



Guernsey Financial
Services Commission

**Feedback on the Engagement on the Financial Services
Commission (Enforcement Powers) (Bailiwick of
Guernsey) Law, 2019 (the “Enforcement Law”)**

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The Commission previously requested engagement on the draft Enforcement 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. Issues raised in relation to the effect of suspension of a licence, authorisation or registration

Currently the Supervisory Laws (as well as the other relevant laws) are silent on the effect of suspension of a licence, authorisation or registration. Accordingly, a provision has been included setting out the current position that licensees and funds remain subject to regulatory requirements during the period their licence, authorisation or registration is suspended.

2. Disapplication of Non-Discretionary Exemptions

Having considered the feedback on this provision, it has been amended so that it will apply only to the exemption under section 3(1)(g) of the *Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2019* (the “Regulation of Fiduciaries Law”) (being acting as a director of not more than six companies where those directorships are not the subject of an exemption contained in any other paragraph of section 3(1) of the Regulation of Fiduciaries Law). This mirrors the current position in section 3(1)(g) of the *Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000* (the “Fiduciaries Law”).

3. Enforcement Requirements

a) Basis of Enforcement Requirements and application of Enforcement Requirements to former licensees and funds

Enforcement requirements are used in place of conditions and directions in an enforcement context. Currently, directions apply to persons who are surrendering their licence or where a licence is being revoked. Directions allow for obligations to be imposed after the licence ceases to exist (as well as in the period between surrender notification or notice of revocation and the actual surrender or revocation of the

licence). As such, directions may apply to former licensees and, as currently enacted, there is no end date to the imposition of the direction. As enforcement requirements are used in place of conditions and directions in an enforcement context, they may need to be applied where a licensee has its licence revoked or has otherwise ceased to be licensed. In short, this merely replicates in different terminology the current position under some of the Supervisory Laws.

While the Policy Letter does not make explicit reference to former licensees in 7.4.7, it does indicate that enforcement requirements take the place of conditions and directions in an enforcement context; as such it is appropriate and in accordance with the Policy Letter that enforcement requirements extend to former licensees.

Two examples of the types of common directions used are:

- i) a requirement to continue to have professional indemnity insurance for a certain period; and
- ii) record keeping requirements. These type of directions are considered reasonable and necessary where, for example, a licence is being revoked or surrendered.

If enforcement requirements could not be imposed upon a former licensee, then significant difficulties could arise in circumstances where considerable time is likely to be necessary to resolve a licensee's business and it is necessary to ensure the best interests of clients and the reputation of the Bailiwick are protected.

The measures contained in section 23(5) and (6) of the Enforcement Law were included as additional comfort for former licensees. As mentioned above, currently there is no time limit on when the Commission can impose directions on former licensees.

b) Application of Enforcement Requirements to persons other than licensees, funds or former licensees or funds

The Policy Letter clearly indicated that enforcement requirements would be able to be imposed upon permission holders, licensees, funds, persons who have discretionary exemptions disappplied and other persons. In particular, at paragraph 7.5.4 of the Policy Letter it states that the Commission should have wider powers (i.e. not just information-gathering powers) in respect of any individual or business who carries out activities without the appropriate permission as it has in respect of permission holders. This is on the basis that it is necessary to deliver effective protection of the public and the reputation of the Bailiwick.

The other categories of person upon whom enforcement requirements can be imposed are those associated with the licensee or its operations (e.g. directors, ancillary vehicles, etc). The Law Officers have advised that it would be inappropriate (and frankly impossible) for a policy letter to set out all the provisions of the Law itself, and obviously much of the detailed content will only materialise during the drafting process. It is normal for a policy letter only to deal with high level policy rather than the textual specifics of the legislation.

c) Publication of imposition of Enforcement Requirement

Currently the Commission has the power to publish information in relation to the imposition of conditions and directions in a number of the Supervisory Laws. However,

as can be seen from the Commission's website, it is extremely rare that the Commission publishes details of conditions or directions. One exception is where such publication was for the protection of investors (for example where a fund was suspended).

It is anticipated that enforcement requirements would be used in an enforcement context (whether during or after an investigation) rather than for supervisory purposes (as the supervisory laws will retain both conditions and directions). As such, it is highly unlikely that purely market driven matters would be dealt with by enforcement requirements.

