



GUERNSEY FINANCIAL SERVICES COMMISSION

INVESTIGATION AND DECISION-MAKING PROCESS RELATING TO THE USE OF ENFORCEMENT POWERS

This Explanatory Note is intended to inform the way in which the Guernsey Financial Services Commission (the “Commission”) approaches the exercise of its statutory powers that involve the exercise of the Commission’s Enforcement Powers.

The 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, and, whilst it will generally be followed, in exceptional circumstances the Commission may depart from the process described in this document.

The objective of this document is to enable those affected to understand where they are in the process. To that end, as far as possible, the Commission will endeavour to inform those affected when the process described here is being applied, and when significant departures from it occur.

February 2024

DISCLAIMER

This document is intended as a general Explanatory Note and does not constitute the provision of legal advice.

Whilst the Commission has taken all reasonable steps to ensure that any statements as to law contained in this Explanatory Note are accurate, the Commission does not accept any responsibility for errors made.

The Commission makes no warranties, representations, or undertakings, whether express or implied, about any of the information contained in this Explanatory Note, including, without limitation, any as to the quality, accuracy, completeness, timeliness, or fitness for any particular purpose of the information.

TABLE OF CONTENTS

PART A – GENERAL INFORMATION	4
1. INTRODUCTION	4
2. OVERRIDING OBJECTIVE	5
3. WHEN THIS EXPLANATORY NOTE WILL APPLY	6
4. EXECUTIVE REVIEW – THE STEP PRIOR TO REFERRAL TO THE ENFORCEMENT DIVISION	6
PART B – THE DECISION-MAKING PROCESS.....	8
5. OVERVIEW OF THE DECISION-MAKING PROCESS.....	8
6. INITIAL REVIEW BY ENFORCEMENT DIVISION	9
7. CASE REVIEW PANEL.....	9
8. PROVISION OF CASE MATERIAL, DRAFT REPORT AND A SCHEDULE OF DISCLOSABLE MATERIAL.....	10
9. SETTLEMENT	12
10. SELECTION AND APPOINTMENT OF A DECISION-MAKER	14
11. CONSIDERATION BY DECISION-MAKER	14
12. DELIBERATIONS OF THE DECISION-MAKER.....	20
13. DECISION.....	20
14. IMPOSITION OF SANCTIONS	21
15. DISCONTINUANCE OF ENFORCEMENT PROCEEDINGS	21
PART C – APPEALS.....	23
16. APPEALS.....	23
PART D – GLOSSARY OF TERMS	24
APPENDIX – FLOWCHART OF DECISION-MAKING PROCESS.....	27

PART A – GENERAL INFORMATION

1. INTRODUCTION

- 1.1 This document is intended as a guide to the way in which the Commission will approach the exercise of its statutory powers when making decisions that involve the use of Enforcement Powers.
- 1.2 The Commission's role is to enquire into and investigate matters that come to its attention, decide whether breaches of any of the Regulatory Laws have occurred and if so, what the regulatory response will be.
- 1.3 The Commission is not a judicial body, and the enforcement decision-making process is regulatory and administrative in nature. However, it does undertake quasi-judicial functions. So, whilst the Commission is not bound to follow fixed rules of procedure in reaching decisions, it must follow principles of natural justice and fairness. In doing this, the Commission is the master of its own procedure. For the avoidance of doubt the standard of proof applicable in these proceedings is the balance of probabilities.
- 1.4 This Explanatory Note does not hold the force of law. Each case will be considered on its merits and, in exceptional circumstances, the Commission may deviate from the process described in this document where it determines that it is necessary or appropriate to do so. In all cases the Commission must remain satisfied that the process remains fair, proportionate, transparent, and timely.
- 1.5 As an alternative to Commissioners sitting as a Commissioners' Decisions Committee (or "CDC")¹, the Commission may, when it considers it appropriate to do so, appoint as an officer of the Commission a Senior Decision Maker (or "SDM"). The SDM will be chosen from a panel of SDMs that have been selected to exercise the Commission's powers of consideration, determination, and sanction in respect of Enforcement Powers under the Regulatory Laws (the "SDM Panel"). The SDM will have all applicable Enforcement Powers apart from any powers to revoke, cancel, suspend, or withdraw a licence, authorisation, registration, permission or consent.
- 1.6 A decision is taken in stages which are described in Part B of this Explanatory Note. Each stage includes several distinct steps, which are collectively designed to ensure that the final decision² taken:

1.6.1 has been arrived at in accordance with principles of natural justice; and

¹ A Commissioners' Decisions Committee or CDC means an ad-hoc committee comprising not less than three Commissioners.

² The Final Decision is a decision made by a decision-maker as contemplated in S11 of this note and does not include other decisions in relation to the investigation of a matter which precedes S11.

- 1.6.2 is proportionate and reasonable based on all relevant information before the Executive Officers, SDM or CDC (“the decision-maker”) at the time.
- 1.7 The Appendix contains a flow chart of the possible paths which may be followed in the decision-making process.
- 1.8 In this Explanatory Note:
- 1.8.1 please refer to the Glossary of Terms for the list of terms and their meanings which apply unless the context otherwise requires;
- 1.8.2 the singular includes the plural and vice versa; and
- 1.8.3 words denoting one gender include all genders.

