



Guernsey Financial
Services Commission

Industry Seminar – 20 November 2014

Enforcement Division – 1st Year Update

Simon Gaudion, Director

Good afternoon everybody.

Well, it has been an interesting first year for the Division and myself to say the least and I welcome the opportunity to provide you with an update on how things are progressing in that regard.

I will start with a passing reference to the recent review which was published by Deloitte which included the perceptions of compliance professionals in Guernsey on how they see things developing with regards to enforcement. On the whole I agree with the comments that were made, especially the comment that “*it would take some time to get into full swing*”. It may seem that things have been moving slowly, but I can assure you that the Division has been, and remains, extremely busy. We have had a mixture of old legacy cases to work upon and have also taken on a mixture of cases to do with AML, conduct and corporate governance. In essence we are about helping maintain confidence in the Bailiwick by keeping markets clean and ensuring that wrongdoing is sanctioned appropriately. In effect, we wish to make sure that the good firms, that do the right thing, are not disadvantaged by those that are not. In doing just that licensees can expect to be dealt with by a professional enforcement division striving to protect all that is good in our industry.

Last year, as you will probably recall, with the Enforcement Division being in its infancy, I set out the structure and how we proposed to investigate matters in a transparent, proportionate and fair manner. I also walked through the main points of the decision making process and described the process that licensees or individuals could find themselves engaged in when dealing with either the Enforcement Division or a Supervisory Division. On the whole the structure of the Enforcement Division has not changed however, a recent addition is Advocate Liam Roffey who will be assisting the Enforcement, and Financial Crime Divisions. Liam is already proving to be a considerable asset to the Commission, as an ex Crown Prosecutor and also with private practice experience as a defence lawyer. Having only been with us a short time he felt the need for a well deserved holiday and has just embarked on a pre-booked holiday to South America. Unfortunately he thinks he will be back in the office at the beginning of December but I still have contacts with my old colleagues in the UK and I thought it would be an interesting experience for Liam to take a closer look at the Heathrow custody suite. I therefore expect him back anytime within 96 hours of landing in Heathrow. For the criminal lawyers and law enforcement officers here you will know what that time frame represents.

The move to employ a lawyer was felt necessary due to the number of cases and the complex legal issues arising out of them and will reduce the Commission’s legal costs which have, until now, generally been outsourced. Recently, we have also been receiving considerable

support from HM Procureur's Chambers, specifically from the civil litigation team and in particular Crown Advocate Jason Hill. Some level of ongoing support from Chambers will still be required from time to time, for which I am grateful.

Slide: What has happened in the first year?

If any of you were in the unfortunate position of having to listen to me last year, I kept reiterating the process we wished to adopt and the fact that we wanted the way we dealt with enforcement matters to be open, transparent, reasonable and fair. Nothing has changed in that regard, albeit at times some of the correspondence received would suggest otherwise.

It is, of course, accepted that we are going to face considerable legal challenge on the majority of what we do, however I remain hopeful that by ensuring we adopt a professional approach in all that we do, we can encourage all parties to consider sitting down with us and negotiate sensible outcomes. In adopting such an approach, I and my Division are acutely conscious of the need to demonstrate a fair and transparent approach and we will do just that. We will ensure that we place the facts and supporting evidence before licensees, individuals and their representatives and ensure that they are afforded the opportunity to make representations on the findings and to put their side of the story. As I said last year, we accept that such an approach will not always be possible and several cases are going the "full distance" for want of a better phrase, and I will say more shortly about the mechanism for dealing with matters before a Senior Decision Maker.

We also accept that on occasion we are not always going to be right about our initial findings. If you believe we have it wrong, I would encourage you not to just go down the route of protracted correspondence telling us how bad and unreasonable we are but instead provide us with the material to show us why and how you think we have got things wrong – better still, come in and discuss matters with us and I assure you that we will review it and listen to what you have to say, as this approach has got to be in the interests of all concerned. If the opportunity is not taken, for whatever reason, then the whole process will become lengthy, the interpretation of documents provided by a licensee could be misunderstood by us and whereby any fears we had could have been dispelled at an early stage. Having said that we have found this year that on occasion it has simply proved impossible to have sensible, meaningful conversation with some licensees and individuals under investigation, or their legal counsel for that matter, and we are therefore faced with no alternative but to move forward with what we believe to be the findings of our case and if necessary refer the matter to a SDM for consideration.

