been suspended at the time which this occurs.

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<sup>33</sup> Section 42, LCF Law

## 2.6 Prohibition Orders

### 2.6.1 Prohibition orders under the Enforcement Powers Law

- (1) A prohibition order is an enforcement sanction that prohibits an individual from acting in certain roles, or performing certain functions, within the Bailiwick's regulated financial services industry.
- (2) A prohibition order can only be applied to an individual.
- (3) A prohibition order can be imposed where it appears to the Commission that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by a licensee<sup>34</sup>. In determining whether a person is fit and proper, the Commission must have regard to the fit and proper requirements of the minimum criteria for licensing<sup>35</sup>.
- (4) The Commission has the power to prohibit an individual from performing any function, specified function, or specified class or description of function<sup>36</sup>.
- (5) The prohibition order may relate to any –
  - (a) regulated, specified regulated, or specified class or description of regulated business;
  - (b) licensee, specified or specified class or description of licensee;

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<sup>34</sup> Section 33, Enforcement Powers Law.

<sup>35</sup> Schedule 4, POI Law; Schedule 2, Banking Law; Schedule 1, Fiduciaries Law; Schedule 7, IB Law; Schedule 4, IMII Law; Schedule 4, LCF Law.

<sup>36</sup> Section 33, Enforcement Powers Law.

- (c) authorised or registered collective investment scheme, specified or specified class or description of authorised or registered collective investment scheme; or
- (d) supervised role, office, or employment specified or specified class or description of role, office, or employment.

### **2.6.2 Variation and revocation of a prohibition order**

- (1) Once it has come into effect, the Commission may vary or revoke a prohibition order on the application of the person to whom it applies<sup>37</sup>.
- (2) Decisions to make, vary, or refuse to revoke a prohibition order can be appealed to the Royal Court<sup>38</sup>.

### **2.6.3 The Commission's Approach**

- (1) The Commission takes very seriously the requirement, under the Regulatory Laws, that an individual be fit and proper to hold a position subject to requirements under the minimum criteria for licensing.
- (2) The requirement to be fit and proper is a continuous one and exists –
  - (a) when the Commission is notified of the proposed appointment;

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<sup>37</sup> Section 33(5), Enforcement Powers Law.

<sup>38</sup> Section 106(1)(i), Enforcement Powers Law.

- (b) when the Commission approves the proposed appointment or does not object to the proposed appointment, as applicable; and
  - (c) at all times thereafter until the individual ceases to hold a relevant position.
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- (3) Save as set out 2.6.1(3), the Enforcement Powers Law does not set out any criteria for determining whether to impose a prohibition order, the order's scope, or its duration. The Commission must consider in each case whether, in line with the Enforcement Policy, the imposition, variation, or revocation is appropriate.
  - (4) In considering whether to make a prohibition order, its scope and duration, the Commission will consider the seriousness of the contravention or misconduct and all relevant circumstances.
  - (5) The Commission will generally consider imposing a prohibition order where the contravention or misconduct is by a board member or an individual with greater responsibility, or who undertakes a more senior role; or where the behaviour of an individual, irrespective of their level, is such that the contravention has caused or is likely to cause damage to the reputation of the Bailiwick; or the individual poses a risk to the customers or the public.



#### 2.6.4 Appeal and the effective date of prohibition orders

- (1) A decision to impose a prohibition order can be appealed to the Royal Court<sup>39</sup> within 28 days following the date of notice of the Commission's decision<sup>40</sup>.
- (2) A prohibition order will come into effect seven days after the date which the decision is handed down, unless the decision specifically states an alternative date.
- (3) Parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision.

#### 2.6.5 Breach of prohibition orders

- (1) It is a criminal offence for an individual to perform, or agree to perform, any function in breach of a prohibition order<sup>41</sup>. A licensee is required to take reasonable care to ensure none of its functions, in relation to the relevant business or activity, are performed by a person who is prohibited from performing that function by a prohibition order<sup>42</sup>.

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<sup>39</sup> Section 106(1)(i), Enforcement Powers Law.

<sup>40</sup> Section 106(4), Enforcement Powers Law.

<sup>41</sup> Section 33(3), Enforcement Powers Law.

<sup>42</sup> Section 33(4), Enforcement Powers Law.

- (2) An individual who agrees to perform any function in contravention of a prohibition order is personally liable, either jointly or severally, for any debts and liabilities that arise because of the actions taken<sup>43</sup>.

#### **2.6.6 Order revocation or expiration**

- (1) A prohibition order is a regulatory sanction that is applied because of regulatory non-compliance. Its expiration or revocation will not expunge the order from the person's regulatory history with the Commission. The Commission reserves its right to take the original prohibition order into account should regulatory concerns arise in the future.

#### **2.6.7 Publication**

- (1) The Commission must establish and maintain a list of all persons to whom a prohibition order applies<sup>44</sup> and that list may contain such information, in respect of all or any of the persons named on the order, as the Commission thinks desirable.
- (2) It is the practice of the Commission to publish the list of all individuals to whom prohibition orders apply, the functions or descriptions of functions which the individual concerned is prohibited from performing, and whether an order has been varied or revoked.

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<sup>43</sup> Section 35, Enforcement Powers Law.

<sup>44</sup> Section 34, Enforcement Powers Law.

- (3) The Commission will continue to proceed based on a presumption in favour of publishing the fact that a prohibition order has been imposed and its scope and duration. The presumption will only be overridden in exceptional circumstances, particularly where the continuing exercise of the Commission's statutory duties would be prejudiced by disclosure.
  
- (4) The timing of publication will be decided on a case-by-case basis and the matters which the Commission will take into consideration will include –
  - (a) the date on which the prohibition order is due to take effect;
  - (b) any submissions made, to the Commission, as to the effects of the imposition of the prohibition order;
  - (c) whether the Commission has been notified of an intention to appeal the decision;
  - (d) any directions, handed down by the Royal Court, when granting a stay pending appeal;
  - (e) the protection of the public interest;
  - (f) the protection and enhancement of the reputation of the Bailiwick as a financial centre.

## 2.7 Disqualification Orders

### 2.7.1 Relevant legislative provisions

- (1) Under section 427 of the Companies Law<sup>45</sup> and section 15(4) of the Prescribed Businesses Law,<sup>46</sup> the Commission may apply to the court for a disqualification order.
- (2) Disqualification orders, under the different Laws, are set out in the table below.
- (3) The right of appeal against an order is as set out in the Bailiwick's court procedures.

	The Companies Law	The Prescribed Businesses Law
Who?	An individual, body corporate, or unincorporated body	An individual, body corporate, or unincorporated body
Grounds?	On conduct; that person is unfit to be concerned in the management of a company	Contravening a provision or committing an offence made under any relevant enactment AND in the public interest
Criteria for Court to consider	Section 428(2) & (3)	None specified
What can a person be disqualified from?	<ul style="list-style-type: none"> <li>• Being a director, secretary, or other officer of any or a specified company;</li> <li>• Being a shadow director of any or a specified company;</li> <li>• Participating or being involved in the management, formation,</li> </ul>	Without the leave of the Court – <ul style="list-style-type: none"> <li>• Being a director, controller, partner, or senior officer of any specified, prescribed business;</li> <li>• Participating in, or being in any way</li> </ul>

<sup>45</sup> The Companies (Guernsey) Law, 2008.

<sup>46</sup> The Prescribed Businesses (Bailiwick of Guernsey) Law, 2008.