2. OVERRIDING OBJECTIVE

- 2.1 The Commission adopts the following as its “*overriding objective*” to enable a decision-maker to make a Decision under section 11 and to deal with matters in a fair and reasonable manner:
- 2.1.1 To deal with matters justly, including (so far as is reasonably practicable):
- (a) ensuring that the parties are on an equal footing;
 - (b) dealing with the matter in ways that are proportionate to the:
 - (i) amount of money involved;
 - (ii) importance of the matter;
 - (iii) complexity of the issues; and
 - (iv) financial position of each party; and
 - (c) ensuring that the matter is dealt with expeditiously and fairly.
- 2.2 The decision-maker must seek to give effect to the overriding objective when it:
- 2.2.1 exercises any Enforcement Powers; or
- 2.2.2 considers or applies the guidance in this Explanatory Note.
- 2.3 The parties are required to help the decision-maker to further the overriding objective and are reminded of the requirement that a licensee must deal with the Commission in an open and co-operative manner and keep the Commission promptly informed of anything concerning it or its business, or the regulated

business in relation to which it is acting as licensee, which ought reasonably to be disclosed to the Commission³.

3. WHEN THIS EXPLANATORY NOTE WILL APPLY

- 3.1 The decision-making process in this Explanatory Note only relates to decisions taken by the Commission in respect of enforcement sanctions under the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 (“the Enforcement Powers Law”).⁴

4. EXECUTIVE REVIEW

– THE STEP PRIOR TO REFERRAL TO THE ENFORCEMENT DIVISION

- 4.1 The Executive Review is the point at which the appropriate member, or members, of the relevant Supervisory Division select what appears, from the information presented to them to be the most appropriate way forward in dealing with a matter. The selection will be made from a range of options and will depend on the nature and severity of the conduct presented.
- 4.2 The Executive Review will be conducted by the Director or a Deputy Director of the relevant Division. If they cannot act for any reason, alternative arrangements will be made for another Executive Officer, other than the Commission Secretary, Director of Enforcement, Deputy Director of Enforcement or Deputy Director, Legal, to conduct the review.
- 4.3 The Executive Review involves considering information presented by the staff member investigating the matter, with particular attention given to:
- 4.3.1 the relevant Regulatory Laws;
 - 4.3.2 matters indicating non-compliance;
 - 4.3.3 any known mitigating factors;
 - 4.3.4 the degree of confidence that the Commission may have in the reliability of the information; and
 - 4.3.5 any recommendations of the case officer as to the action that may be taken.
- 4.4 If it appears to those conducting the review that the information presented indicates a reasonable probability that non-compliance or non-fulfilment of a minimum criteria for licensing has occurred in relation to which the Commission may wish to exercise an Enforcement Power, they may:
- 4.4.1 refer the matter to the Enforcement Division for further investigation;

³ Principle 10 of the *Principles of Conduct of Finance Business* and section 5(1) of the Enforcement Powers Law.

⁴ Sections 23 to 45 of the Enforcement Powers Law but not including sections 40 and 41.

4.4.2 determine that this matter should be dealt with as a supervisory matter; or

4.4.3 direct any other action they deem to be appropriate that is within the Commission's powers.

4.5 Once a decision has been made to refer a matter to the Enforcement Division, then the matter will be dealt with under the Enforcement Powers Law. The Enforcement Division will use the powers contained within the Enforcement Powers Law for the purpose and conduct of the investigation.

PART B – THE DECISION-MAKING PROCESS

5. OVERVIEW OF THE DECISION-MAKING PROCESS

- 5.1 Where a matter has been referred to the Enforcement Division, that division will undertake an initial review to establish whether any further action is appropriate. (See more detail in section 6 below).
- 5.2 Where the Commission determines to seek the use of Enforcement Powers against a party or parties, the choice of sanctions being considered will determine who fulfils the role of decision-maker. (Selection of the decision-maker is addressed in section 10 below). In any event the decision-maker will be a person or persons unconnected to the investigation of the matter.
- 5.3 The decision-maker will follow the process described in this Explanatory Note and will conduct itself in the manner that it considers suitable to enable it to determine the matter fairly and expeditiously. Throughout the process all decisions made by the decision-maker shall be made in accordance with the overriding objective of ensuring that the final decision is fair, reasonable, and proportionate.
- 5.4 Subject to statutory confidentiality obligations that are imposed on the Commission,⁵ the decision-maker will endeavour to advise the party and the Commission where a material deviation from the process set out in this Explanatory Note occurs.
- 5.5 The Commission's decision-making process generally divides into several key stages, and is preceded by the Executive Review stage:
 - 5.5.1 Initial review by Enforcement Division (see section 6);
 - 5.5.2 Consideration by a Case Review Panel ("CRP") (see section 7);
 - 5.5.3 Provision of case material relied upon, the Enforcement Report and a list of disclosable materials to Persons involved (see section 8);
 - 5.5.4 Appointment of a decision-maker (see section 10) including the provision of materials set out in section 10.4 by the Secretary;
 - 5.5.5 Consideration by the decision-maker and service of a notice detailing any sanctions that the decision-maker may be minded to impose (see section 11);
 - 5.5.6 The opportunity for a party to make written and/or oral representations in respect of any sanctions that the decision-maker has proposed (see sections 11.16 and 11.17);

⁵ For example, s21 FSC Law, s44 Banking Supervision Law, s79 Insurance Business Law, s56 IMII Law, s48 POI Law, s38 Fiduciaries Law, s20 Prescribed Businesses Law and s69 Lending, Credit and Finance Law.