Also, in deciding whether or not to exercise the power to publish in section 23(11) of the Enforcement Law, the Commission must have regard to the interests of the public and the reputation of the Bailiwick.

d) When to impose Enforcement Requirements

Enforcement requirements take the place of conditions and directions in an enforcement context. Accordingly, these are not necessarily imposed as a sanction but would often be imposed as a protective measure. Accordingly, it is reasonable that enforcement requirements can be imposed on a similar basis as conditions and directions, with the threshold that the enforcement requirement must appear to the Commission to be necessary or desirable in the interests of protecting the public or the reputation of the Bailiwick.

4. Prohibition Orders

a) When will prohibition orders be imposed?

The Enforcement Law provides for the making of rules under section 119. In particular, it provides the power to make rules in relation to the standard of proof for decision-making.

Each of the sanctions, including prohibition orders, has criteria published in the law which must be taken into account before the sanction can be imposed (e.g. before many of the sanctions can be imposed it must be shown that the person does not fulfil the applicable minimum criteria for licensing). It is not considered practical to publish exhaustive criteria to be taken into account before each sanction may be imposed. Any attempt to do so would run the risk of omitting a particular criterion.

b) Prohibition Orders and Director Disqualification under the Guernsey Companies Law and Alderney Companies Laws – should they be linked?

Prohibition orders under the current Supervisory Laws differ in a number of ways from director disqualification orders under the Companies Laws. Prohibition orders and director disqualification orders generally apply to different positions, are based upon different grounds and different processes apply for the imposition of these orders. Further, the power to maintain a list of prohibition orders and *Companies (Guernsey) Law, 2008* disqualification orders rest with the Commission and the Registrar of Companies respectively. Of course, the same facts or circumstances may, in relation to an individual, result in proceedings for both types of order.

To assist the public in obtaining necessary information on directors' disqualifications, the Commission proposes to provide a link on its website to the Director Disqualification list on the Guernsey Registrar of Companies' website.

c) *Ability for the Commission to charge for a copy of the list of prohibited persons*

Under the existing Supervisory Laws, the Commission has the power to charge for the provision of a copy of the list of prohibited persons¹. The Commission has not previously exercised this power and this position is unlikely to change.

5. Administration and Intervention

a) *Application of Administration to branches of Banks*

Some respondents would like an exemption from the administration application provisions relating to bank branches similar to that which relates to the dissolution or winding up as per Part VI of the Enforcement Law.

Following feedback, an appropriate exemption has been inserted to exempt banks which have only branches in Guernsey from the application of the administration management provisions.

b) *Persons in relation to whom the Commission may apply to Court for Administration Management Orders*

Some respondents raised concerns about permitting the Commission to make applications in relation to:

- a) persons exempted from the requirement to be licensed;
- b) persons otherwise carrying on regulated business in circumstances where they are not required to be licensed; and
- c) persons who apply or who have applied for a licence or an authorisation or registration as a collective investment scheme.

The Policy Letter at paragraph 7.4.11(d) provides the Commission with the ability to apply to the Court to appoint an administration manager across all sectors in respect of permission holders. This is currently contained in the *Protection of Investors (Administration and Intervention) (Bailiwick of Guernsey) Ordinance, 2008* which applies to persons who apply for a licence under section 3 of the *Protection of Investors (Bailiwick of Guernsey) Law, 1987* (the “Protection of Investors Law”) or for an authorisation or registration under section 8 of that Law and anyone at all carrying on controlled investment business (licensed, exempted or otherwise).

Paragraph 7.5.4 of the Policy Letter provides that the Commission should have the necessary powers (i.e. not just information-gathering powers) in respect of any individual or business who carries out activities without the appropriate permission as it has in respect of permission holders. This is on the basis that it is necessary to deliver effective protection of the public and the reputation of the Bailiwick.

¹ Section 28B(3) of the *Insurance Business (Bailiwick of Guernsey) Law, 2002* (the “Insurance Business Law”), section 18B(3) of the *Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002* (“Insurance Managers and Insurance Intermediaries Law”), section 17B(3) of the *Banking Supervision (Bailiwick of Guernsey) Law, 1994* (the “Banking Supervision Law”); section 17B(3) *Regulation of Fiduciaries, Administration Businesses and Company Directors etc (Bailiwick of Guernsey) Law, 2000* (the “Fiduciaries Law”) and section 34F(3) *Protection of Investors (Bailiwick of Guernsey) Law, 1987* (the “Protection of Investors Law”).