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	<p>or promotion of any or a specified company;</p> <ul style="list-style-type: none"> <li>• Participating or being involved in the management, formation, or promotion of any overseas company;</li> <li>• Being an administrator of any or a specified company;</li> <li>• Being an administration manager of any company or any specified company or of a cell of any protected cell company or any specified protected cell company;</li> <li>• Being a receiver of a cell of any protected cell or a specified protected cell company;</li> <li>• Being a liquidator of any or a specified company.</li> </ul>	<p>concerned in, director or indirectly, the management, the management, formation, or promotion of any specified, prescribed business.</p>
Maximum term	15 Years	15 Years
Can it be renewed?	No specific provision	Yes – more than once (at any time before, or within a period of one month immediately succeeding, the date of the expiration of the order)
Revocation	On successful application to the Court by the person subject to the order	On successful application to the Court by the person subject to the order
Contravention of the Disqualification	Guilty of an offence. Personally liable for any debts and liabilities, of the company, incurred whilst acting in contravention of the order	Guilty of an offence. Personally liable for any debts and liabilities, of the company, incurred whilst acting in contravention of the order or the renewal of the order

**2.7.2 The Commission’s approach to applying for a disqualification order**

- (1) Neither the FSC Law, the Companies Law, the Prescribed Businesses Law, nor the Enforcement Powers Law set out any criteria that the Commission must take into consideration when deciding whether to apply for a disqualification order. It is not possible, nor would it be appropriate, for the Commission to try to produce a definitive list of matters that would be considered.
- (2) The Commission will consider, in each case, whether the application is consistent with the Commission's Enforcement Policy and its functions under the FSC Law – in particular with regard to the protection of the public interest and the protection and enhancement of the reputation of the Bailiwick as a financial centre.
- (3) In determining whether to make an application, the Commission will also consider –
  - (a) whether it is desirable, in the public interest, to apply for a disqualification order; and
  - (b) the criteria, laid down in the relevant Law, to which the Court will refer when deciding whether to make the order.
- (4) The Commission will consider all of the circumstances of the case. In relation to the public interest, the Commission will consider, amongst other things –
  - (a) the seriousness of the matter;
  - (b) whether the public should be protected from that person's involvement in companies or in a particular business;
  - (c) the need to encourage that person to remedy their failings, shortcomings or contraventions related to the relevant legislation;
  - (d) the need to deter that person from repeating the misconduct; and

- (e) the need to deter others.
  
- (5) The Commission does not consider itself precluded from applying for a disqualification order in relation to a person where a criminal prosecution has been discontinued, against that person; or where the Law Officers have proposed a disqualification order as part of a sentencing option in connection with criminal prosecutions and the Court has chosen not to impose this.

### 2.7.3 Disqualification orders and prohibition orders

- (1) In cases where the nature of the contravention or misconduct of the individual is such that the Commission has determined that the person is not fit and proper, under the Regulatory Laws, the Commission will consider whether it is appropriate to impose a prohibition order (see section 2.6) instead of, or in addition to, making an application to the Court for a disqualification order.
  
- (2) Generally, the Commission will seek a disqualification order, under the Companies Law, in addition to a prohibition order where the Commission is of the view that –
  - (a) a prohibition order alone would not adequately protect the public interest or is for some other reason not a sufficient response to the seriousness of the case, for example, where the case relates to dishonesty, fraud, money-laundering, financial crime, or the facilitating of such matters;
  - (b) doing so would protect or enhance the reputation of the Bailiwick as a financial centre; or
  - (c) any other circumstances which appear to the Commission to make the behaviour more suitable for it to be dealt with in one way rather than the other.

#### 2.7.4 Disqualification order by consent

- (1) The power to grant, revoke, or (where provided for) renew a disqualification order is in the Court's absolute discretion, and such an order cannot be made, revoked, or renewed by agreement between the parties alone<sup>47</sup>.

#### 2.7.5 Renewal of a disqualification order

- (1) Under the Prescribed Businesses Law, the Court may renew a disqualification order on more than one occasion<sup>48</sup>. There is no guidance on the criteria to be applied when the Court is considering whether to renew. In deciding whether to apply for the order to be renewed, the Commission will consider the same matters that it takes into account when deciding to apply for an order and will also consider –
  - (a) the background to the making of the original order;
  - (b) whether the person has remedied the matters that led to the original disqualification where it would have been reasonable for them to do so;
  - (c) the likelihood of a reoccurrence; and
  - (d) whether they have committed further breaches or contraventions or otherwise been guilty of further unfit conduct.

#### 2.7.6 Removal or variation of a disqualification order

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<sup>47</sup> Section 427(4), Companies Law; Section 15(10), Prescribed Businesses Law.

<sup>48</sup> Section 15(7), Prescribed Business Law



- (1) The Commission does not have the power, under the Companies Law or the Prescribed Businesses Law to apply for the removal or variation of a disqualification order. Only the person subject to the order may do this.

#### **2.7.7 Publication**

- (1) Details of a disqualification order granted by the Court will be published on the Register of Disqualification Orders maintained by the Registrar of Companies. The Register will be published on the Guernsey Registry website.
- (2) The Commission will proceed on the basis that there is a presumption in favour of publication in relation to the making of a disqualification order by the Court.
- (3) Such publication will generally be made on the Commission's website once the Court has granted the order.

## 2.8 Disapplication of the directorship exemption

### 2.8.1 Relevant legislative provisions

- (1) Under the Fiduciaries Law a person cannot carry on by way of business, in or from within the Bailiwick, any regulated activities<sup>49</sup> except in accordance with a licence granted by the Commission under that Law.
- (2) The Fiduciaries Law also states that acting as a director in, or from within, the Bailiwick is a regulated activity for which a fiduciary licence is required if that director is acting by way of business.
- (3) However, the Fiduciaries Law also provides several exemptions from the requirement for a director to obtain a licence, including –
  - (a) where the company has an established place of business in the Bailiwick; provided that no services consisting of or comprising a regulated activity are supplied to the company by the director (other than acting as a director)<sup>50</sup>;
  - (b) where the company is a company listed on a stock exchange recognised by the Commission for the purposes of section 3(1) of the Fiduciaries Law<sup>51</sup>;
  - (c) acting as a director of a company when more than half in nominal value of the equity share capital of that company is held by one or more of the following, separately or collectively –
    - the director, as beneficial owner;

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<sup>49</sup> As set out in section 2 of the Fiduciaries Law.

<sup>50</sup> Section 3(1)(b), Fiduciaries Law.

<sup>51</sup> Section 3(1)(c), Fiduciaries Law.

- any close relative of the director, as beneficial owner;
- the trustees of a trust of which a person mentioned above is a beneficiary<sup>52</sup>.

(d) the company is a supervised body<sup>53</sup>; or

(e) the company is a subsidiary of any of those in (a) to (d)<sup>54</sup>.

(4) The Fiduciaries Law also contains a further exemption in relation to acting as a director (“the exemption”) which allows an individual to hold up to six directorships of companies which do not fall under any of the categories set out above<sup>55</sup>.

(5) The exemption applies only to acting as a director and covers no other regulated fiduciary activity. It applies to directorships of companies incorporated anywhere in the world. Once an individual steps over the threshold of six directorships they would be required to hold a personal fiduciary licence should they wish to hold any further directorships of companies which do not fall under the categories set out above – where that individual is a director by way of business.

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<sup>52</sup> Section 3(1)(d), Fiduciaries Law.

<sup>53</sup> Section 3(1)(e), Fiduciaries Law.

<sup>54</sup> Section 3(1)(f), Fiduciaries Law.

<sup>55</sup> Section 3(1)(g), Fiduciaries Law.