5.5.7 A decision is taken by the decision-maker (see section 12) and notice of the decision is given (see section 13).

6. INITIAL REVIEW BY ENFORCEMENT DIVISION

- 6.1 Once a matter has been referred to the Enforcement Division an assessment will take place on the merits of the referral. If the referral is accepted, then at the appropriate time the Enforcement Division will contact the party and provide them with a copy of this Explanatory Note. The Enforcement Division will highlight the process that will now be adopted and point out the stage that they are now at in respect of the matter.
- 6.2 If a matter referred is not accepted by the Enforcement Division, for whatever reason, this will be relayed back to the referring Division with an explanation on why and with any recommendation the Enforcement Division may consider appropriate.
- 6.3 Once accepted there are several options available to the Enforcement Division to obtain information from parties. This could include the appointment of inspectors with a specific scope and timeframe to report back to the Commission on their findings. Generally, the Enforcement Division will use the information seeking powers under the Enforcement Powers Law, which may also include compulsory interviews with relevant parties.
- 6.4 Once all information has been gathered an assessment will then take place on the information provided. Just because a matter has been referred to Enforcement it does not mean that there will necessarily be sanctions imposed at the end of this process.
- 6.5 For the avoidance of doubt, the decision-making process set out in this Explanatory Note does not apply to this part of the process.

7. CASE REVIEW PANEL

- 7.1 The Case Review Panel (CRP) is a committee convened on a “case by case” basis, with membership dependent upon the matter under consideration. It will normally include the following members:
 - 7.1.1 the Director General or a Senior Executive Officer who is sufficiently independent from the matter under consideration (who will chair the CRP);
 - 7.1.2 an Executive Officer from the Enforcement Division (likely to be the Principal Executive Officer⁶);

⁶ A “Principal” Executive Officer is the Relevant Executive Officer with responsibility for oversight of a particular matter throughout the enforcement process.

7.1.3 another Relevant Executive Officer⁷; and

7.1.4 at least one other Executive Officer other than the Deputy Director of Intelligence or the Deputy Director, Legal, who is *not* connected with the case.

7.2 The case officer(s) will attend the meeting to present the facts and to answer any questions or clarify issues raised.

7.3 The CRP will review the matter before it, consider the proposed recommendations for further action and decide how the Commission should deal with the matter from this point forward.

8. PROVISION OF CASE MATERIAL, ENFORCEMENT REPORT AND DISCLOSURE

8.1 This stage involves the provision to the party of the draft Enforcement Report and all the material on which the Commission proposes to rely in asking any appointed decision-maker to act.⁸ It also includes a schedule of disclosable material (see section 8.7 below). It will be carried out by the Enforcement Division, who will be responsible for the investigation and findings.

8.2 The party will be asked to consider the material that has been provided and respond to the Enforcement Division, in writing by a specified date:

8.2.1 to make any requests regarding the provision of material contained on the schedule of disclosable material that is held by the Commission as per the schedule provided;

8.2.2 confirming that the facts as presented are correct or, if not, suggesting what changes might be made so that they are correct, with the evidence to support the assertion made;

8.2.3 providing any additional information they consider to be material or relevant to the matter; and

8.2.4 including any comments they may wish to make in relation to the recommendations contained in the draft Enforcement Report.

8.3 In determining the date by which the response should be provided, the Commission will take account of the nature and volume of information, and the

⁷ An Executive Officer will be a “*Relevant*” Executive Officer where the case involves a person that is connected to the Division for which they have responsibility in the Commission. This will include Executive Officers from the Enforcement and relevant Supervisory Divisions.

⁸ Statutory powers exist throughout the Regulatory Laws and the Enforcement Powers Law in terms similar to sections 11G(2) and 21 of the FSC Law, which allows the Commission to withhold certain confidential information in limited circumstances.

extent to which individual items have been previously available to the party for review and comment.

- 8.4 No delays in responses will be accepted unless there are documented exceptional circumstances. Any late submissions pertaining to 8.2.1 to 8.2.4 above will have to be made before an SDM in due course and if appointed.
- 8.5 All comments and material received will be considered and evaluated prior to a revised Enforcement Report being produced by the Enforcement Division. This will be marked as the “*Final Enforcement Report*”.
- 8.6 The Final Enforcement Report will be re-presented to the CRP, together with any representations received from the party. The CRP will review the matter and decide whether the initial proposed sanctions should be varied, and whether referral to a decision-maker remains appropriate. If the CRP decides that the matter should proceed to a decision-maker, the Final Enforcement Report will be provided to the party and, if applicable, with any further material relied upon and an updated schedule of disclosable material (in accordance with section 8.7 below).
- 8.7 Subject to the Commission’s statutory confidentiality obligations and issues relating to privilege, in addition to the material on which the Commission intends to rely (as set out at 8.1 above), the Commission will disclose to a party a schedule of documents that it is not relying on but which meet the test set out at sections 8.7.1 to 8.7.3 below (the “disclosure test”) and are held by the Commission. The schedule will contain documents which:
 - 8.7.1 adversely affect the Commission’s case;
 - 8.7.2 support the party’s case; or
 - 8.7.3 adversely affect the party’s case.
- 8.8 Electronic copies of the documents listed on the schedule will be made available for inspection upon request.
- 8.9 If a party believes there is material in the possession of the Commission which would meet the disclosure test, and which has not been disclosed, they should apply to the Commission with a specific disclosure request in writing, which contains sufficient detail to identify the document or documents – including search terms if these will assist.
- 8.10 They should also provide a detailed explanation as to why the document or documents meets any of the descriptions in section 8.7. If the Commission is satisfied the material identified meets the disclosure test, it is under an obligation to disclose the material and will do so. The Enforcement Division is only obliged to search and review material that is in the Commission’s possession.

