Guernsey Financial
Services Commission

Feedback on the Engagement on the Banking Supervision (Bailiwick of Guernsey) Law, 2018 (the "Banking Supervision Law")

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The Commission previously requested engagement on the draft Banking Supervision Law.

Responses were received from a cross section of industry, trade associations and business groups/committees.

Overall the engagement has highlighted the willingness by stakeholders to continue to be involved and helpful suggestions for the Revision of Laws Project.

We would like to thank everyone who responded to the engagement and we look forward to continuing to work with our stakeholders going forward.

The feedback received raised some issues which are set out below by topic. Where considered necessary, we have included a brief explanation of the issues raised in blue. While we have not been able to address in this document every comment made, we have sought to address common concerns and comments raised by the stakeholders.

1. Treatment of Branches

A number of comments have been received in respect of the need to distinguish clearly within the legislation between the treatment of subsidiary and branch licensees. The Commission agrees that legislation should seek to distinguish respective treatment where appropriate and this is demonstrated in the differing treatment with respect to control as described above. The Commission does not accept, however, that where a Guernsey banking licence is issued to a branch operation of a foreign bank, the Commission should adopt a light touch approach.

2. Directions - Scope of persons who may be subject to Directions

Concerns were raised regarding the scope of persons who fall within the definition of "directed person". In particular in relation to:

i) former licensees.

Currently, directions apply where a licence is surrendered or revoked[1]. In particular, directions allow for obligations to be imposed after the licence ceases to exist (as well as in the period between the surrender notification or notice of revocation and the actual surrender or revocation of the licence). For example, this could be used to require an entity to have runoff insurance where there is significant compensation claims which may be payable by the entity. As such, directions may apply to former licensees and as currently drafted there is no end date to the imposition of the direction.

[1] Section 16 of the *Insurance Business (Bailiwick of Guernsey) Law, 2002* ("Insurance Business Law"); section 11 of the *Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002* ("Insurance Managers and Insurance Intermediaries Law"); section 12 of the *Banking Supervision (Bailiwick of Guernsey) Law, 1994* ("the 1994 Law"); section 12 of the *Regulation of Fiduciaries, Administration Businesses and Company directors, etc (Bailiwick of Guernsey) Law, 2000* ("Regulation of Fiduciaries Law").

Paragraph 4.7.2 of the Policy Letter states that the availability of directions should be consistent across the Supervisory Laws and paragraph 4.7.2 (a) of the Policy Letter indicates that the scope of directions should be broadened to apply to permission holders and supervised roles. While the *Protection of Investors (Bailiwick of Guernsey) Law, 1987* (the "Protection of Investors Law") does not currently have direction provisions in it, the application of directions to former licensees is presently contained in the other Supervisory Laws which do have direction provisions. Further 4.7.2 of the Policy Letter clearly indicates that directions should be of general rather than limited application and not merely available where a licence is being revoked, surrendered or has expired.

ii) A person reasonably believed to have contravened a provision of the regulatory laws.

Having considered this in combination with the provisions in the Financial Services Business (Enforcement Powers)(Bailiwick of Guernsey) Law, 2017 (the "Enforcement Law"), we understand the concerns raised and will remove this.

iii) Ancillary vehicles.

Having considered this in combination with the provisions in the draft *Protection of Investors (Bailiwick of Guernsey) Law 2018*, we understand the concerns raised and will remove this.

3. Information published by the Commission.

a) *Scope of publication of information for example refusal of a licence*

Concerns were raised regarding the scope of the information which may be published. In particular, in relation to publication of the refusal of a licence. The concern was that this may have occurred "at no fault" of the clients but could result in them sustaining reputational or business detriment in the future.

Currently, the Commission has the express power to publish the refusal of a banking licence under section 13(4) of the *Banking Supervision (Bailiwick of Guernsey) Law,1994* (the "1994 Law"). This provision is mirrored in the *Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000* (the "Regulation of Fiduciaries Law"), *the Insurance Business (Bailiwick of Guernsey) Law, 2002* (the "Insurance Business" Law) and the *Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002* ("the Insurance Managers and Insurance Intermediaries Law"). Those Laws also confer power to publish information in relation to the imposition of conditions and directions[2] (see (b) below). Section 34D of the Protection of Investors Law by contrast does not mention such matters specifically but is expressed in very wide and general terms.

