Guernsey Financial Services Commission

Feedback on the Engagement on the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2018 (the "Regulation of Fiduciaries Law")

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The Commission previously requested engagement on the draft Regulation of Fiduciaries 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. Matters raised in relation to the introduction of Secondary Fiduciary Licensees

a) Introduction of Secondary Fiduciary Licensees

A concern was raised regarding the introduction of Secondary Fiduciary Licensees and in particular regarding whether there would be a significant increase in fees in relation to the introduction of these.

Currently each full fiduciary licensee (whether lead or joint) has the same category of licence. The introduction of a secondary category of fiduciary licensee was contained in the Policy Letter (at paragraph 3.2.3). To a significant extent the introduction of a secondary category of licence formalises the lead and joint licensee practice which has arisen through the Fee Regulations. Some additional requirements to comply with relevant international standards have also been incorporated.

As this is the formalisation of the lead and joint licensee position, the Commission does not, at this time, consider that this will lead to a significant change in the manner in which fees are charged to Primary (i.e. "lead") and Secondary (i.e. "joint") licensees. However, some licensees which are currently joint licensees may wish to consider whether to become Primary licensees in their own right by opting for a full rather than a secondary fiduciary licence, as they are currently trading.

b) Ownership of Primary and Secondary Licensees

An issue was raised regarding the common ownership requirement of a Primary and Secondary Licensee and in particular that they could not be under the common ownership of a trust, but that they could be under the common ownership of a company.

Having considered this, it has been decided to amend the relevant provision of the Regulation of Fiduciaries Law to allow for the Primary and Secondary Licensee to be under the common ownership of a trust.

2. Directions

a) 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

Directions currently 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.

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.

As ancillary vehicles are primarily addressed in the draft *Protection of Investors (Bailiwick of Guernsey) Law, 2018*, they will be removed from the scope of "directed person" in the Regulation of Fiduciaries Law.

b) Directions and rights of appeal

[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 ("Banking Supervision Law"); section 12 of the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 ("the 2000 Law").

A concern was raised that a decision to impose a direction on a licensee to remove an auditor was not subject to a right of appeal.

Section 21(1)(d) provides for a right of appeal in relation to directions imposed pursuant to section 11(1). This power is also subject to a "minded to" process and representation process (along with the auditor being notified pursuant to section 19(2)(b)).

3. Definition of "relevant person"[2] – used in relation to information gathering and document production

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 funds, licensees, unsupervised group entities and special purpose vehicles, discretionary exempted persons and associated parties.[3] 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[4]. 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.

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

In particular, it should be noted that the Commission currently has the power to require employees of licensees to provide an explanation in relation to documents produced under the Regulation of Fiduciaries Law[5].

However, having considered section 25(1)(o) *"a person who performs any function on behalf of a relevant person"* in combination with the provisions in the Enforcement Law, we understand the concerns raised and will remove this from the Regulation of Fiduciaries Law.

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.

[2] The term "relevant person" is defined in section 25 and relates to section 26 (Power to require information and production of documents etc).
[3] 7.2.1 and 5.4 of the Policy Letter.
[4] 5.4.2 of the Policy Letter.
[5] Section 23(4)(a)(ii) of the Regulation of Fiduciaries Law.

The Policy Letter provides that the Commission should have the power to request, but not compel, an interview under the Supervisory Laws[6]. Section 26(1) provides that information shall be "furnished" 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 33 of the Regulation of Fiduciaries Law and include those persons set out in 5.4 and 5.9.5 of the Policy Letter.

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 as a finance centre.

It should be noted that trilateral meetings between the licensee, the auditor or actuary and the Commission will 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 (Bailiwick of Guernsey) Law, 2002* (the "Insurance Business Law"), will be included in the Regulation of Fiduciaries Law.

c) *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 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 indicates that it was intended that the Commission should, in appropriate circumstances, be able to impose confidentiality provisions around such communications. Of course, the Commission is required to do so in a reasonable manner and only as necessary in the circumstances.

In relation to charging of clients, 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.

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 that protection for legal privilege be included in the section concerning voluntary meetings.

A subsection has been included in section 33 providing that:

[6] At 5.4.3.

[7] For example under 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; and section 31 of the 2000 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 26 (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 for 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 as a matter of course or frequently.

