



Draft Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2017

Engagement with the financial services industry

Introduction

On 30 October 2015, the States of Deliberation approved the Policy Letter submitted by the Policy Council on the Revision of the Financial Supervisory and Regulatory Laws. Representatives of the States of Alderney and the Chief Pleas of Sark had previously indicated their support for the proposals which followed a public consultation process. The Law Officers of the Crown together with the Commission and with the assistance of members of industry, have produced the draft Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2017 (the “Enforcement Law”). A copy of the draft Enforcement Law is available in [PDF format here](#).

The Commission is now seeking feedback and assistance from the financial services industry specifically on whether the provisions of the Enforcement Law may have any unintended consequences or fatal flaws.

Feedback is sought no later than 5pm on Friday, 22 September 2017. Detailed information on how to respond is set out below.

What the engagement is not about

The Commission has engaged with the financial services industry through the issuing of a discussion paper and later through a full consultation process which included a consultation paper in 2015, the use of ‘drop in’ sessions, meetings and other methods of stakeholder engagement. As the States have already approved the Policy Letter, the policy in relation to the Enforcement Law has already been set. Thus, the Commission is not seeking extensive responses in relation to matters of policy or policy direction in relation to the Enforcement Law.

The Format of this engagement

This engagement paper sets out below the topics upon which the financial services industry’s assistance is requested and in particular questions regarding unintended consequences and whether there are any significant issues in relation to certain provisions or areas.

How to respond

The engagement period runs from 24 July 2017 to midnight on Friday, 22 September 2017. Participants are encouraged to feed back any comments as soon as possible.

As with the consultation paper for this project, the Commission has decided to use an online consultation tool. It is hoped that using this process will facilitate the timely return of responses, and will also assist in the detailed analysis of those responses at the end of the engagement period. Please note that it will only be possible to submit responses to this site during the engagement period, after which the survey function automatically ends. It is therefore very important that all submissions are made before midnight on Friday, 22 September 2017.

The use of this online platform will also enable us to publish the responses to the engagement paper at the end of the engagement period. You will therefore be asked whether you consent to your comments being made public, and if so, whether you wish them to be attributed to you or remain anonymous.

The engagement paper has been published online via the organisation known as 'Citizen Space'. Citizen Space is an online engagement platform that has been used for engagement by more than 80 diverse organisations around the world. These organisations include national and state governments, local authorities, healthcare, utilities, police, regulators and trusts. Citizen Space handled the highly contentious BBC Radio 6 consultation and the more recent Scottish Government Independence Referendum Consultation, which received over 24,000 responses.

You can find and complete your response to the discussion paper online via [the Commission's consultation hub](#).

The full paper is available in PDF format, and also within the survey on a document reader. We would ask that you take the time to read the document before giving your responses. Citizen Space gives respondents the option to 'Save your response and return later'. Once this option is selected, the system will ask you to provide an email address to which the unique response ID and URL to the part-completed response will be sent. To resume submission, you must simply click on this URL to return to the point at which you left the engagement.

A PDF of your response will be e-mailed to you upon submission.

If you have any problems with the online submissions process, please contact us at revisionoflaws@gfsc.gg

Key Issues for consideration

1. Suspension of a Licence

The provisions relating to suspension of a licence have been extended to IBL, IMIIL, Fiduciary and Banking licensees. In addition this also include suspension upon the request of the licensee. Clarification is provided that where a licence is suspended, the person continues to be a licensee.

Do you foresee any unintended consequences in relation to the provisions as drafted?

2. Disapplication of Non-Discretionary Exemption

Historically the Commission has been able to dis-apply the six directorship exemption in section 3(1)(g) of the Fiduciaries Law.

This ability to dis-apply a non-discretionary exemption has been extended to all non-discretionary exemptions.

In addition, the Commission will be able to dis-apply a non-discretionary exemption on the request of the relevant person.

Do you foresee any unintended consequences in relation to the proposed wording of the provisions?