Regarding the publication of a refusal of a licence under the new draft clause, this is a permissive power only and it is very unlikely that this would occur as a matter of general policy (bearing in mind that in exercising its powers the Commission must have regard to the protection of the public and the protection and enhancement of the reputation of the Bailiwick as a finance centre). Evidence of the restricted use of this power can be

[2] Section 12 of the Insurance Managers and Insurance Intermediaries Law, section 17 of the Insurance Business Law; section 13 of the 1994 Law; section 13 of the Regulation of Fiduciaries Law.

seen from the limited publications on the Commission's website in respect of refused licences etc.

b) *Publication of conditions or directions and rights of appeal*

A concern was raised that the decision to publish details of a condition or direction was not subject to a right of appeal (as compared to the decision to impose a condition or direction which is subject to a right of appeal).

While the decision to publish is not subject to a right of appeal, such decisions may be judicially reviewed. The Commission is cognisant of the fact that it must act at all times in a reasonable and proportionate manner.

Broad powers in relation to the publication of conditions and other particulars is contained in most of the current Supervisory Laws[3].

In particular, the Insurance Managers and Insurance Intermediaries Law and the Insurance Business Law contain a specific requirement for the Commission to publish, in the list of licensees it maintains, "unless the Commission determines otherwise, the fact of any conditions of the licence or directions restricting the acceptance of new business".

The current powers of publication are not subject to a right of appeal but, again, such decisions may potentially be judicially reviewed. As mentioned above the Commission is cognisant of the fact that it must act at all times in a reasonable and proportionate manner.

4. Definition of "relevant person"

a) *Inclusion of persons other than licensees and the management and controllers of licensees*

Some respondents were concerned that "relevant person" included persons other than licensees and those who undertook Supervised Roles in relation to licensees (e.g. managers and controllers).

The Policy Letter clearly established that the Commission should be able to require the provision of information from licensees, unsupervised group entities and special purpose vehicles, discretionary exempted persons and associated parties[4]. The Policy Letter also stated that the Commission should be able to request the provision of information from a broad range of persons and entities wherever they reside[5]. In addition, as has been mentioned in other contexts, the Law Officers have advised that it would be inappropriate (and frankly impossible) for a policy letter, which is intended to deal with high level policy rather than textual specifics, to set out all the detailed content of the Law itself.

[3] Section 12(2)(d) and (e) of the Insurance Managers and Insurance Intermediaries Law, section 17(2)(e) and (f) of the Insurance Business Law; section 13(5) of the Regulation of Fiduciaries Law; section 13 of the 1994 Law.
[4] 7.2.1 and 5.4 of the Policy Letter.
[5] 5.4.2 of the Policy Letter.

Accordingly, it would not be appropriate to limit "relevant person" to licensees and those undertaking Supervised Roles in relation to licensees.

While it is appreciated that the definition of "relevant person" is necessarily wide, the Commission would not generally seek to obtain information or documents from persons other than the licensee unless the licensee was not in possession of, or otherwise unable or unwilling to provide, the relevant information or documents.

b) *Voluntary Interviews*

Concern was raised that the Commission did not have the power to request an interview.

The Policy Letter provides that the Commission should have the power to request, but not compel, an interview under the Supervisory Laws[6]. Section 29(1) provides that the person shall "furnish" the information to the Commission (as compared to a requirement to attend before the Commission which would indicate a mandatory interview). Voluntary interviews or meetings are dealt with in section 37 of the Banking Supervision Law and include those persons set out in 5.4 and 5.9.5 of the Policy Letter.

c) *Does the Commission plan to "regulate" the "relevant persons"?*

The Commission will not "regulate" the persons contained in the definition of "relevant person" other than those they currently license, authorise or register although other categories of persons may be subject to particular powers conferred by the Laws. The wide definition of "relevant person" will allow the Commission to obtain information and documents so that the Commission can undertake its functions and objectives.

5. Requesting meetings with auditors, actuaries and others

a) *Inclusion of associated parties or officers of, or holders of supervised roles in respect of current and former licensees*

The power to require a bilateral meeting with auditors or actuaries was proposed in the Policy Letter (at 5.9.5) for inclusion in the Supervisory Laws. The provision in the Supervisory Laws relates to requesting a meeting (rather than require). The other parties have been included pursuant to 5.4.3 of the Policy Letter which provides that the Commission should have the power to request, but not compel, an interview under the Supervisory Laws. Accordingly, the person whom the Commission has requested the interview of is able to decline to attend.