In relation to the other powers of the Commission which may relate to auditors, for example the imposition of a condition upon a licensee to remove an auditor, the Commission would only seek to do this only when necessary. For example, it may be that the auditor is unsuitable, perhaps lacking a particular expertise necessary to audit a particular financial services company, that the auditor does not have adequate resources to audit the company, or that 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 Protection of Investors Law (and other Supervisory Laws)[8]. 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.

4. Appointment of Skilled Person

[8] In particular please see reference to removal of auditors by condition in section 35(3) of the Protection of Investors Law.

a) *Definition of "inspected person"*

Concerns were raised regarding the scope of persons who fall within the definition of "inspected person" for the purposes of 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 indeed fall within the scope of the Policy Letter or the current legislation, we are of the view that, in light of the feedback from this engagement, the change of focus of the Supervisory Laws and other powers available to the Commission, 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 Regulation of Fiduciaries Law as follows:

i) Applicants for fiduciary licenses

Having considered this in combination with the other provisions in the Regulation of Fiduciaries 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 regulated activity.

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 regulated activities, 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 fiduciary or a person acting for and on behalf of a licensed fiduciary in relation to regulated activities, including, without limitation, a person who is an auditor of a licensed fiduciary 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 (Bailiwick of Guernsey) Law, 2002*.

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 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*.

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, this provision has been drafted to reflect the provisions of the Policy Letter.

5. Supervised Roles

a) Company secretary as a supervised role

A suggestion was made by a respondent that "company secretary" should be a supervised role.

While the term "company secretary" is not defined within the Regulation of Fiduciaries Law and is not specified as an approved or vetted supervised role, the Commission considers that it would fall under notified supervised role as an "other supervised manager". However, depending upon what is included in the role of "company secretary", it may be that the person is also undertaking a compliance officer role and would therefore be undertaking an approved supervised role. **The Commission will issue guidance on this issue in due course**.

b) *Objection to existing holders of supervised roles*

Under all of the Supervisory Laws except the 2000 Law, classes of persons such as MLROs still require prior approval before appointment and can be subject to sanctions, therefore (given the policy aim stated in 2.3 of the Policy Letter that the Supervisory Laws should so far as practicable be consistent across the board) this has not changed substantively, other than to render the Regulation of Fiduciaries Law consistent and 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 anticipates 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.

c) *Prior notification and no objection and post-notification processes*

The response to the engagement indicated that there is some confusion regarding the process of prior notification and no objection in respect of Approved Supervised Roles ("ASR") and Vetted Supervised Roles ("VSR").

Currently the Regulation of Fiduciaries Law only has roles defined under ASR and Notified Supervised Roles ("NSR"). However, processes for notification in respect of all three types of Supervised Roles (ASR, VSR and NSR) are included in the Regulation of Fiduciaries Law. While the process relating to VSR has been included it will not be used until and unless the Committee makes a regulation specifying positions, interests or roles which are to be VSR (pursuant to section 12(2)). Whether a particular role or position is as an ASR or a VSR differs between the Supervisory Laws and is generally based upon the requirements of the relevant international standard.

ASR positions require prior notification from the person proposing to take the position or the relevant licensed fiduciary and the Commission's confirmation that it has no objection to the person holding that role. There is a similar prior notification requirement in relation to VSR (when those roles are finally determined by regulation) except that, 60 days after notification to the Commission, and provided that the Commission has not extended that period, the Commission is deemed not to have objected to the person holding that role.

The licensed fiduciary is required to provide written notification where a person becomes or ceases to be the holder of a Supervised Role (which includes ASR, VSR and NSR). This notification must be provided within a period of 14 days immediately following the change.

6. Information published by the Commission

Publication of imposition of conditions, directions and enforcement requirements

Currently the Commission has express power under other Supervisory Laws to publish information in relation to the imposition of conditions and directions9. However, as can be seen from the Commission's website, it is extremely rare that the Commission publishes details of the conditions or directions imposed. One exception may be where such publication was for the protection of clients (for example where a licensed fiduciary had been prohibited by direction from entering into any particular class of transactions).

However, due to the concerns raised in relation to this matter, the wording of clause 13(3) will be changed as set out in the Annex hereto.

7. Other Issues

a) Record Keeping and retention of documents

Concern was raised that the requirement of persons set out in section 29(1)(c) (a person other than a person mentioned in paragraph (a) or (b) carrying on any class or description of regulated activities) to retain documents under section 29.