- 8.11 The Commission will continue to monitor its disclosure obligations throughout the enforcement process and up to the handing down of a Decision, and will make any further disclosures that are appropriate as a case develops and/or new material is uncovered.
- 8.12 If a matter is referred to one of the SDMs, issues relating to disclosure will continue to be dealt with between the Enforcement Division and the parties unless there is a dispute which is not capable of being resolved. Where there is such a dispute, any party may refer the matter to the SDM with a specific disclosure request. Such referral must contain the information set out in sections 8.9 and 8.10. For the avoidance of doubt, the SDM will remain in overall charge of contentious disclosure issues.
- 8.13 The SDM can call for additional material as a result of a specific disclosure request being made and granted, and the parties will have the ability to make submissions to the SDM in respect of any material provided.

9. SETTLEMENT

- 9.1 Where it is consistent with the Commission discharging its statutory functions in accordance with its guiding principles, the Commission may enter into discussions (“settlement discussions”) with a party, with a view to entering into a settlement agreement concerning the nature of non-compliance by the party and the action to be taken by the Commission. Any settlement agreement is a regulatory decision to which the party has consented.
- 9.2 Early settlement is generally desirable; however the Commission reserves the right not to enter into settlement discussions or to settle where settlement would not be consistent with the Commission’s regulatory objectives or in the public interest.
- 9.3 Settlement discussions will only be held once the Commission has a sufficient understanding of the nature and gravity of the misconduct, and this is accepted by the party. The Commission reserves the right to withdraw from discussions. All settlement discussions will be conducted on a *without prejudice* basis and take place between the parties and the Enforcement Division only. No correspondence with any decision-maker shall reference any without prejudice discussions or produce any documents which form part of such discussions. If settlement discussions are commenced, but cannot be concluded with a settlement agreement, the matter will continue to be dealt with in accordance with this Explanatory Note.
- 9.4 Settlement of a matter is an opportunity for parties to reach agreement with the Commission. It must be considered within the timeframes stipulated by the Commission, who reserve the right to withdraw without notice if matters are being overly drawn out.

- 9.5 Commission approval to any settlement agreement will be given by either:
- 9.5.1 at least two Executive Officers; or
 - 9.5.2 a CRP; or
 - 9.5.3 a sub-group of Commissioners not otherwise previously involved with the matter.
- 9.6 The Commission operates a discount scheme for discretionary financial penalties and/or periods of prohibition on early settlement. In outline, this operates as follows:
- 9.6.1 the Commission and the party will agree in principle the amount of the financial penalty and/or period of prohibition, taking into account all the factors as set out in the case;
 - 9.6.2 A discount will be applied depending upon when settlement is reached:
 - (a) Stage 1: Prior to the matter being referred to a decision-maker (as referred to in section 10): 30%;
 - (b) Stage 2: After the matter has been referred to a decision-maker, but before the decision-maker has issued a notice that it is *minded to* impose a sanction or sanctions (as referred to in section 11): 15%;
 - (c) Stage 3: After a “*minded to*” notice has been issued, but before three days prior to the expiry of any Representation Period (as explained in section 11.8)⁹: 10%.
- 9.7 A party is encouraged to bring a legal advisor to any settlement meeting, or to obtain legal advice beforehand. Further, a party is recommended to take legal advice before entering into a settlement agreement.
- 9.8 Until any settlement agreement has been executed the terms of that agreement (including any attachments such as a direction or public statement) will not be in effect. The agreement will remain a working draft document that is *without prejudice* to the rights of any party concerned. Once the settlement agreement has been executed the *without prejudice* nature of the settlement agreement and any attachments will fall away, but will continue to apply to the discussions and correspondence that led to the agreement.
- 9.9 It is important to note that the Commission expects the Parties to acknowledge wrongdoing or failings in the settlement discussions and to accept responsibility for these in the Settlement Agreement. In this regard, the settlement discussions are

⁹ Please note that this discount will not apply where the Representation Period is reduced to three days or less or dispensed with altogether (see section 11.9).

different to civil litigation settlement discussions where a party can settle with no admission of liability.