The Commission does not intend to use the power to request a bilateral meeting as a replacement for trilateral meetings, for example meetings between the Commission, a licensee and its auditor. The Commission would only request a bilateral meeting where it considers it necessary or desirable with a view to the performance of its functions or in the interests of the public or the reputation of the Bailiwick.

b) *Meetings with Auditors and confidentiality*

Concerns were raised that where the Commission requests that an auditor attend a meeting without its client (and the auditor agrees to such a request) and the Commission

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[6] At 5.4.3.

imposes confidentiality restrictions on the auditor, how the auditor would be able to bill for its time.

The Policy Letter (at 5.9.6) clearly indicated that it was intended that the Commission should, in appropriate circumstances, be able to impose confidentiality provisions around such communications. The Commission is required to do so in a reasonable manner and only as necessary in the circumstances.

In relation to charging of clients by auditors, this is not dissimilar to the position that exists in relation to disclosures by auditors to the Commission in fulfilment of their obligations to the Commission[7]. The position could also arise in the course of a criminal investigation (for example, into money laundering offences) or the reporting of a suspicious transaction.

c) *Bilateral Meetings with Auditors and Actuaries*

Some respondents raised concerns regarding provisions relating to bilateral meetings with auditors, in particular regarding the charging of fees for such meetings and that the confidentiality provisions could place auditors or actuaries in a difficult position with their clients.

The power to require a bilateral meeting with auditors or actuaries was proposed in the Policy Letter (at 5.9.5) for inclusion in the Supervisory Laws rather than the Enforcement Law. However, it was considered appropriate to include mandatory meetings in the Enforcement Law, with the Supervisory Laws containing only a power to *request* a meeting. The Policy Letter (at 5.9.6) clearly indicates that it was intended that the Commission should, in appropriate circumstances, be able to impose confidentiality provisions around such communications. The Commission would not seek to do so in an unreasonable manner and only as necessary in the circumstances.

In relation to charging of clients, as mentioned above, this is not dissimilar to the position that exists in relation to disclosures by auditors to the Commission in fulfilment of their obligations to the Commission[8]. The position could also arise in the course of a criminal investigation (for example, into money laundering offences) or the reporting of a suspicious transaction.

It should be noted that trilateral meetings between the licensee, the auditor or actuary and the Commission would still be available and to clarify this a provision expressly referring to trilateral meetings, similar to that set out in section 83 of the Insurance Business Law, will be inserted.

d) *Voluntary meetings and legal privilege*

A suggestion was received that protection for legal privilege be included in the section concerning voluntary meetings.

A subsection has been included in section 36 providing that:

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[7] Section 27A of the *Protection of Investors (Bailiwick of Guernsey) Law, 1987* (the "Protection of Investors Law"); section 82 of the Insurance Business Law; section 59 of the Insurance Managers and Insurance Intermediaries Law; section 31 of the Regulation of Fiduciaries Law.

[8] Section 27A of the Protection of Investors Law; section 82 of the Insurance Business Law; section 59 of the Insurance Managers and Insurance Intermediaries Law; section 31 of the Regulation of Fiduciaries Law.

"Nothing in the provisions of this section compels the production or divulgence of a communication or item subject to legal professional privilege when it is in the possession of a person who is entitled to possession of it; but an advocate or other legal adviser may be required to give the name and address (including an electronic address) of any client."

This provision is the same as that contained in section 33 (Power to require information and production of documents etc.).

e) *The Commission and its relationship with auditors*

The Commission enjoys a relationship with its licensees and auditors which is largely positive, productive and based upon mutual respect and trust. A number of the comments made by persons responding to the engagement indicated that there were concerns that the Commission was seeking to act as a quasi-regulator of the audit profession.

The Commission's functions are set out in the *Financial Services Commission (Bailiwick of Guernsey) Law, 1987* (the "Commission Law"). The notifications and communications in relation to auditors of licensees will assist the Commission in fulfilling these functions. In particular, the ability of the Commission to request a voluntary meeting with auditors without the presence of the licensee is merely one tool that the Commission may seek to use in appropriate circumstances. It is unlikely that this gateway would be used frequently.