- (6) The exemption only applies to individuals and not to any company acting in or from within the Bailiwick as a corporate director. The exemption can be disapplied by the Commission in cases where, having regard to the minimum licensing criteria, it is not satisfied that the individual is a fit and proper person to be or to become a director of a company.<sup>56</sup> The exemption may also be disapplied at the individual's request. In the case of officers, employees, and holders of supervised roles the exemption may also be disapplied in any of the circumstances set out in section 32(3)(b)(iii) to (v).
- (7) A person aggrieved by the Commission's decision to disapply the exemption may appeal to the Court against the decision<sup>57</sup>.

### 2.8.2 The Commission's approach

- (1) Although the Fiduciaries Law sets out the criteria which the Commission must consider when deciding whether a person is fit and proper, other than those set out in section 32(3)(i) to (v) of the Enforcement Powers Law, it does not prescribe any factors that it must take into consideration in determining whether to disapply the exemption.
- (2) It is not possible, nor would it be appropriate for the Commission to try and produce a definitive list of matters that it might take into account. The Commission will consider, in each case, whether the disapplication is consistent with, and an effective discharge of, its functions. It will consider the Enforcement Policy and its regulatory objectives, namely –
  - (a) providing effective supervision of the financial services sector;

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<sup>56</sup> Section 32, Enforcement Powers Law.

<sup>57</sup> Section 106(1)(h), Enforcement Powers Law.

- (b) making recommendations, to the States, on schemes for the statutory regulation of finance businesses;
- (c) countering financial crime and the financing of terrorism;
- (d) maintaining confidence in the Bailiwick's financial services sector; and
- (e) ensuring the safety, soundness, and integrity of the Bailiwick's financial services sector.

### **2.8.3 Appeal and the effective date of the disapplication of the directorship exemption**

- (1) A decision to disapply the exemption can be appealed to the Royal Court<sup>58</sup> within 28 days following the date of notice of the Commission's decision<sup>59</sup>.
- (2) In general, a disapplication will come into effect on the date on which it is made.
- (3) A decision to impose a disapplication will come into effect seven days after the date which the decision is handed down, unless the decision specifically states an alternative date.
- (4) Parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision.

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<sup>58</sup> Section 106(1)(h), Enforcement Powers Law.

<sup>59</sup> Section 106(4), Enforcement Powers Law; by summons served on the Chairman of the Commission stating the grounds and material facts on which the appeal relies.

#### 2.8.4 Consequences of the disapplication of the exemption

- (1) The disapplication of the exemption is a regulatory sanction that is applied because of the individual's behaviour. Any reinstatement of the exemption will not expunge the disapplication from the person's record with the Commission.
- (2) The Commission reserves its right, should it determine it reasonable to do so, to take the disapplication of the exemption into account should regulatory concerns relating to the individual, or a firm with which that individual is associated, arise in the future.

## 2.9 Discretionary Financial Penalties

### 2.9.1 The power to impose a discretionary financial penalty

- (1) The Commission has the power, under the Enforcement Powers Law, to impose a discretionary financial penalty of up to £4,000,000 on licensed firms or former licensed firms and up to £400,000 on licensed (or formerly licensed) individuals, relevant officers or any other person, where it is satisfied that the licensee, former licensee, relevant officer or other person<sup>60</sup> -
  - (a) has contravened in a material particular:
    - (i) a provision of the Enforcement Powers Law, the FSC Law or the prescribed Laws; or
    - (ii) any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction, or arrangement imposed, issued, or arising under any such provision, or
  - (b) does not fulfil any of the applicable minimum criteria for licensing specified in the Regulatory Laws.
- (2) The Commission also has the power under the Prescribed Business Law<sup>61</sup> to impose a discretionary financial penalty of up to £200,000 where it considers that a registered prescribed business or any person who is a director, controller, partner, senior officer, or beneficial owner of a registered prescribed business has contravened or not fulfilled in a material particular a provision of, or made under, that Law or any of the relevant enactments.

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<sup>60</sup> Section 39(1), Enforcement Powers Law.

<sup>61</sup> Section 13(1), Prescribed Businesses Law.

- (3) Under both Laws, the Commission must consider the factors set out below when deciding whether to impose a discretionary financial penalty and its amount.

### 2.9.2 Legislative requirements

- (1) The Commission will determine –
- (a) whether to impose the discretionary financial penalty; and
  - (b) the amount.
- (2) In making these determinations the Commission must consider –
- (a) whether the contravention or non-fulfilment was brought to the attention of the Commission by the persons concerned;
  - (b) the seriousness of the contravention or non-fulfilment<sup>62</sup>;
  - (c) whether the contravention or non-fulfilment was inadvertent;
  - (d) what efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent any reoccurrence;

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<sup>62</sup> [2024] GCA003 GFSC V I. Domaille And I. Clarke And M. Hannis 18 January 2024.



- (e) the potential financial consequences to the person concerned and to third parties, including customers and creditors of that person, of imposing a discretionary financial penalty;
  - (f) in the case of individuals, the emoluments, pertinent to them, at the time that the contravention or non-fulfilment occurred;
  - (g) discretionary financial penalties imposed by the Commission in other cases; and
  - (h) any matters which it considers to be relevant<sup>63</sup>.
- (3) Discretionary financial penalties imposed in other cases will be considered but are not considered to be binding on the Commission<sup>64</sup>.

### 2.9.3 Assessment of penalty quantum

- (1) The Commission has decided that it would not be appropriate for it to prescribe a specific penalty quantum with regards to breaches of the Regulatory Laws.
- (2) Instead, the Commission will determine the quantum having regard to the factors set out above and, in relation to the penalties under the Enforcement Powers Law, the Schedule of Bandings set out in section 2.9.

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<sup>63</sup> Section (2)(h) is not applicable to those registered under the Prescribed Businesses Law.

<sup>64</sup> [2024] GCA003 GFSC V I. Domaille And I. Clarke And M. Hannis 18 January 2024 – paragraphs 178 - 179

#### 2.9.4 Appeal and the effective date of a discretionary financial penalty

- (1) A decision to impose a discretionary financial penalty can be appealed to the Royal Court<sup>65</sup> within 28 days following the date of notice of the Commission's decision<sup>66</sup>.
- (2) A decision to impose a discretionary financial penalty will come into effect seven days after the date which the decision is handed down, unless the decision specifically states an alternative date, with the Commission invoicing for payment within seven days from that date.
- (3) Parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision.

#### 2.9.5 Publication

- (1) The Commission may publish the name of the person on whom a discretionary financial penalty has been imposed, along with the amount<sup>67</sup>.
- (2) The Commission will proceed on the basis of a presumption in favour of publication, on the basis that the public interest served by disclosure will only be overridden by other factors in exceptional circumstances, particularly where the continuing exercise of the Commission's statutory duties would be prejudiced by present disclosure.

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<sup>65</sup> Section 106(1)(m), Enforcement Powers Law.

<sup>66</sup> Section 106(4), Enforcement Powers Law; by summons served on the Chairman of the Commission stating the grounds and material facts on which the appeal relies.

<sup>67</sup> Section 39(7), Enforcement Powers Law; section 13(3), Prescribed Businesses Law.

- (3) The timing of publication will be decided on a case-by-case basis and the matters which the Commission will take into consideration will include -
  - (a) the date on which the Discretionary Financial Penalty is due to be imposed;
  - (b) whether the Commission had been notified of an intention to appeal the decision;
  - (c) whether an application to stay the decision, pending appeal, has been granted;
  - (d) the protection of the public interest;
  - (e) the protection and enhancement of the reputation of the Bailiwick as a financial centre.
  