6. Representations, Notices of Decisions and Appeals

a) Request to define “member” of the Commission

A definition of “member” has been inserted into the Enforcement Law as requested.

b) The reduction of the 28-day representation period under section 103(6)

Some respondents objected to section 103(6) (relating to the reduction of 28-day period for representations) on the basis that it was not consulted on or set out in the Policy Letter.

The Policy Letter makes reference to the length of the representation period at 7.3.3 as being the same as under the Supervisory Laws. At paragraph 5.10.4 of the Policy Letter, the shortening or dispensation of such a period was provided for in the terms set out in section 103(6).

In addition, a similar power to reduce or (in some cases) dispense with the representation periods exists under the Supervisory Laws at present².

The provisions relating to the reduction of the representation period and the basis for this is as currently set out in section 103(6).

c) Publication of retraction statement at the request of the appellant

The concern articulated is that there doesn't appear to be a mechanism for appellants who have made representations to be granted a retraction publication where an investigation is dropped by the Commission and where an appeal is successful in all circumstances.

Section 106(9B) (now 106(10)) of the Enforcement Law reflects the current wording of section 11H(8) of the *Financial Services Commission (Bailiwick of Guernsey) Law, 1987*. In the event that an appeal against the making of a public statement (under section 38) or (under section 39(7)) that a financial penalty has been imposed, is successful, the Commission will take the necessary action depending upon the order of the Court (which may be something other than setting aside the decision in full). Where the Court sets aside a financial penalty in full, the Commission would remove the publication under section 39(7). Similarly, where the Court sets aside a decision of the Commission to issue a public statement in full, this would be removed from the website.

As set out in section 106(9), the presumption in relation to appeals is that they will be held in public. Accordingly, upon publication of the Court's decision, the outcome of the appeal will be in the public domain. Consequently, the appellants who have made representations, in addition to the publication being removed, will have the result of the appeal in the public domain.

Concerning the suggestion that the Commission release a public statement where an appeal is successful in all circumstances, it is noted that subsection (9B) is aimed at

² Section 17C(3) of the Fiduciaries Law; section 17C(3) of the Banking Supervision Law; sections 28C(3), 61(5) and 84C(3) of the Insurance Business Law; sections 18C(3), and 41(5) of the Insurance Managers and Insurance Intermediaries Law; sections 34G(3) and 35(5) of the Protection of Investors Law; section 11E(3) of the *Financial Services Commission (Bailiwick of Guernsey) Law, 1987*.

decisions to make a publication and where the appellant has not had the opportunity to make representations before the decision which has been appealed was made. A number of the decisions listed in the appeal provision do not have publications made and therefore would not require a statement subsequent to an appeal to correct any public perception.

In relation to releasing a statement upon an investigation coming to an end without the imposition of sanctions, as the investigation will generally (subject to the investigation publication provision) not be in the public domain, this is not appropriate, and could indeed be of considerable embarrassment to the person who had been under investigation.

d) Enforcement powers which have a right of appeal

Some responses indicated that they would like right of appeal extended across entire range of enforcement powers, decisions and penalties.

Most of the sanctions and powers set out in the Enforcement Law are subject to a right of appeal. Decisions which are not subject to a right of appeal include:

- i) Enforceable undertakings – these are not imposed by the Commission but are agreed between the Commission and the relevant person (section 37).
- ii) Meetings of the Commission with auditors, actuaries etc (section 10).
- iii) Limited information gathering powers – section 14 (Other provisions as to notices and information); section 16 (Disclosure of information to professional bodies).

However, it should be noted that all decisions of the Commission may be subject to review by the Royal Court whether or not by way of an express statutory right of appeal.

One respondent did not agree with the presumption in the Enforcement Law whereby appeals against a decision of the Commission to publish a public statement are held in public unless agreed between the parties or ordered by the Court.

The Policy Letter at 7.4.12 clearly indicates that unless there is good reason to the contrary, the presumption is that all appeals should be heard in public.