In relation to the imposition of a condition or direction upon a licensee to remove an auditor, the Commission would seek to do this only when necessary, for example, because the auditor is unsuitable, perhaps lacking a particular expertise necessary to audit a financial services company, that the auditor does not have adequate resources, or the auditor is no longer of good standing with its regulator. Where the Commission imposes a condition requiring the removal of a person as auditor of a company, the auditor will be provided with notice of the decision and will have a right of appeal. The power to impose such a condition and the provisions in respect of the right of appeal are currently contained in the Insurance Business Law (and other Supervisory Laws)[9]. The Commission has rarely considered imposing this type of condition. However, the Commission regards this power as a necessary element in the range of options that it needs to have for the protection of the public or the reputation of the Bailiwick.

In addition this is the view of the Basel Committee on Banking Supervision as reflected under Core Principle 27, Essential Criterion 6 of which states that the supervisor shall have the "*power to reject and rescind the appointment of an external auditor who is deemed to have inadequate expertise or independence, or is not subject to or does not adhere to established professional standards*".

6. Appointment of Skilled Person

a) *Definition of "inspected person"*

[9] In particular please see reference to removal of auditors by condition in sections 61(3) and 63(2) of the Insurance Business Law.

Concerns were raised regarding the scope of persons who fall within the definition of "inspected person" for the purposes of the skilled person appointments, in particular in relation to the persons set out in blue below.

We have reviewed the scope of "inspected persons" and, while they do fall within the scope of the Policy Letter and/or the current legislation, in light of the feedback from this engagement the Commission has concluded that it would be appropriate to reduce the scope of the definition of "inspected person". **Accordingly, the definition of "inspected person" will be amended in the Banking Supervision Law as follows:**

i) Applicants for licences

Having considered this in combination with the other provisions in the Banking Supervision Law, we understand the concerns raised and will remove this.

ii) Former licensees

Having considered this in combination with the provisions in the Enforcement Law, we understand the concerns raised and will remove this.

iii) Persons other than a person mentioned in paragraph (a), (b), or (d) carrying on any class or description of deposit-taking business.

Having considered this in combination with the provisions in the Enforcement Law, we understand the concerns raised and will remove this.

iv) An associated party of an inspected person specified in any other paragraph of this subsection

Having considered this in combination with the provisions in the Enforcement Law, we understand the concerns raised and will remove this.

v) A person who is the holder of a Supervised Role in respect of an inspected person.

Having considered this in combination with the provisions in the Enforcement Law, we understand the concerns raised and will amend this to limit it to apply only to persons who hold a Supervised Role in respect of a licensee.

vi) A person who performs any function for or on behalf of -

(1) an inspected person specified in any other paragraph of this subsection, or
(2) a person acting for and on behalf of an inspected person so specified,

in relation to deposit-taking business, including, without limitation, a person who is an auditor of an inspected person so specified.

Having considered the issues raised, this will be amended to:

"a person who performs any function for or on behalf of a licensed institution or a person acting for and on behalf of a licensed institution in relation to

deposit-taking business, including, without limitation, a person who is an auditor a licensed institution or such a person."

This is in keeping with the current powers under section 69(12)(b) of the Insurance Business Law and section 46(12) of the Insurance Managers and Insurance Intermediaries Law.

b) *Costs*

A concern was raised regarding the requirement for the inspected person to pay the costs of the skilled person.

While it is appreciated that the appointment of a skilled person can be costly, the Commission considers that the provisions relating to payment of skilled persons are similar to those relating to payment of inspectors and in accordance with the Policy Letter (at paragraph 5.6). The alternative, which is not considered acceptable, would be to require the costs to be met by the industry as a whole. In addition, if the court is satisfied that a sum is not reasonable in amount or was not reasonably incurred, or that the Commission acted unreasonably, frivolously or vexatiously in incurring the sum, it would not be recoverable as part of any claim the Commission made.

c) *Protection from liability for skilled person*

A request was made that skilled persons be afforded the same protection as the Commission as set out in the *Financial Services Commission (Limitation of Liability) Ordinance, 1990*, unless the thing is done or omitted to be done in bad faith.

The Policy Letter (at 5.3.6(e)) provides that skilled persons should not be liable in any civil proceedings in respect of anything done (or not done) in the preparation of the report unless the liability arises in respect of fraud, wilful misconduct or gross negligence. Accordingly, the provision has been drafted to reflect the provisions of the Policy Letter.