- (4) Where the imposition of a discretionary financial penalty is appealed, and the imposition of the discretionary financial penalty has been stayed, then publication will take place on completion of an unsuccessful appeal.

#### **2.9.6 Consequences of a discretionary financial penalty**

- (1) The imposition of a discretionary financial penalty is a regulatory sanction that is applied because of regulatory non-compliance. Once paid, the fact that the Commission imposed a discretionary financial penalty will be recorded in the firm's regulatory history.
  
- (2) The Commission reserves its right, should it determine it reasonable to do so, to take the discretionary financial penalty into account should regulatory concerns arise in the future.

## Discretionary Financial Penalties – schedule of bandings

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 39 of The Financial Services Business (Enforcement Powers)(Bailiwick of Guernsey) Law, 2020 ('the Enforcement Powers Law').
- In determining which band a firm or individual may fall under, the behaviour of the firm and individual (as relevant) will be considered. All of the characteristics falling within a particular band do not have had to occur for the proposed sanctions to fall within that band. Additionally, where some behaviour falls within a lower band and some within the higher band, this does not mean that the lower band will be applied. Each situation will be looked at on a case by case basis to determine which is the appropriate band to apply.
- 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 39(6) of the Enforcement Powers Law).

Issue	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 his/her connection to the firm)	Up to £100,000 (with consideration to the total emoluments the individual has received during his/her connection to the firm)	Up to £250,000 (with consideration to the total emoluments the individual has received during his/her connection to the firm)	Up to £400,000 (with consideration to the total emoluments the individual has received during his/her connection to the firm)

## ENFORCEMENT EXPLANATORY NOTE

	Characteristics			
<b>Whether the contravention or non-fulfilment was brought to the attention of the Commission by the person concerned</b>	Brought to the attention of the Commission by the person concerned as soon as discovered	Brought to the attention of the Commission by the person concerned	Not brought to attention of the Commission by the person concerned but they acknowledged, straight away, or within a short time, breaches when brought to their attention	Not brought to attention of the Commission by the person concerned and they failed to acknowledge the breaches once identified by the Commission.
Open and Cooperative	Completely open and cooperative	Partially, but not fully open and cooperative	Partially, but not fully open and cooperative	Not open and cooperative
<b>The seriousness of the contravention or non-fulfilment</b>				
The number of failings, the level of seriousness of the failings, whether or not systemic	A small number of regulatory failings which are serious in nature but not systemic	Regulatory failings which are serious in nature but not systemic	Systemic regulatory failings which are serious in nature	Systemic regulatory failings, which are serious in nature
Risk of loss	No risk of loss to customers of the Licensee	Risk, but no actual loss to customers of the Licensee	Significant risk, but no actual loss to customers of the Licensee	Significant risk of loss to customers or actual loss to customers of the Licensee
Risk to reputation	No reputational risk to the Bailiwick	Reputational risk to the Bailiwick	Significant reputational risk to the Bailiwick	Significant reputational risk to the Bailiwick or actual reputational damage
Financial crime risk	Small risk of financial crime or being used to facilitate financial crime	Risk of financial crime or being used to facilitate financial crime	Significant risk of financial crime or being used to facilitate financial crime	Suspected financial crime or Licensee used to facilitate financial crime
Previous history	No adverse regulatory history	Previous unconnected regulatory breaches	Previous regulatory breaches which may or may not be connected	Previous regulatory breaches/poor regulatory history which may or may not be connected
<b>Whether or not the contravention or non-fulfilment was inadvertent</b>				
Deliberate actions / incompetence	All failings were inadvertent	Majority of failings were inadvertent	Majority of failings were not inadvertent	Failings were not inadvertent

**ENFORCEMENT EXPLANATORY NOTE**

<b>What efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent a recurrence</b>	Effective steps taken to rectify breach(es) and prevent recurrence	Little action taken to rectify breach(es) and prevent recurrence, or the steps taken were insufficient	Little or no action taken to rectify breach(es) and prevent recurrence, or the steps taken were insufficient	No steps taken to rectify breach(es) and prevent recurrence
------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------

\* **Supervisory action may be more appropriate for failings identified in Band 1. As such we may not seek to enforce on the characteristics within this band, and where there are no other aggravating factors, supervisory action may be deemed to be more appropriate. This will be considered on a case by case basis.**

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 39 of the Enforcement Powers Law 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. All factors under section 39(6) will be taken into consideration as required under the Enforcement Powers Law. 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.

## 2.10 Administrative Financial Penalties

### 2.10.1 Enforcement Powers Law provision<sup>68</sup>

- (1) Under provisions set out in the Enforcement Powers Law the Commission has the power to make regulations setting out administrative financial penalties for –
  - (a) the late payment of fees or charges; and
  - (b) the late filing or delivery of information or documents required to be filed or delivered.
- (2) Further information as to the circumstances under which such penalties become payable and the levels at which such penalties are set will be made available on the Commission's website.

### 2.10.2 The Commission's approach

- (1) The Commission follows a policy to impose administrative financial penalties, where these have been set, and will issue a notice to a licensee who has become subject to such a penalty.
- (2) Once an administrative financial penalty has been issued, it is the Commission's policy to pursue payment.

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<sup>68</sup> Section 40, Enforcement Powers Law.

## 2.11 Private Reprimands

### 2.11.1 Enforcement Powers Law provisions<sup>69</sup>

- (1) The Commission may issue a private reprimand to a licensee or to any person who holds a supervised role, is an officer, or an employee of a licensee.
- (2) In considering whether to issue a private reprimand, the Commission may have regard to compliance with any of the provisions of the Regulatory Laws.
- (3) A private reprimand can only be published with the permission of the licensee or person in respect of which it was issued.
- (4) Decisions to issue a private reprimand may be appealed to the Royal Court<sup>70</sup> within 28 days following the date of notice of the Commission's decision<sup>71</sup>.
- (5) A decision to impose a private reprimand will come into effect seven days after the date which the decision is handed down, unless the decision specifically states an alternative date.
- (6) Parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision.

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<sup>69</sup> Section 36, Enforcement Powers Law.

<sup>70</sup> Section 106(1)(k), Enforcement Powers Law.

<sup>71</sup> Section 106(4), Enforcement Powers Law, by summons served on the Chairman of the Commission stating the grounds and material facts on which the appeal relies.



### 2.11.2 The Prescribed Businesses Law provisions

- (1) Under the Prescribed Businesses Law, the Commission may issue, to the business or any person who is a director, controller, partner, senior officer or beneficial owner of a registered prescribed business, a private reprimand<sup>72</sup>, subject to section 4 of the Prescribed Businesses Law and where it considers it appropriate.
  - (2) Decisions to issue a private reprimand may be appealed to the Royal Court within 28 days of the Commission's decision<sup>73</sup>.
  - (3) A decision to impose a private reprimand will come into effect seven days after the date which the decision is handed down, unless the decision specifically states an alternative date.
- (4) Parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision.

### 2.11.3 The Commission's approach

- (1) Save as set out in section 12 of the Prescribed Businesses Law, the Laws do not prescribe the criteria that the Commission must take into consideration when determining whether to issue, and any terms which may be included in, a private reprimand.

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<sup>72</sup> Section 12(1), Prescribed Businesses Law.

<sup>73</sup> Section 4(1)(d), Prescribed Businesses Law.

- (2) The Commission will consider, in each case, whether a private reprimand is consistent with the Enforcement Policy and the Commission's functions.
- (3) In considering whether to issue a private reprimand, the Commission will consider all the relevant circumstances including the seriousness of any contravention or misconduct.