10. SELECTION AND APPOINTMENT OF A DECISION-MAKER

- 10.1 If one of the proposed Enforcement Powers is to revoke, cancel, suspend, or withdraw a licence, authorisation, registration, permission, or consent, or to make an application for the winding-up of a body corporate, this must be considered by a CDC¹⁰. All other cases may be heard by an SDM.
- 10.2 Whatever type of decision-maker is chosen, checks will be carried out to ensure that there are no conflicts of interest in relation to the parties identified in the referral. These checks will extend to potential conflicts involving the Commission Secretary. If the Commission Secretary is un-conflicted, they will assume the role of secretary to the decision-maker (the “Secretary”). If the Commission Secretary has a conflict of interest the Executive will appoint another un-conflicted Executive Officer to assume the responsibilities of the Secretary for the remainder of the relevant matter.
- 10.3 Where a matter is to be heard by a SDM from the SDM Panel, the Secretary shall inform the President of the Panel of the nature of a particular matter, and request that they advise which member of the SDM Panel should be appointed. The President’s choice will be based on availability (ensuring that the SDM is able to deal with matters expeditiously), conflicts checks being cleared, and whether any specialist area of expertise is required.
- 10.4 Once the appropriate decision-maker has been identified, the Secretary will appoint the decision-maker and provide them with, among other things, a copy of the Commission’s *Explanatory Note on the Investigation and Decision-Making Process Relating to the Use of Enforcement Powers*, the final Enforcement Report (which will include a draft public statement) and evidence or supporting documents referred to in the Enforcement Report.
- 10.5 The Secretary will also notify the party and the Principal Executive Officer of the appointment of a decision-maker and provide the party (or its legal adviser) with an electronic version of all information that the Secretary has provided to the decision-maker. The party will be advised that the decision-maker is considering the Enforcement Division’s recommendations and may, in due course, take the matter forward.

11. CONSIDERATION BY DECISION-MAKER

- 11.1 Within 30 days of receiving the referral the decision-maker should consider the Enforcement Report and evidential documents presented to it, and decide whether

¹⁰ Section 19(5), FSC Law.

it is necessary to request further information on specific issues that arise out of the Enforcement Report:

- 11.1.1 from the material that is held by the Enforcement Division; or
 - 11.1.2 from the parties as necessary in the consideration of the decision-maker, via the Enforcement Division.
- 11.2 Where information is provided to the decision-maker under section 11.1.1, a copy of that information must be made available by the provider to the parties as soon as the process of requesting and obtaining information from that provider has been completed. This requirement is subject to the right of the Commission to withhold information from a party in limited circumstances, for example where the information is not relevant to the allegations against them. The decision-maker should be informed of the fact and date of compliance with this section. As stated at section 8.12, if agreement cannot be reached on disclosure the parties can make a specific disclosure request to the SDM having regard to the conditions for such a request as laid out at sections 8.7, 8.9 and 8.10 above.
- 11.3 After considering the Enforcement Report, the evidential documents provided and any further information provided pursuant to sections 11.1.1 or 11.1.2, the decision-maker may:
- 11.3.1 issue a “minded to” notice as referred to in section 11.7;
 - 11.3.2 decide to take no further enforcement action; or
 - 11.3.3 refer the matter to a person with the authority to take the appropriate enforcement action.
- 11.4 Within 70 days (10 weeks) of receiving the referral the decision-maker will release the decision that it is minded to take, in accordance with 11.3 and considering the overriding objective set out in section 2.1. If the decision-maker is minded to issue some form of regulatory sanction(s) the final decision notice should be issued within 180 days (6 months) from the date of the referral being made save in exceptional circumstances.
- 11.5 The decision-maker has a right to seek further information and/or clarification at any stage (this includes any material as part of a specific disclosure request). Where a SDM wishes further information to be provided (at their sole discretion), this can be requested via the Commission Secretary to the Enforcement Division or from the relevant party, as appropriate. They will then revert to the SDM via the same route. Any direction placed on parties for further information to be provided by a certain date must be strictly adhered to. Any information or documents obtained as a result of this request will be provided to all parties unless the SDM determines otherwise. The SDM reserves the right not to take into

consideration any material which is provided out of time having regard to any direction being served on the Enforcement Division or relevant party.

- 11.6 Where the decision-maker decides that it is minded to take some form of enforcement action, the “*minded to*” notice referred to in sections 11.3 and 11.4 should be issued.

The “*Minded to*” Notice and Representations

- 11.7 The Enforcement Powers Law provides that before certain decisions are made, a decision-maker must serve a notice advising the party that it is “*minded to*” make this decision and, among other things, that the party may make representations. The decision-maker is then obliged to take those representations into account before making their final decision. This notice is colloquially referred to as a “*minded to*” notice.

- 11.8 The Enforcement Powers Law provides that the party may, within 28 days (or such longer period as the Commission may specify in the notice or subsequently allow) of the date of the minded to notice (the “Representation Period”), make written *and/or* oral representations to the decision-maker in respect of the recommended measure or sanction, in such a manner as the Commission may from time to time determine. The Commission considers 28 days to be a reasonable period for representations in most cases and will generally apply it as the Representation Period in respect of all matters where “*minded to*” notices are served.

- 11.9 A decision-maker may reduce the Representation Period if they consider it necessary to do so in the interests of the public or the reputation of the Bailiwick as a finance centre. If by reason of those interests a decision-maker considers that a decision must be taken immediately as a matter of urgency, then a decision-maker may decide, with the prior written authority of not less than two ordinary members of the Commission, to dispense with the Representation Period altogether.

- 11.10 The decision-maker will issue a “*minded to*” notice together with the proposed text of any Public Statement (which may or may not be the same as the version proposed by the Enforcement Division, dependent on the SDM’s findings). The Secretary will send both documents to the Enforcement Division and all parties and confirm that the Representation Period has commenced.