Sadly, in such cases, much time is taken and considerable cost incurred by both the Commission and the licensee, with protracted correspondence from legal representatives in an attempt to derail the investigations. This approach is completely counter-productive and the Commission will robustly defend its position. In some respects I take comfort when this happens because if the process is being attacked then the licensee and their legal counsel are indicating that they have serious concerns regarding our findings. Clearly, how a licensee chooses to defend themselves is a matter entirely for them, however I would simply encourage everyone to at least consider that there is an alternative way forward based upon common sense and an understanding that until the Commission has been provided with sufficient material to show that we have got things wrong, we will move forward with our case, based on the evidence before us. I have to give a strong message here in that if we believe that serious breaches of the regulatory laws have taken place **unreasonable argument will be strongly fought by the Commission**, and we will investigate the matter thoroughly with or without the co-operation of the licensee. I do not want that to happen or this message to sound threatening in any way, but nevertheless I have to be clear in our

intentions that poor behaviour and conduct within the industry will be investigated. My role is to ensure that we do this within our legal powers and in a professional and open manner. In my first slide I mentioned the addition of Advocate Roffey to the Commission and he will take forward our cases before either the SDM or the Court of appeal if necessary and appropriate to do so.

Right, after that particularly gloomy statement, I have to say that in most of the investigations to date the licensees have co-operated fully with the requests made of them, which naturally makes the process quicker and on some occasions has enabled initial concerns to be constructively addressed and re-evaluated. Remember – the Enforcement Division is investigating a matter to try and establish the facts as a result of a Supervisory Division being concerned about aspects of the conduct of a licensee.

All of the cases investigated to date have been brought to a conclusion in favour of the Commission whether by agreed settlement or via a SDM, which again gives me some comfort in that what has been referred to us by a Supervisory Division and then subsequently investigated has been shown to be based on correct analysis and solid evidence. It also shows that the internal process with our Case Review Panel, which is referred to within the guidance document, is working properly. However, I can assure you that Case Review Panels, which is the internal panel chaired ordinarily by the Director General, always prove to be challenging for my Division and we always face tough questioning regarding our findings. This is to be expected and is also welcomed by me, as the focus has to be on ensuring our findings and evidence are robust and can withstand scrutiny. This ensures that we are not engaging with a licensee or individual with weak facts that could or should be dealt with by way of Supervision or by other means.

It is of note and is to be commended that, on five occasions, we have reached early settlement with licensees and this was taken into consideration when setting the sanctions to be imposed. In four of those cases they involved AML breaches of varying degrees.

If I go back to this time last year I had no idea how many cases or what the nature of those cases would be that were to be referred for investigation by my colleagues, but since November last year we have brought 5 cases to a conclusion, and we currently have 3 further cases before a SDM for consideration, one of which had its hearing last week. At least three other cases are in the pipeline to be referred to the Division for investigation. Although there are signs of a healthy turnaround of some cases we are still striving to improve in all areas of how we operate and ensure that cases are progressed as expeditiously as possible bearing in mind that the approach and pace of progress is often in the hands of those that are being investigated. During the course of our investigations to date the Division has also sought evidence from our international colleagues and in that regard we have reached out to the likes of Mauritius, the UK, Gibraltar, The US, South Africa and not forgetting our colleagues in Jersey.

Slide: Principle 10 – Principle of Conduct of Finance Business

Having said everything that I did on the last slide it is worth bringing some context to this, and I would just like to take a moment to remind everybody of article 10 of the Principles of Conduct of Finance Business in this regard, which is that *A financial institution should deal with the Commission in an open and co-operative manner and keep the Commission promptly informed of anything concerning the financial institution which might reasonably be expected to be disclosed to it.*

Parties are required to help not only the Commission, but also the decision-maker if a matter is referred for consideration. Therefore this is something that is expected from you.

Slide: What has changed?

So moving on, what has changed?

After careful consideration we published in March 2014 our Guidance document on the Decision Making Process. This document goes into far more detail than previous documents, which is in line with our commitments to be as open and transparent as we can be when dealing with a licensee. In effect this will be the process that licensees can expect to be involved in if a matter is referred for investigation.

I talked last year about dealing with matters in a just manner including, so far as is practicable, ensuring that the parties are on an equal footing, and dealing with the matter in ways which are proportionate to the likes of:

- (i) amount of money involved;
- (ii) importance of the matter;
- (iii) and the complexity of the issues

As I also stated last year we are to have a particular focus on the protection of investors and this has not changed in that regard.