#### **2.11.4 Consequences of a private reprimand**

- (1) A private reprimand is a regulatory sanction that is applied because of regulatory non-compliance or other conduct.
- (2) A private reprimand will remain on a licensee's, business' or individual's regulatory history (as relevant); and the regulatory history of those individuals involved in its control and direction at the time that that private reprimand was issued.
- (3) The Commission reserves its right to take any private reprimand into account should regulatory concerns arise in the future.

## 2.12 Public Statements

### 2.12.1 Power to publish a public statement

- (1) The Commission, following accepted international practice, will always seek to impose a public statement following the Enforcement Process<sup>74</sup>.
- (2) The public statement may identify the relevant persons and individuals and will raise awareness of the issues where standards have fallen short.
- (3) When an enforcement matter is settled by agreement between the Commission and a person and the Commission is satisfied there are grounds for making a public statement, the Commission would also expect to issue a public statement.
- (4) The Commission has the power under the Enforcement Powers Law to publish a statement where it is satisfied that a person, a licensee, a former licensee, a relevant officer, or other person<sup>75</sup> -
  - (a) has contravened in a material particular:
    - (i) a provision of, or made under, the Enforcement Powers Law, the FSC Law and the prescribed Laws; or
    - (ii) any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction, or arrangement imposed, issued, or arising under any such provision, or

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<sup>74</sup> Subject to the grounds set out at section 38 of the Enforcement Powers Law.

<sup>75</sup> Section 38, Enforcement Powers Law.

- (b) does not fulfil any of the minimum criteria for licensing, applicable to the party, as specified in the Regulatory Laws.
  
- (5) The Commission also has the power, under the Prescribed Businesses Law<sup>76</sup>, to publish a statement where it considers that a registered prescribed business, or any person who is a director, controller, partner, senior officer, or beneficial owner of a registered prescribed business, has contravened, or not fulfilled, a relevant provision.
  
- (6) Under both Laws mentioned above the Commission must consider the factors summarised below when deciding whether to publish a public statement.

#### 2.12.2 Whether to publish a public statement - Legislative requirements

- (1) The Commission must first determine whether to publish a public statement and, once that decision has been made, then decide on its terms.
  
- (2) When making these decisions the Commission must take into consideration<sup>77</sup> –
  - (a) whether the contravention or non-fulfilment was brought to the attention of the Commission by the person concerned;
  
  - (b) the seriousness of the contravention or non-fulfilment<sup>78</sup>;
  
  - (c) whether the contravention or non-fulfilment was inadvertent;

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<sup>76</sup> The Prescribed Businesses Law, section 14(1).

<sup>77</sup> section 38(2), Enforcement Powers Law; Section 4, Prescribed Businesses Law.

<sup>78</sup> [2024] GCA003 GFSC V I. Domaille And I. Clarke And M. Hannis 18 January 2024..

- (d) what efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent any recurrence;
- (e) the potential financial consequences to the person concerned, and to third parties including customers and creditors of that person, of publishing a Public Statement; and
- (f) Public Statements published, by the Commission, in other cases; and
- (g) any other matters which the Commission considers to be relevant<sup>79</sup>.

### 2.12.3 Terms of a statement

- (1) The Commission will, generally, follow the process described below in determining the terms of a public statement, but reserves the right to deviate from this approach as it may deem necessary or appropriate.
- (2) The Commission has determined that it would not be appropriate for it to prescribe specific criteria in respect of the terms that might be included in a public statement. Instead, the Commission will determine the terms having regard to the factors listed in section 38 (2) of the Enforcement Powers Law and section 14 (2) of the Prescribed Business Law (as summarised above).
- (3) Generally the public statement will include –
  - (a) the identity of the persons in respect of whom the public statement is being made;

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<sup>79</sup> Section (2)(g) does not apply to those registered under the Prescribed Businesses Law.

- (b) an explanation of the circumstances which have given rise to the public statement;
- (c) a description of the breach, contravention or non-fulfilment; and
- (d) any other sanctions which have been imposed as a result of the relevant behaviour.

#### 2.12.4 Appeal

- (1) A decision to record a public statement can be appealed to the Royal Court<sup>80</sup> within 28 days following the date of notice of the Commission's decision<sup>81</sup>
- (2) In general, a public statement will be published on the date on which the decision to make the public statement comes into effect.
- (3) A decision to make a public statement will come into effect seven days after the date which the decision is handed down, unless the decision specifically states an alternative date.
- (4) Parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision.

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<sup>80</sup> Section 106(1)(l), Enforcement Powers Law.

<sup>81</sup> Section 106(4), Enforcement Powers Law; by summons served on the Chairman of the Commission stating the grounds and material facts on which the appeal relies.

## 2.13 Enforceable Undertakings

### 2.13.1 Enforcement Powers Law Provision<sup>82</sup>

- (1) Under the Enforcement Powers Law, the Commission may agree to accept a written undertaking, from an entity or person, which will become enforceable by court order in the event of a breach of the undertaking.
- (2) The Commission can accept written undertakings from any person but such an undertaking must be marked as being an undertaking entered into under section 37 of the Enforcement Powers Law.
- (3) In considering whether to accept a written undertaking, the Commission may have regard to compliance with any of the provisions of the Regulatory Laws.
- (4) The undertaking is proposed by the 'promissor' and may cover situations where the promissor –
  - (a) agrees to carry out specific actions in order to ensure regulatory compliance;
  - (b) agrees to refrain from carrying out specific actions in order to ensure regulatory compliance;
  - (c) agrees to take specific actions in order to avoid falling into a situation where they are deemed to be in contravention of regulatory requirements.

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<sup>82</sup> Section 37, Enforcement Powers Law.

### 2.13.2 The Commission's approach

- (1) At all times, it remains within the Commission's discretion whether to accept an enforceable undertaking.
- (2) The Laws do not prescribe the criteria that the Commission must take into consideration when determining whether to accept, and any terms which may be included in, an enforceable undertaking.
- (3) The Commission will consider, in each case, whether the acceptance of an enforceable undertaking is consistent with the Enforcement Policy and the Commission's functions.
- (4) In considering whether to accept an enforceable undertaking the Commission will consider all relevant circumstances including the seriousness of any contravention or misconduct.
- (5) At all times, the acceptance and continuance of an enforceable undertaking remains in the Commission's discretion.
- (6) The promissor may withdraw or vary the undertaking but must receive express permission, from the Commission, to do so. The Commission will consider all the circumstances of the case, the seriousness of any contraventions and the way in which the promissor has undertaken the conditions of the enforceable undertaking, when deciding whether to accept a request for variation or withdrawal.

### 2.13.3 Consequences of enforceable undertakings

- (1) An enforceable undertaking is an agreement, by the promissor, to abide by regulatory requirements. As such, the Commission may decide to stay, suspend, determine, or settle any other actions which the promissor may be subject to.



- (2) Where the Commission believes that the promissor has acted in contravention of the enforceable undertaking, the Commission will take the appropriate steps to deal with any regulatory breach and may resume actions that have been suspended, whilst the undertaking remained in place, and may instigate new proceedings.
- (3) Additionally, where an enforceable undertaking has been breached, the Commission may apply to the Court requesting an Order to direct the promissor–
  - (a) to comply with the undertaking;
  - (b) to pay an amount not exceeding the financial benefit obtained as a result of the breach of the undertaking;
  - (c) to compensate any other person who has suffered loss, or damage, as a result of the breach of the undertaking;and the Court may impose any order which it deems appropriate.
- (4) An enforceable undertaking will remain on the promissors' regulatory history after it has been fulfilled.
- (5) The Commission reserves its right to take any enforceable undertaking into account should regulatory concerns arise in the future.