7. Supervised Roles

a) *Objection to existing holders of supervised roles*

Under the 1994 Law, classes of persons such as MLROs still require prior approval before appointment and can be subject to sanctions, therefore this has not changed substantively, other than to move sanctions to the Enforcement Law. The grounds upon which the Commission can object to an existing holder of a vetted or approved supervised role is that the person is not or is no longer a fit and proper person to hold such a role. This is a significant sanction and as such it is more fitting that it be contained in the Enforcement Law.

Before considering such a sanction, the Commission's approach would in the normal course involve communication with the relevant position holder and generally the Commission would anticipate that it would not need to use such a power with a co-operative person. For example, where an existing MLRO is no longer appropriately qualified alternative options might be for the person to take steps to obtain the

qualification (as there is generally a transition period to allow this to occur where new requirements are put into place) or for them to step down.

b) *Branches and Supervised Roles*

It was suggested that parent banks of Guernsey licensed banks should be excluded from the definition of significant shareholder, shareholder controller and indirect controller (collectively "Approved Supervised Roles") and that such institutions should be outside the scope of the requirement for prior notification and non-objection. The supporting argument offered is that there is no mandate under Basel Core Principles, that it is inconsistent with law in the other Crown Dependencies and that it is practically difficult.

The Commission disagrees with this view.

The essential criteria of Basel Core Principle 6 state that there should be "r*equirements to obtain supervisory approval or provide immediate notification of proposed changes that would result in a change in ownership, including beneficial ownership, or the exercise of voting rights over a particular threshold or change in controlling interest*" and that "*the supervisor has the power to reject any proposal for a change in significant ownership, including beneficial ownership, or controlling interest, or prevent the exercise of voting rights in respect of such investments*". The Commission takes the view not only that there is a clear mandate under Basel Core Principles for the Commission's prior non-objection to changes in approved supervisory roles but that such a requirement is necessary in order that the Commission may effectively conduct its role as a banking supervisor.

From a review of the banking legislation in the other Crown dependencies it would appear that there are pre-notification and approval requirements around change of control. It should be emphasised that the notification obligation relating to approved supervised roles would fall on the controller rather than the Guernsey licensed bank. It is not an unreasonable expectation that as part of any transaction involving the change of control of a banking group that appropriate legal advice would be obtained at group level to ensure that all regulatory requirements are met.

A further concern was raised that branches have been included within the scope of the definition of "approved supervised role" in section 13. It is the Commission's view that such treatment is appropriate. Controllers of licensed bank branches are brought into scope of the fitness and propriety requirement of the minimum criteria for licensing and where this criterion is not met the Commission would have the power to take appropriate supervisory action e.g. make a direction under section 11. It should be noted however that bank branches have been specifically excluded from the scope of the requirement regarding the notification and objection to a holder of an approved supervised role and that is consistent with current law. Accordingly, there is no requirement for prior notification and non-objection in relation to approved supervised roles of branches.

8. Other Issues

a) *Consultation regarding applicants or licensed institutions proposing to carry on business from Sark or Alderney.*

A concern was raised that the Commission was required to consult with the relevant authority on Sark or Alderney where an applicant or licensed institution proposes to carry on deposit-taking business in or from within Alderney or Sark.

This is not a new provision. Under the 1994 Law, the Commission is required to consult with the relevant authority on Sark or Alderney where an applicant or licensed institution proposes to carry on deposit taking business in or from within Alderney or Sark[10].

b) *Section 36 – prospective auditor.*

Having considered the matters raised in respect of the inclusion of "prospective auditor" in section 36, we have determined to remove the reference to "prospective auditors" from this provision.

c) *Inclusion of market abuse provisions in the Enforcement Law*

Comment was made that the non-enforcement market abuse provisions should be included in the Supervisory Laws rather than the Enforcement Law.

These provisions were centralised into the Enforcement Law to ensure that the provisions remained consistent and the contents of the regime remained grouped together. There was the concern that placing one part of the market abuse provisions in the Supervisory Laws and the other in the Enforcement Law would inevitably lead to inconsistencies and possibly a frustrating system requiring a read across between two Laws. It is considered that the boundaries between when a licensee is, in practice, in supervision or in enforcement are clear.

[10] Section 5(8) and 5(9) of the 1994 Law.