The purpose of this was to require persons who were carrying on regulated activities without the appropriate licence or exemption (and thus in contravention of the Regulation of Fiduciaries Law) to retain documents on the same basis as licensed fiduciaries. This would reflect the powers under the Enforcement Law in relation to the Commission policing the perimeter of financial services business in the Bailiwick. **However, due to the concerns that have been raised, this will be removed.**

Concern was raised regarding the ability of the Commission to extend the 6-year period.

While the Commission is aware of potential difficulties for former licensees where information is requested after the 6-year period, there are certain situations which may arise in which it could be critical for the protection of the public to be able to request information after this period. In particular where the Commission has the power to request information or documents, it is imperative that this power is not frustrated by a former licensee or their related party disposing of the documents on the day the 6-year period ends.

b) Section 32 – Inclusion of prospective auditor.

[9] Section 17(2) of the Insurance Business Law and section 12(2) of the Insurance Managers and Insurance Intermediaries Law.

Having considered the matters raised in respect of the inclusion of "prospective auditor" in section 32, we have determined to remove the reference to "prospective auditors" from this provision.

c) *Definition of Protector*

A concern was raised in relation to the current definition of "protector". The Commission appreciates **the feedback it has received in relation to the definition of "protector" and will consider this matter further. However, as this was not a matter contained in the Policy Letter, the Commission feels that this is a matter to take forward separately rather than being dealt with in the Revision of Laws project.**

d) *Power to obtain information from an unsupervised entity on behalf of another supervisory authority*

A concern was raised that the power for the Commission to obtain information and documents from unsupervised entities of a group on behalf of another supervisory authority was not expressly contained in the Regulation of Fiduciaries Law.

The Commission has and will continue to have the power under s. 21B of the Commission Law to exercise any relevant power conferred on the Commission under an enactment to assist or enable a requesting authority to carry out its functions. This is the power the Commission currently uses, together with the power under section 23 of the 2000 Law, obtain relevant information on behalf of another supervisory authority. The power to exercise relevant powers at the behest of a requesting authority in the interests of the public or the reputation of the Bailiwick as a finance centre is also set out in section 11 of the Enforcement Law.

e) *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 unlikely that the inclusion of the relevant market abuse provisions in the Enforcement Law would, objectively, indicate that the issuing of a code of practice in relation to market abuse is an enforcement issue. The legal effect of the provision remains unchanged, wherever it is. The boundaries between when a licensee is, in practice, in supervision or in enforcement are clear.

f) *Annual returns and financial crime information*

Concerns were raised that as drafted section 36 may not allow the Commission to make rules in relation to the provision of additional annual returns on financial crime.

While it is the view that as drafted the Commission would have the power to request such information in relation to financial crime (indeed, financial crime is specifically mentioned at subsection (2)(b)), as this has been raised as a concern, **we will include an additional specific reference to this in section 36.**

g) Changes to fee making powers

A concern was raised regarding the power of the Committee to make regulations in respect of the payment of fees under section 7.

The provisions relating to the power to make regulations regarding fees are significantly varied between the Supervisory Laws. For example, the Banking Supervision Law only provides for regulations to be made for fees relating to applications for licences and annual fees. However, the Insurance Business Law (the most recent of the Supervisory Laws) has a very broad power to make regulations in relation to fees. In order to make the Supervisory Laws more consistent (an aim stated in 2.3 of the Policy Letter), the power to make regulations in relation to fees will be made substantially similar across the Supervisory Laws. This will enable flexibility and consistency in the future fee regulations to fairly distribute costs across the supervisory sectors.

Annex

Wording of section 13(3)

3) The list shall contain, in relation to each licensed fiduciary -

   a) the name of the licensed fiduciary,

   b) the addresses or principal places of business of the licensed fiduciary in the Bailiwick,

   c) if the Commission determines that it is necessary or desirable in the interests of the public or the reputation of the Bailiwick as a finance centre or for the purpose of the performance of its functions, details of-

      i) any conditions imposed in respect of the fiduciary licence,

      ii) any directions given to the licensed fiduciary, or

      iii) any enforcement requirements imposed on the licensed fiduciary or any other person in connection with the fiduciary licence, and

   d) such other particulars as the Commission may determine.