## 2.14 Injunctions Restraining Unlawful Business

### 2.14.1 Powers under the Enforcement Powers Law

- (1) Under the Enforcement Powers Law, the Commission may apply to the Court for an injunction to prevent a person or entity engaging in business where it has reason to believe that any of the conditions set out in section 47 (1)(a) or (b)<sup>83</sup> are met.
- (2) Injunctions may be applied for in the following circumstances –
  - (a) when there is a reasonable likelihood that a person will contravene any provisions of the supervisory or regulatory laws or any prohibition, restriction, condition, obligation, enforcement or other requirement, duty, direction or arrangement imposed or issued under those laws; or
  - (b) a person has or may have carried out the actions set out at (a) and there is a reasonable likelihood that the contravention will continue or be repeated.
- (3) The Court may grant an injunction in terms it sees fit. These may include –
  - (a) restraint of the contravention;

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<sup>83</sup> (a) there is a reasonable likelihood that a person will contravene any of the provisions of this Law, the Financial Services Commission Law or the supervisory Laws or any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issue or arising under any such provision, or

(b) a person has or may have contravened a provision, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement mentioned in paragraph (a) and there is a reasonable likelihood that the contravention will continue or be repeated.

- (b) ordering that person or any other person who appears to the Court to have been knowingly concerned in the contravention to take such steps to remedy it; and
- (c) restraint over the disposal of or dealing with assets or class or description of assets;

and the terms and conditions, of such an injunction, including any incidental, ancillary, consequential or supplementary provisions or the application of any penalty, are within the discretion of the Court.

#### **2.14.2 The Commission's approach**

- (1) The Enforcement Powers Law sets out the circumstances in which the Commission may apply to the Court for an injunction to restrain unlawful business.
- (2) An injunction may be applied for at any point at which the Commission is of the opinion that it has sufficient evidence, which it can present to the Court, that there is a reasonable likelihood that unlawful business either has been engaged in or is likely to be undertaken.

## 2.15 Restitution Orders<sup>84</sup>

### 2.15.1 Restitution Orders under the Enforcement Powers Law

- (1) Under the Enforcement Powers Law, the Commission may apply to the Court for the repayment of monies from unlawful business and in certain other circumstances under a restitution order.
- (2) The Commission may apply for a restitution order in any circumstances where business has been carried on in contravention of any of the regulatory or supervisory laws, or of any prohibition, restriction, condition, obligation, enforcement or other requirement, duty, direction or arrangement imposed, issued or arising under any of those laws.
- (3) In cases where a person has carried on any business found to be in contravention of the Enforcement Powers Law, the Financial Services Commission Law or the supervisory laws, the Court may order that person to repay monies accepted in the course of that business, or appoint a receiver to recover such monies.
- (4) In cases where a person has profited from business carried out in circumstances set out in (2), the Court may order that person to pay a sum, decided by the Court, or may appoint a receiver to recover such a sum.
- (5) In cases where a customer of the person, who has undertaken business in circumstances set out in (2), has, as a consequence, suffered any loss or been otherwise adversely affected the Court may order that person to pay a sum, decided by the Court, or may appoint a receiver to recover such a sum.

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<sup>84</sup> Section 46, Enforcement Powers Law

### 2.15.2 The Commission's approach

- (1) The Enforcement Powers Law sets out the circumstances in which the Commission may apply to the Court for a restitution order.
- (2) A restitution order may be applied for at any point at which the Commission is of the opinion that it has sufficient evidence, which it can present to the Court, that unlawful business has been engaged in.
- (3) The Commission may make applications for restitution orders where voluntary recompense is not offered and –
  - (a) to recompense the losses of customers;
  - (b) to deprive persons of the profit gained from undertaking business in an unlawful manner.

## 2.16 Appointment of Administrator and Administration Manager

### 2.16.1 Administration

- (1) Issues relating to solvency, undue risk to customers or potential customers, or protection of the public or reputation of the Bailiwick as a finance centre can often arise at short notice and require immediate action. The Commission reserves the right to act swiftly, where the circumstances dictate, and may have to disregard aspects of this section as the case requires. The Commission will seek to liaise with the Board of any company when looking to invoke these powers, where appropriate, but this may not always be possible.

### 2.16.2 The Enforcement Powers Law

- (1) Under the Enforcement Powers Law, the Commission may apply to the Court to seek an administration order directing that, during the period for which the order is in force, the affairs, business, and property of the relevant person shall be managed by an administration manager appointed for the purpose by the Court.
- (2) The Court may make an administration order in relation to the relevant person<sup>85</sup> if it –
  - (a) is satisfied that the administered person -
    - (i) has performed an act or made an omission<sup>86</sup>, or

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<sup>85</sup> Section 81(1), Enforcement Powers Law.

<sup>86</sup> Being acts performed or omissions made after 10 December 2008, which is the commencement of the repealed Protection of Investors (Administration and Intervention)(Bailiwick of Guernsey) Ordinance, 2008.

- (ii) will or is likely to perform any act or make any omission that would cause undue risk to investors, and
- (b) considers that the making of an administration order would be for the protection of investors.

### 2.16.3 The Companies Law

- (1) Under the Companies Law, the Commission may apply to the Court to seek an administration order directing that, during the period for which the order is in force, the affairs, business, and property of a supervised company or the company engaged in financial services business, shall be managed by an administrator appointed for the purpose by the Court<sup>87</sup>.
- (2) The Court may make an administration order in relation to a supervised company, or the company engaged in financial services business<sup>88</sup>, if it –
  - (a) is satisfied that a company (or a cell of a protected cell company) does not satisfy or is likely to become unable to satisfy the solvency test<sup>89</sup>; and
  - (b) considers that the making of an administration order may achieve one or more of the purposes set out below –
    - (i) the survival of the company/cell, and the whole or any part of its undertaking, as a going concern; or

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<sup>87</sup> Section 374(2), Companies Law.

<sup>88</sup> Section 374(1), Companies Law.

<sup>89</sup> As defined in section 527, Companies Law.

- (ii) a more advantageous realisation of the company's/cell's assets than would be effected on winding up<sup>90</sup>.

#### 2.16.4 Making an application

- (1) In considering whether to apply for an Administration Order or Administration Management Order, the Commission will be guided by the criteria set out in the relevant law which entitled the Court to make the Order.
- (2) The legislation does not set out any criteria that the Commission must take into account when determining whether to make an application and it would not be possible, or appropriate, for the Commission to try to set out a definitive list of such matters.
- (3) Whenever the Commission is considering making an application it will, firstly, decide whether such an application is consistent with the Commission's functions and its Enforcement Policy. In determining this 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.
- (4) In deciding these questions, the Commission will consider all of the circumstances of the case, including but not limited to –
  - (a) the seriousness of the matter;

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<sup>90</sup> Section 374(3), Companies Law.



- (b) whether the public or customers should be protected from the relevant persons, the supervised company's, or other company's involvement with controlled investment business or financial services business; and
- (c) in the case of the Enforcement Powers Law, whether an administration management order would be likely to provide customers or the public with effective and adequate protection and, in the case of the Companies Law, the solvency test and the prospect that either of the purposes as set out in section 2.16.3 above can be achieved.

**2.16.5 The appointment of an administrator or administration manager**

- (1) When making an application, the Commission will include, in its application to the Court, a recommendation for the appointment of a particular administrator or administration manager.