As the year has progressed it became clear that some additional clarification would be helpful on the decision making process as there has been confusion, or dare I say, some lengthy and unnecessary legal challenge over disclosure of material. Therefore in September this year the guidance document was amended to show the difference between 'provision of material' which the Enforcement Division wishes to rely upon as evidence before a decision maker, and disclosure of relevant material, which we do not intend to use, but we believe to be relevant material to be provided to a licensee or individual.

I must emphasise that we are working to an administrative process and not that of a civil court, however we try to ensure that processes used are appropriate and reasonable to all parties. The Commission is not trying to confuse or mislead anybody but merely attempting to adopt a fair and reasonable process regarding disclosure. When establishing the facts of our case, as I have said in many instances there may be good reason why a particular event has occurred and if so what we require is that you produce material to that effect and explain to us, in an open and transparent manner.

Another area that we wanted to change within the Decision Making Document was the settlement process and to highlight exactly what discount licensees and individuals could expect to receive in the event that they wished to settle on agreed terms with the Commission.

So there is very good reason to come forward and discuss matters with us if you know the failings identified are right, because if you settle on agreed terms the penalties can be reduced considerably.

Slide: Senior Decision Maker (“SDM”)

Turning now to Senior Decision Makers, earlier this year the Commissioners delegated to the Commission Secretary power under section 11 of the FSC Law to appoint Senior Decision Makers as officers of the Commission.

This situation will occur when an enforcement case has been investigated and evidential material to be relied upon has been presented to the licensee or individual. Once representations have been received from the licensee or individual and any amendments to the enforcement report have been made, the final report and supporting evidence will be provided to all the parties concerned. If the parties do not wish to enter into settlement negotiations on a without prejudice basis, we will refer the matter to the Commission Secretary with a request to appoint a SDM.

Once this stage has occurred all parties, including the Enforcement Division, will await a decision or instruction from the SDM on his or her findings or, as has happened in some instances, requests for further information are made.

These instances will occur only when there is no realistic prospect of settlement between the parties or if the Enforcement Division is of a view that the only way that the matter can be dealt with is before a SDM.

We recently published the names of those Queens Counsel who have been appointed to the Commission’s panel of Senior Decision Makers and who will consider enforcement cases. They will sit as a single judicial officer and consider the material that has been provided to them. This will be the material that has been provided to the licensee or individual. In one case earlier this year the SDM made many requests for more documents from the Commission that were also made available to the parties under investigation. This was welcomed by the Enforcement Division as it showed that careful, well thought out consideration was being given to all aspects of the case.

The panel members clearly have the requisite skills to consider the issues placed before them, and they are completely independent. This new approach will also ensure that the hearings are dealt with in accordance with best practice and that any legal issues that may be brought by the parties’ legal counsel can be properly and professionally dealt with at the time to ensure that the process is smooth and most importantly fair to all concerned.

It is early days yet but I honestly believe that we will all learn from this new approach and I accept there are going to be occasions when the Commission receives a bumpy ride as a result of a case we ask for judgment on. That is inevitable if we get it wrong or misinterpret material obtained during the investigation. However, I sincerely hope that due to the internal processes that we have that these occasions will be few and far between. If they are too frequent then I am sure that the Chairman and Director General will be looking very closely at what I am doing.

Slide: Outsourcing of functions

If I may I would like to point out one common issue that has arisen during the course of investigations in the last year and that is the outsourcing of functions, whether compliance or

otherwise. If I may take a quote from Susan Grossey, who I know carries out tremendously good work in the training she does with compliance officials and boards here in Guernsey.

“You can give away the task but not the responsibility. It’s a bit like trusting someone else to do up your seat belt for you, when both you and he know that, if there is a crash, it will be you catapulting through the windscreen while he stands on the hard shoulder”.

Slide: Outsourcing

If I can very quickly refer you to the handbook and sections 27 and 28 in that regard, which make it quite clear on where the responsibility remains with this in mind. I do not think I need to say anything more on this issue.

Slide: Whistleblowing line

And finally from me today just a reminder to all that we have a whistleblower line that is managed by the Intelligence Division at the Commission headed by Kevin Bown, who tells me last night that he considers himself to be a ‘Shadow Warrior’. I will leave that to your imagination as mine will run away with me! This line is totally confidential and information is dealt with on that basis by the Intelligence Division. I would also add that plans are afoot to set up an email address to receive information, too. Details will be announced in due course once this is in place.

Kevin has asked me to remind people that if they ever wish to talk to him or his colleague in person they are willing to listen to what you have to say.

That is all from me and I thank you for listening.