- 11.11 Upon receipt of the “*minded to*” notice:

- 11.11.1 The parties should indicate within 3 days if a meeting is required for oral representations to be made, and if so the decision-maker, the Commission and relevant parties to agree its date and duration within 7 days;

11.11.2 Where a financial penalty is proposed to be imposed on any party, for which the party provides an indication that it cannot pay, it is for that party to provide a statement of means (a form for which will be provided by the Enforcement Division) to the decision-maker and the Enforcement Division. Where a party discloses their statement of means, documentary evidence is required to corroborate responses.¹¹ Parties relying on a statement of means will be required to provide a declaration that the information provided within their disclosure of their statement of means is accurate and complete.

11.12 Oral evidence may be given at the meeting (see section 11.17), and testing of that evidence by another party, will, in each case, be permitted only where the decision-maker considers that the interests of justice so require. This is not expected to be a frequent event since the parties and potential witnesses will normally have been interviewed by the Enforcement Division, will have had an opportunity to comment on the transcript of the interview, and written representations would have been reviewed:

11.12.1 Where the Principal Executive Officer or a party proposes to call a witness, a request must be submitted to the decision-maker in writing, identifying the name of the witness(es) and a summary of the evidence to be adduced. The request must be made within 7 days of the “*minded to*” notice being sent and must be copied to the other parties and the Enforcement Division.

11.12.2 The decision-maker will then decide whether to permit the witness(es) to give evidence in person. Witnesses proposed to be called during a meeting must be available on the scheduled meeting date. The unavailability of a witness on the scheduled meeting date may not constitute sufficient grounds upon which to adjourn the meeting.

11.12.3 Exceptionally the decision-maker may decide it needs to hear from an individual as a witness.

11.13 If the decision-maker receives no response or representations from the party, the decision-maker may regard the allegations or matters outlined in the Commission’s submissions and the “*minded to*” notice as undisputed.

11.14 If a party wishes to rely upon any additional documents or material not already before the SDM, the relevant party shall provide the additional document or material to the decision-maker and the Enforcement Division as soon as practicable and in any event not later than 10 days in advance of the meeting to

¹¹ Such evidence may include a report from an independent accountant verifying the assets and income of the party unless otherwise directed by the SDM.

make oral representations to the SDM and in any other case prior to the end of the Representation Period.

11.15 It is not for the Enforcement Division to state its case before the meeting and it does not have any burden to “prove” anything to the SDM. Rather it is for the parties to present their representations to the SDM on the contents of the “*minded to*” notice. It is for the SDM to establish a proper factual basis in reaching any finding, applying the balance of probabilities measure.¹² The Enforcement Division will assist the SDM when requested to do so and take direction from the SDM as appropriate.

Written Representations to the Decision-Maker

11.16 The decision-maker will be responsible for determining the procedure that will be followed where written submissions are made, but in general, the following guidelines will apply:

11.16.1 One round of written representations will be provided by the parties before the meeting referred to at section 11.17 as directed by the decision-maker;

11.16.2 The Secretary shall be responsible for ensuring that a copy of any written representations is provided to the decision-maker, the Principal Executive Officer and any other parties to the matter;

11.16.3 The Principal Executive Officer may respond to the written representations. The Secretary will provide these responses to the decision-maker, with a copy to the party and any other parties to the matter;

11.16.4 The SDM may direct short written representations regarding matters that arise during the meeting to be provided following the meeting and before the expiry of the Representation Period.

Oral Representations to the Decision-Maker (the Meeting)

11.17 The decision-maker will be responsible for determining the procedure that will be followed where oral submissions are made, but in general, the following guidelines will apply:

11.17.1 All decision-maker meetings will be conducted in private;

11.17.2 Whilst the decision-maker may determine the order in which people speak, they do so as the Chair of the meeting;

11.17.3 Oral representations must be made before the expiry of the Representation Period (see section 11.8), and where possible at a time

¹² Robilliard v the GFSC Court of Appeal judgment - S54

and place agreed by all parties and the Relevant Executive Officer, or determined by the decision-maker;

- 11.17.4 The oral representations by, or on behalf of, the party should explain why the party thinks that the proposed decision, including any sanction(s), is inappropriate or not justified;
- 11.17.5 Following the oral representations, the party may be required to answer questions from the decision-maker and clarify issues that may arise;
- 11.17.6 Members of the Executive may be invited to comment on matters raised by the party, to answer questions posed by the decision-maker or clarify issues;
- 11.17.7 The Executive can respond on any matters raised within any statement of means;
- 11.17.8 If, in exceptional circumstances and with the consent of the decision-maker, information is introduced by the party during the oral representations that has not previously been made available to the Commission, the decision-maker may decide to allow more time for the Principal Executive Officer to comment on the information and to disclose any such comments to the party;
- 11.17.9 If a party fails to attend the meeting, the decision-maker may proceed in its absence, provided that the decision-maker is satisfied that the party has been given sufficient notice of the meeting and it is reasonable to do so;
- 11.17.10 The meeting will be recorded using audio equipment: one of the audio copies made at the meeting will be provided to the party;
- 11.17.11 The decision-maker may also ask for assistance from anyone else that they consider will assist it in their deliberations, such as the decision-maker's legal adviser;
- 11.17.12 Procedural matters relating to the conduct of the meeting, evidence, or the process will be addressed in the first instance at the start of the meeting by the decision-maker;
- 11.17.13 The giving of oral evidence and testing of oral evidence will only be permitted where the decision-maker has permitted it under section 11.12;
- 11.17.14 Where the decision-maker has permitted a witness to give evidence then they must attend the meeting in person on the scheduled date. The unavailability of a witness on the scheduled meeting date may not constitute sufficient grounds upon which to adjourn the meeting;