**2.16.6 Granting, discharging, and varying an administration order by consent**

- (1) It should be noted that the power to grant, discharge, or vary an administration order is in the Court's absolute discretion and one cannot be made, discharged, or varied on the agreement of the parties<sup>91</sup>.
- (2) The Commission does not have the power to apply for the discharge or variation of an administration order.

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<sup>91</sup> Sections 82(2) and 89, Enforcement Powers Law; Sections 374(1) and 382(3), Companies Law.

**2.16.7 Discharge of an administration order**

- (1) An administration order will not be expunged from a licensee's regulatory history, or from that of individuals who were involved in its control and direction at the time the administration order was granted, by discharge or variation of the order.
- (2) The Commission reserves its right to take the administration order into account should regulatory concerns arise in the future.

**2.16.8 Publication**

- (1) Details of an Administration Order granted by the Court will be published on the Register of Companies maintained by the Registrar of Companies. The Register is published on the Guernsey Registry website.
- (2) 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 an Administration Order by the Court. Such publication will generally be made on the Commission's website once the Court has granted the Administration Order.

## 2.17 Winding-Up of a Business

### 2.17.1 Introduction to winding-up

- (1) This section 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 Limited Liability Partnerships Law, the Limited Partnerships Law, the Prescribed Businesses Law and the Enforcement Powers Law.
- (2) The Commission recognises that because a winding-up order brings the business to an end, its impact is particularly severe. For this reason, a winding-up order will usually be sought only 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.

### 2.17.2 Who can a winding-up application be made against under the Enforcement Powers Law

- (1) The Commission does not have the power to compel a firm to wind-up its business but it does have the power to apply, to the Court, for a winding-up order to be made.
- (2) Under sections 71 and 74 of the Enforcement Powers Law, the Commission (or any other person) may make an application for a winding-up order against any –
  - (a) Guernsey Company;
  - (b) Alderney Company;
  - (c) Guernsey Limited Partnership;

(d) Guernsey Limited Liability Partnership; or

(e) Guernsey Foundation;

which is –

- (i) a licensee;
- (ii) a former licensee;
- (iii) an authorised collective investment scheme;
- (iv) a former authorised collective investment scheme;
- (v) a registered collective investment scheme;
- (vi) a former registered collective investment scheme;
- (vii) any body which (licensed or not) has contravened provisions of the Enforcement Powers Law, the FSC Law or the Regulatory Laws (“the relevant Laws”);
- (viii) any body which (licensed or not) has contravened any prohibition, condition, obligation, enforcement requirement, other requirement, duty, direction, or arrangement made under the provisions in (g); or
- (ix) any body for which an application for a license, authorisation, or registration has been refused by the Commission.

### 2.17.3 Grounds for a winding-up application under the Enforcement Law

- (1) Under section 74(2) of the Enforcement Powers Law, a winding-up application may be made on any of the following grounds –
- (a) a winding-up event<sup>92</sup> has occurred;
  - (b) the body is insolvent;
  - (c) the body has contravened a provision of the relevant Laws;
  - (d) the body has committed an offence under the relevant Laws;
  - (e) there has been a contravention of any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction, or arrangement made under the relevant Laws;
  - (f) the Commission is unable to ascertain the financial position of the body;
  - (g) it is necessary, or desirable –
    - (i) for the protection of the public;
    - (ii) to counter financial crime or the financing of terrorism;
    - (iii) to maintain confidence in the Bailiwick as a finance centre;  
or
    - (iv) to protect or enhance the reputation of the Bailiwick as a finance centre;
  - (h) the body has failed to pay a sum due in respect of a deposit;

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<sup>92</sup> Defined in Schedule 1 to the Enforcement Powers Law.

- (i) the body has failed to pay a sum due in respect of its regulated business;
  - (j) the body has failed to pay Commission fees, penalties, or interest on such;
  - (k) the body has failed to reach the minimum criteria for licensing;
  - (l) any person who holds a supervised role, is an officer, or an employee of the body has failed to reach the minimum criteria for licensing; or
  - (m) it is just and equitable that the body should be dissolved or wound up.
- (2) The right of appeal, against a winding-up order, is set out in the Bailiwick's court procedures.

#### **2.17.4 Special provisions in the case of insurers**

- (1) Section 74(3) of the Enforcement Powers Law sets out the evidence required to prove an insurer to be insolvent to support this ground for an application to wind-up the insurer.
- (2) Sections 75, 76 and 77 of the Enforcement Powers Law make further provisions in relation to the dissolution, or winding-up, of insurers with long term business. These provisions aim to –
  - (a) ensure that assets are used to meet the liabilities attributable to the business before being used to settle further dates (section 75);
  - (b) carry on long-term business with the view to transfer as a going concern (section 76); and
  - (c) reduce contracts as an alternative to dissolution and winding-up (section 77).

### 2.17.5 The Commission's approach

- (1) In deciding whether to make a winding-up application, the Commission will have regard to the various provisions of the relevant Laws.
- (2) Apart from these matters, the relevant Laws do not set out any criteria that the Commission must take into consideration in determining whether to make the application. It is not possible, nor would it be appropriate, for the Commission to try to produce a definitive list of matters that may be considered.
- (3) The Commission will consider, in each case, whether the application is consistent with the Commission's Enforcement Policy and its functions under the FSC Law, considering –
  - (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 it believes appropriate.
- (4) In considering whether to make an application, the Commission will take all relevant circumstances into account, including the seriousness of any contravention or misconduct.
- (5) As well as insolvency, examples of the types of circumstance in which an application may be appropriate include –
  - (a) where it is appropriate for the protection of the public or of its customers, that the company and its business should be ended; or

- (b) where it is desirable, in the interests of customers or the public, that the affairs of the company should be placed under the control of an independent person.

#### **2.17.6 Publication**

- (1) Details of any winding-up order, granted by the Court, will be published on the relevant Guernsey Register. The Registers are published on the Guernsey Registry website.
- (2) 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.
- (3) Such publication will generally be made on the Commission's website once the Court has granted the winding-up order.



## 2.18 Disqualification of Actuaries

### 2.18.1 Power to make an actuaries disqualification order

- (1) There are prescribed requirements and duties, under the Regulatory Laws, which must be complied with by those who act as an actuary of a licensee.
- (2) The Commission has the power to disqualify a person from acting as the actuary of a licensee. The power applies both in relation to those persons who are currently the actuaries of a licensee and those who have previously acted in this capacity<sup>93</sup>.
- (3) The Commission may also vary or revoke an actuaries disqualification order on the application of the person named in that order or of its own motion<sup>94</sup>.
- (4) A person aggrieved by the Commission's decision to impose, vary, or refusal to revoke an actuaries disqualification order made against them may appeal to the Court against that decision within 28 days following the date of notice of that decision<sup>95</sup>.
- (5) A decision to make a disqualification order will come into effect seven days after the date which the decision is handed down, unless the decision specifically states an alternative date.

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<sup>93</sup> Section 44(1), Enforcement Powers Law.

<sup>94</sup> Section 44(2), Enforcement Powers Law.

<sup>95</sup> Section 106(1)(r), Enforcement Powers Law.

- (6) Parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision.

### **2.18.2 When can the Commission make an actuaries disqualification order?**

- (1) The Commission may make an actuaries disqualification order against a person, who is or has been an actuary of a licensee, from carrying out the same function for any licensee, or any particular class, description, or category of licensee, if it appears to the Commission that –
  - (a) the person has failed to comply with any duty imposed on them by or under the Regulatory Laws;
  - (b) the person is unfit to be an actuary of a licensee (whether by reason of lacking the necessary skills or resources to carry out effectively their responsibilities as actuary, or otherwise); or
  - (c) for any other reason which is either in the interests of the public or for maintaining the reputation of the Bailiwick as a finance centre.