7. Whistleblowing, Disclosure to the Commission and Confidentiality

a) Whistleblowing protection and outsourced service providers

Some respondents suggested that outsourced service providers should have equal whistleblowing protections as employees.

The power to make Ordinances in relation to whistleblowing has been incorporated into the Enforcement Law. The Ordinance-making powers are wide and it will be possible to specify "the persons or classes or descriptions of persons by and to whom protected disclosures may be made".

b) *Duty of Confidentiality and Extra-Territorial Effect*

A respondent was concerned that the provision relating to a person's duties of confidentiality not being broken by disclosure to the Commission may not have extra-territorial effect.

The Law Officers have confirmed that this is a difficult area of law and one on which it would not be appropriate to attempt to legislate with purported extra-territorial effect. The clause is based on a precedent used across the statute book.

c) *Whistleblowing and Employment Law in Alderney and Sark*

A respondent raised concerns that the employment laws, which give remedies to unfair dismissal, do not apply in Alderney and Sark.

The extent of employment protection for whistleblowers in Alderney and Sark is ultimately a matter for the States of Alderney and the Chief Pleas of Sark.

d) *Confidentiality and Legal Professional Privilege*

Concern was raised by a respondent that the term "unenforceable" in relation to the provision of information regarding a client (i.e. their name and address) would cause an advocate to breach their professional duties to that client, even if the duty was "unenforceable".

This provision has been amended to reflect the respondent's preferred wording, stating that the relevant duty was not contravened.

8. Power to rectify publications

Some respondents raised concerns that the Commission would not be required to notify relevant persons before amending a public statement and that the process does not provide for representations and appeals to all persons named in the publication.

As stated in the legislation, this is not a full variation of the public statement but rather a correction or amendment of misleading, inaccurate or incomplete information or an alteration etc, necessary or desirable in the interests of the public or reputation of the Bailiwick as a financial centre. For example, it may be that the Commission wishes, upon request or otherwise, to remove references to an individual from a public statement. This could be for a number of reasons, for example the individual has passed away. It is not intended to be used for substantial amendments. There is nothing to preclude the Commission from consulting the interested party if it thinks it appropriate to do so.

A subject of a public statement may request that a statement be varied.

9. Definition of "relevant person"³

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

³ The term "relevant person" is defined in section 6 and relates to section 7 (Power to request and obtain information and documents) and section 8 (Investigations by inspectors).

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

The Policy Letter clearly indicated 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.⁴ In addition, at paragraph 7.5.4 of the Policy Letter, it states that the Commission should have the same powers (which include information-gathering powers) in respect of any individual or business who carries out activities without the appropriate permission as it has in respect of permission holders. This will enable the Commission to more effectively ensure that it is policing the perimeter and, in part this will ensure that individuals are not obtaining an unfair competitive advantage.

Accordingly, it would not be appropriate to limit “relevant person” to licensees, funds and those undertaking Supervised Roles in relation to licensees. That would narrow the powers the Commission currently has under the existing Supervisory Laws.

b) Information from shareholder or interest holders in funds

A respondent raised a concern that as drafted “relevant person” extended to include the ability to obtain information from shareholders or investment interest holders in funds.

This was unintended and the Enforcement Law has been amended to exclude shareholders or investment interest holders in funds.

10. Other Issues

a) 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 paragraph 5.9.5), albeit for inclusion in the Supervisory Laws rather than the Enforcement Law. It was considered more appropriate to include this in the Enforcement Law rather than replicating the power in each Supervisory Law. The Policy Letter (at paragraph 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 at all times to act in a reasonable manner.

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

⁴ 7.2.1 and 5.4 of the Policy Letter.

to the Commission.⁵ The Commission anticipates that the exercise of this power would not engage significant time of the auditors involved.

Some respondents queried what the scope of the enquiries would be and in particular whether the auditors and actuaries would be expected to respond to queries outside their area of expertise.

It is not anticipated that auditors or actuaries would be requested to respond to queries outside their area of expertise, knowledge or experience.

b) Power to impose a licence

Some respondents raised issues regarding the power of the Commission to impose a licence. There was confusion as some respondents believed that this was not an existing power of the Commission and that it was redundant in light of the Commission's powers to restrain unlawful trading (section 46 and 47 of the Enforcement Law).