11.17.15 The process is intended to be interactive rather than adversarial in nature. For the avoidance of doubt, court rules, process and procedures do not apply. Whilst a party may instruct a lawyer to assist them this does not make the process of the meeting judicial;

11.17.16 The decision-maker may, at its sole discretion, adjourn the meeting. This may occur where the decision-maker requests that the Principal Executive Officer or the party provide further material or attend a subsequent meeting, or to assist the decision-maker in obtaining information it requires to make a final decision, though where strict statutory provisions exist the decision-maker is unable to adjourn a meeting scheduled to hear oral representations beyond the Representation Period.

11.18 The decision-maker will close the meeting when it is satisfied that the relevant party has had a fair and sufficient opportunity to make oral representations.

12. DELIBERATIONS OF THE DECISION-MAKER

12.1 The decision-maker must consider any representations made during the Representation Period in response to a “*minded to*” notice before giving further consideration to the decision that has been proposed.

12.2 If the decision-maker considers it to be necessary or appropriate, the party and the Principal Executive Officer will be invited to comment on any new information or matters that emerge during the decision-maker’s deliberations and before the end of the 180-day period set out in section 11.4. In such a case, the decision-maker may delay taking its final decision for a reasonable period to allow the person(s) concerned to make comments, while still ensuring that matters are dealt with expeditiously.

13. DECISION

13.1 In deciding any matter of disputed fact or whether any of the allegations have been proved, the standard of proof to be applied by the decision-maker will be the balance of probabilities.

13.2 In reaching its decision, the decision-maker will have regard to the written and oral representations received and all other information in the documents before it. It is for the decision-maker to decide which of the matters it accepts, and which it does not.

13.3 The decision-maker, through the Secretary, will notify the Principal Executive Officer and the party in writing of its decision. If the decision is adverse to any party, the written notice will contain:

13.3.1 the terms and grounds of any enforcement measure or sanction imposed;

- 13.3.2 a copy of any public statement;
 - 13.3.3 a written statement of the reasons for the decision-maker's decision; and
 - 13.3.4 the particulars of the applicable right of appeal.
- 13.4 Where, in relation to any fact or matter, the decision-maker is aware, or has been informed by the Commission at any time prior to the finalisation of their decision, that its decision may not, pursuant to any Regulatory Law, specify any reason¹³ which would involve the disclosure of confidential information the disclosure of which would be prejudicial to:
- 13.4.1 a criminal or regulatory investigation (whether in the Bailiwick or elsewhere); or
 - 13.4.2 co-operation or relations with investigatory, regulatory or prosecuting authorities in any other place,
- the statement of reasons must respect that obligation. If, in consequence, anything is omitted from the statement the decision-maker must notify the Commission in writing of the fact that there has been such an omission.
- 13.5 Where under section 13.4 the decision-maker omits any matter from a statement of reasons, and where the party has a right of appeal with respect to the omission, the Commission must inform that party of the fact that there has been an omission and give particulars of that right of appeal¹⁴.
- 13.6 Where a ground for a decision is that any of the applicable minimum criteria for licensing is not, has not been, may not, or may not have been, fulfilled in the case of any person other than a party ("person A"), person A should also be served with a copy of the written decision. The copy of the decision served on person A may omit any matter that does not relate to him, and should give particulars of any right of appeal that may be exercisable by person A.

14. IMPOSITION OF SANCTIONS

- 14.1 Where a decision includes the imposition of sanctions, those sanctions will come in to force seven days after the decision has been handed down, unless the decision specifically states an alternative date.

15. DISCONTINUANCE OF ENFORCEMENT PROCEEDINGS

- 15.1 The Principal Executive Officer will continually assess the appropriateness of the relevant Supervisory Division's recommendation in the light of any new information or representations received and any material change in the relevant

¹³ Where the power exists under the relevant Regulatory Law or where the Commission is not required under a Regulatory Law to provide reasons for a decision.

¹⁴ The right of appeal, and therefore this provision, will not apply where the Commission is not required to provide reasons for its decision under a Regulatory Law.

facts or circumstances. As a result, in some cases the Commission may decide to withdraw its recommendation and discontinue the matter. If this happens the Principal Executive Officer will inform the decision-maker and the party accordingly.

PART C – APPEALS

16. APPEALS

16.1 Many of the Commission’s decisions relating to the potential use of Enforcement Powers give rise to rights of appeal for parties aggrieved or affected by the Commission’s decision. The specific rights of appeal are detailed in the Enforcement Powers Law, but the grounds of appeal are that:

16.1.1 the decision was *ultra vires* or there was some other error of law;

16.1.2 the decision was unreasonable;

16.1.3 the decision was made in bad faith;

16.1.4 there was a lack of proportionality; or

16.1.5 there was a material error as to the facts or as to the procedure,

and any appeal must be instituted within 28 days of the Commission’s decision (the “appeal period”).