### **2.18.3 The Commission's approach**

- (1) The Enforcement Powers Law does not set out any criteria that the Commission must take into consideration in determining whether to impose, vary, or revoke an actuaries disqualification order; either in relation to the scope or duration of such an order. It is not possible nor would it be appropriate for the Commission to try to produce a definitive list of matters that would be taken into account.

- (2) The Commission must consider, on a case-by-case basis, whether, consistent with its Enforcement Policy, the imposition, variation, or revocation of an actuaries disqualification order is reasonable and appropriate.
- (3) The Commission also has the power to report an actuary to any authority, institution, or professional body to whose rules or requirements the actuary is subject, where it appears that an actuary has failed to comply with a duty imposed under the Regulatory Laws<sup>96</sup>.

#### 2.18.4 Consequences of order revocation or expiration

- (1) An actuaries disqualification order is a regulatory sanction that is applied because of regulatory non-compliance. Its expiration or revocation will not expunge the order from that person's regulatory history with the Commission.
- (2) The Commission reserves its right, should it determine it reasonable to do so, to take the original actuaries disqualification order into account should regulatory concerns arise in the future.

#### 2.18.5 Publication

- (1) The Commission will compile and maintain a list of all persons to whom an actuaries disqualification order applies<sup>97</sup>. This list will be published in a form which sets out the name of the person subject to the actuaries disqualification order and whether the order has been renewed, varied, or revoked<sup>98</sup>. It may also include ancillary, incidental, or supplementary information<sup>99</sup>.

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<sup>96</sup> Section 16, Enforcement Powers Law.

<sup>97</sup> Section 45(1), Enforcement Powers Law.

<sup>98</sup> Section 45(3), Enforcement Powers Law.

<sup>99</sup> Section 45(4), Enforcement Powers Law.

- (2) The Commission will publish the full list of actuaries disqualification orders. In exceptional circumstances, the Commission may consider not publishing details; particularly where the continuing exercise of the statutory duties, of the Commission, would be prejudiced by such a disclosure.
- (3) The timing of publication will be decided in a case-by-case basis and the matters which the Commission will take into consideration will include -
  - (a) the date of the imposition of the actuaries disqualification order;
  - (b) any submissions made, to the Commission, as to the effects of the imposition of the disqualification order;
  - (c) whether the Commission has been notified of an intention to appeal the decision;
  - (d) whether a stay has been granted, preventing publication until the outcome of an appeal;
  - (e) the protection of the public interest;
  - (f) the protection and enhancement of the reputation of the Bailiwick as a financial centre.
- (4) Where the disqualification order is appealed, and publication has been stayed, publication will take place on completion of an unsuccessful appeal.

## 2.19 Disqualification of Auditors

### 2.19.1 Power to make an auditors disqualification order

- (1) There are prescribed requirements and duties, under the Regulatory Laws, which must be complied with by those who act as an auditor of a licensee.
- (2) The Commission has the power to disqualify a firm, or an individual from a firm, from acting as the auditor of a licensee. The power applies both in relation to those persons who are currently the auditors of a licensee and those who have previously acted in this capacity<sup>100</sup>.
- (3) The Commission may also vary or revoke an auditors disqualification order on the application of the person named in that order or of its own motion<sup>101</sup>.
- (4) A person aggrieved by the Commission's decision to impose, vary, or refusal to revoke an auditors disqualification order made against them may appeal to the Court against that decision within 28 days following the date of notice of that decision<sup>102</sup>.
- (5) A decision to make a disqualification order will come into effect seven days after the date which the decision is handed down, unless the decision specifically states an alternative date.

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<sup>100</sup> Section 42(1), Enforcement Powers Law.

<sup>101</sup> Section 42(2), Enforcement Powers Law.

<sup>102</sup> Section 106(1)(p) and (q), Enforcement Powers Law.

- (6) Parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision.

### **2.19.2 When can the Commission make an auditors disqualification order?**

- (1) The Commission may make an auditors disqualification order against a person who is, or has been, an auditor of a licensee from carrying out the same function for any licensee, or any particular class, description, or category of licensee if it appears to the Commission that –
  - (a) the person has failed to comply with any duty imposed on them by or under the Regulatory Laws;
  - (b) the firm or individual is unfit to be an auditor of a licensee (whether by reason of lacking the necessary skills or resources to carry out effectively his responsibilities as auditor, or otherwise); or
  - (c) for any other reason which is either in the interests of the public or for maintaining the reputation of the Bailiwick.

### **2.19.3 The Commission's approach**

- (1) The Enforcement Powers Law does not set out any criteria that the Commission must take into consideration in determining whether to impose, vary or revoke an auditors disqualification order; nor in relation to the scope or duration of such an order. It is not possible, nor would it be appropriate for the Commission to try to produce a definitive list of matters that would be taken into account.

- (2) The Commission must consider, on a case-by-case basis, whether, consistent with its Enforcement Policy, the imposition, variation, or revocation of an auditors disqualification order is reasonable and appropriate.
- (3) The Commission may impose an auditors disqualification order alone or in addition to any other sanction which it is empowered to impose under the Enforcement Powers Law or Regulatory Laws; as it determines to be reasonable and appropriate. Such determination will be made on a case by case basis.
- (4) The Commission also has the power to report an auditor to any authority, institution, or professional body to whose rules or requirements the auditor is subject, where it appears that an auditor has failed to comply with a duty imposed under the Regulatory Laws.
- (5) The Commission may also consider taking regulatory action against a licensee who appointed the auditor in certain circumstances, for example, where the auditor had no skill to fulfil their duties as auditor due to a lack of expertise or experience in relation to the type of assets held by the company.

#### **2.19.4 Consequences of order revocation or expiration**

- (1) An auditors disqualification order is a regulatory sanction that is applied because of regulatory non-compliance. Its expiration or revocation will not expunge the order from that person's regulatory history with the Commission.
- (2) The Commission reserves its right, should it determine it reasonable to do so, to take the original auditors disqualification order into account should regulatory concerns arise in the future.

### 2.19.5 Publication

- (1) The Commission will compile and maintain a list of all persons to whom an auditors disqualification order applies<sup>103</sup>. This list may be published in a form which sets out the name of the person subject to the auditors disqualification order and whether the order has been renewed, varied, or revoked<sup>104</sup>. It may also include ancillary, incidental, or supplementary information<sup>105</sup>.
- (2) The Commission will publish the full list of auditors disqualification orders. In exceptional circumstances the Commission may consider not publishing details, particularly where the continuing exercise of the statutory duties, of the Commission, would be prejudiced by such a disclosure.
- (3) The timing of publication will be decided in a case-by-case basis and the matters which the Commission will take into consideration will include -
  - (a) the date of the imposition of the auditors disqualification order;
  - (b) any submissions made, to the Commission, as to the effects of the imposition of the disqualification order;
  - (c) whether the Commission has been notified of an intention to appeal the decision;
  - (d) whether a stay has been granted, preventing publication until the outcome of an appeal;
  - (e) the protection of the public interest;

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<sup>103</sup> Section 43(1), Enforcement Powers Law.

<sup>104</sup> Section 43(3)(b), Enforcement Powers Law.

<sup>105</sup> Section 43(4), Enforcement Powers Law.



- (f) the protection and enhancement of the reputation of the Bailiwick as a financial centre.
  
- (4) Where the disqualification order is appealed, and imposition of the disqualification order has been stayed, publication will take place on completion of an unsuccessful appeal.