Currently the Commission has power under section 10 of the *Insurance Business (Bailiwick of Guernsey) Law, 2002* (the "Insurance Business Law") to impose a licence upon a person where the Commission has reasonable grounds to suspect, for whatever reason, that a person who does not hold a licence to carry on insurance business of any particular description is carrying on, or holding himself out as carrying on, insurance business of that description in contravention of section 1, 3 or 4 of the Insurance Business Law. The inclusion of this power is to facilitate consistency in respect of financial services businesses and to enable the Commission to effectively police the perimeter.

While the Commission understands that imposing a licence does not ensure compliance by the licensee, it is one of a range of options available to the Commission to deal with a person carrying on or holding themselves out as carrying on business without a licence.

c) Decision making process and standard of proof

A respondent raised a concern that it is not explicit as to what standards should be applied by the Commission in relation to a determination. The respondent was of the view that the Law should explicitly state what those standards should be.

Broadly, the enforcement process and powers are based upon existing process and powers of the Commission. For example, section 25 of the Enforcement Law "Objection to existing holders of supervised roles" references "opinion", as do the existing equivalent provisions (section 26 of the Insurance Business Law, section 15 of the *Banking Supervision (Bailiwick of Guernsey) Law, 1994* (the "Banking Supervision Law"), section 28A of the Protection of Investors Law, section 37 of the *Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002*, section 15 of the Fiduciaries Law).

⁵ 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; section 31 of the Fiduciaries Law.

The Commission will, under the Enforcement Law, be able to make rules under section 119 including (if considered necessary) in relation to the standard of proof required in respect of the decision making process and proceedings. The Commission intends to consult industry before making such rules in due course.

d) Restrictions on disclosures in relation to information requests

Some respondents raised concerns that the power under section 14 of the Enforcement Law whereby the Commission could impose restrictions on the disclosure of information in relation to information requests could prevent people from:

- i) talking to their legal adviser, or
- ii) talking to other parts of their financial services group in order to obtain the information covered by a Commission notice, or
- iii) reporting any potential regulatory action through the appropriate risk and compliance chain within that group, as required by good corporate governance.

The Commission can currently place restrictions on the disclosure of information in relation to interviews with individuals. Under the Enforcement Law, restrictions imposed on the disclosure of information in these circumstances will allow the relevant person to obtain legal advice and will not, except where necessary, limit a person from seeking information from other parts of a business. As required by public law principles, the Commission will undertake a decision under section 14 in a reasonable manner and would not seek to unreasonably restrict the disclosure of information requests. Generally the licensee and its board are, in nearly all instances, aware of the regulatory issues of concern where a disclosure restriction is put into place.

It is worth bearing in mind that restrictions on “tipping off” are now well established in the statute book.

e) Public announcements of enforcement proceedings

Some respondents raised the following issues in relation to public announcements of enforcement proceedings power in section 41 of the Enforcement Law:

- i) That the power is not subject to minded to process.
- ii) That they would like automatic publication that no further action has been taken if no further action is taken (compared to publication at the request of the relevant persons - section 41(3)).
- (i) That section 41(2) catches any firm or individual within the “subject of enforcement proceedings or investigation” scope if they are subject to something as minor as an enforcement-related on-site visit or a request for information.

In relation to the matters raised above:

- i) While the power is not subject to a minded to process, the Commission’s decision to make this type of announcement is subject to appeal under section 106, and the court may order the suspension of the decision (i.e. the taking down of the publication) pending resolution of the appeal.
- ii) While we understand the argument put forward for automatic publication where no further action is taken, the difficulty which arises in relation to this is the

impression which this may cause to the public. If there was a requirement to make a further publication where no further action is taken (as compared to at the request of the person), then an absence of such a publication would indicate that some action had been taken. While often a public statement is issued in relation to enforcement sanctions, this is not always the case. There may also be cases where the person in question does not actually want any further publication or publicity.

- iii) The Commission is committed to using all of its powers in a reasonable and proportionate manner and believes that this power, cannot be used automatically to announce all enforcement investigations. As such it would be the exception, rather than the rule, that this power would be utilised.