16.2 Under section 106(7) of the Enforcement Powers Law, 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.

16.3 On appeal the relevant Court may:

16.3.1 confirm the Commission’s decision, in whole or in part; or

16.3.2 set the decision of the Commission aside and, if the Court considers it appropriate to do so, remit the matter to the Commission with such directions as the Court thinks fit.

16.4 Where the Court has remitted a decision to the decision-maker, the exact process to be followed will depend upon any directions given by the Court. In some instances, remittal will involve the decision-maker issuing a further “*minded to*” notice reflecting the decision that it proposes to make following the Court’s decision, and any directions or guidance that may have been given¹⁵. Where a “*minded to*” notice is issued after a remittal, the party will have an opportunity to make additional representations in respect of the decision that has been remitted, in accordance with the procedure set out in section 11.

¹⁵ See sections 11.7 to 11.15 in respect to the “*minded to*” notice procedure.

PART D – GLOSSARY OF TERMS

For the purposes of this Explanatory Note, the following terms should be understood to have the meanings shown below. The terms and their meanings apply unless the context otherwise requires. They are intended to aid clarity to the Explanatory Note and are not formal definitions.

“**appeal period**” has the meaning given to it in section 106(4) of the Enforcement Powers Law;

“**Banking Supervision Law**” means *The Banking Supervision (Bailiwick of Guernsey) Law, 2020*;

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

“**Commissioner**” means a person appointed by the States of Guernsey to be a member of the Commission under the FSC Law;

“**Commissioners’ Decisions Committee**” or “**CDC**” means an ad-hoc committee comprising not less than three Commissioners;

“**Commission Secretary**” means the Secretary of the Commission;

“**decision-maker**” means all or any of the Executive Officers, an SDM, and a Commissioners’ Decisions Committee;

“**Enforcement Powers**” means the Commission’s powers of enforcement and sanction, which are derived principally from sections 23 to 39 and sections 42 to 45 of the Enforcement Powers Law;

“**Executive**” means, collectively, those individuals appointed, or employed, as officers of the Commission in the following positions:

- a) Director General;
- b) Deputy Director General;
- c) Director and Deputy Director of Authorisations;
- d) Director and Deputy Directors of Banking and Insurance Division;
- e) Deputy Directors of Investment, Fiduciary and Pension Division;
- f) Director and Deputy Directors of Financial Crime Division;
- g) Director and Deputy Director of Enforcement;
- h) Deputy Directors of Risk and Operations;
- i) Deputy Director of Intelligence Services;
- j) Deputy Director, Legal.

“Executive Review” means a review by an Executive Officer undertaken as set out at section 4;

“Executive Officer” means an individual holding any of the above Executive positions;

“Fiduciaries Law” means *The Regulation of Fiduciaries, Administration Businesses and Company Directors etc (Bailiwick of Guernsey) Law, 2020*;

“FSC Law” means *The Financial Services Commission (Bailiwick of Guernsey) Law, 1987*;

“Insurance Business Law” means *The Insurance Business (Bailiwick of Guernsey) Law, 2002*;

“IMII Law” means *The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002*;

“Lending, Credit & Finance Law” means *The Lending, Credit and Finance (Bailiwick of Guernsey) Law, 2022*;

“party” means any person who is the subject of the proposed Enforcement Power;

“POI Law” means *The Protection of Investors (Bailiwick of Guernsey) Law, 2020*;

“Prescribed Businesses Law” means *The Prescribed Businesses (Bailiwick of Guernsey) Law, 2008*;

“President of the Panel” means the individual chosen to assume the role of president of the SDM Panel;

“Principal Executive Officer” means the Relevant Executive Officer with responsibility for oversight of a particular matter throughout the enforcement process or their delegate;

“Registered Businesses Law” means *The Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008*;

“Regulatory Laws” means the FSC Law, the Enforcement Powers Law, the Banking Supervision Law, the Fiduciaries Law, the Insurance Business Law, the IMII Law, the POI Law, the Prescribed Businesses Law, The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, The Financial Services Commission (Site Visits) (Bailiwick of Guernsey) Ordinance, 2008, The Protection of Investors (Administration and Intervention) (Bailiwick of Guernsey) Ordinance, 2008 and the Registered Businesses Law and the Lending, Credit & Finance Law;

“Relevant Executive Officer” means an Executive Officer of the Division to which a matter is connected. A connection may exist due to, for example, supervisory or enforcement responsibility and/or the nature of allegations being made. There may be more than one Relevant Executive Officer in respect of a particular matter;

“Representation Period” has the meaning ascribed to it in section 11.8;

“SDM Panel” means the panel of SDMs that have been selected to fulfil the Commission’s powers of consideration, determination, and sanction in respect of Enforcement Powers under the Regulatory Laws;

“Secretary” means the secretary to the decision-maker, who is ordinarily the Commission Secretary or, where the Commission Secretary is unable to act, the other member of the Executive who has been appointed to exercise these functions;

“Senior Decision Maker” or **“SDM”** means an officer appointed by the Commission, in accordance with the processes and procedures outlined in section 10;

“Supervisory Division” means, the Financial Crime Division, the Banking and Insurance Division, the Investment, Fiduciary and Pension Division, and the Authorisations and Innovation Division;

“the Enforcement Powers Law” means *The Financial Services Business (Enforcement Powers)(Bailiwick of Guernsey) Law, 2020*.

APPENDIX – FLOWCHART OF DECISION-MAKING PROCESS

See following page for flowchart.