3. Enforcement Requirements

The Enforcement Law does not contain conditions or directions. However, it does contain enforcement requirements. Enforcement requirements may apply during the existence of a licence, authorisation or registration and can continue after the revocation of a licence, authorisation or registration. However, the types of persons who may be subject to enforcement requirements are, as per the consultation and policy letter, significantly greater than those upon whom conditions can be placed. For example holders of supervised roles and persons who have or are reasonably suspected of contravening provisions of the Enforcement Law, the FSC Law or the supervisory laws can be subject to enforcement requirements.

Do you foresee any unintended consequences in relation to the scope of persons who may be subject to enforcement requirements?

4. Prohibition Orders

Under the Enforcement Law the Commission will be able to make prohibition orders in relation to a wider number of roles than it is empowered to do so under the Supervisory Laws as currently drafted.

Personal liability will attach individuals who perform or agree to perform any function in breach of a prohibition order.

Are you aware of any unintended consequences with the Enforcement Law provisions as drafted?

5. Administration and Intervention

The provisions currently under the POI Administration and Intervention Ordinance have been incorporated into the Enforcement Law. The ability of the Commission to apply for an administration management order or an injunction have been extended to include:

- all licensees and authorised or registered collective investment schemes,
- persons exempted from the requirement to be licensed,
- persons otherwise lawfully carrying on regulated business in circumstances which do not require them to be licensed under the supervisory laws,
- persons otherwise carrying on regulated business,
- persons who apply or who have applied for a licence or an authorisation or registration as a collective investment scheme.

The definition of “undue risk” has been slightly amended but not substantially altered.

Once appointed, the administration manager may require relevant persons (who include persons who hold or have held supervised roles) to provide a statement of affairs of the administered person. This is in addition to the other powers of administration manager.

Provisions similar to those contained in the Guernsey Companies Law have been included in relation to the administration of incorporated cell companies and their incorporated cells and that the administration management of the incorporated cell company should not be carried on in such a way to prejudice the business, property and affairs to its cells.

In addition provisions similar to those contained in the Guernsey Companies Law in relation to the cells of protected cell companies and administration orders being made in relation to them have been included. Further the administration manager will have the ability to make an application to the Royal Court under the Guernsey Companies Law.

Do you anticipate any unintended consequences in relation to this area?

6. Part V – Representations, notices of decisions and appeals

Generally in the decision making process of the Commission relating to “minded to” notices, decisions, reasons for decisions and rights of appeal has been made consistent.

In addition a provision restricting the application for the variation or revocation of specified decisions, for example disqualification orders in relation to auditors and actuaries, prohibition orders, public statements and enforcement requirements has been included. This means that in certain circumstances, the Commission will not be required to consider a further application for variation or revocation of these types of decisions.

Do you expect that this will cause significant issues which are unintended?

7. Whistle blowing, Disclosure to the Commission and the Duty of Confidentiality

While the Bailiwick legislative bodies approved the enactment of whistle blowing legislation in relation to the financial services sector, the Enforcement Law currently provides for the States to have the power to make ordinances of the protections of, and conferring rights, remedies etc on whistle blowers who make disclosures of information in the public interest or for another specified reason.

In addition, and separately, the Enforcement Law (section 94) also provides that a person’s duties of confidentiality are not broken by the making of a disclosure to the Commission. Where a current or former employee makes a disclosure to the Commission for the purpose of enabling or assisting the Commission to perform its functions, then this provision would come into effect and

mean that the current or former employee has not breached the requirements they are subject to due to their employment.

Are there any unintended consequences which may arise with the implementation of whistle blowing legislation?

8. Power to rectify publications

The Commission will have the power to amend or alter a statement or the content thereof where it feels that the statement (whether published under the Enforcement Law, the FSC Law, a supervisory law is or has become misleading, inaccurate or incomplete or it is necessary or desirable in the interests of the public or the reputation of the Bailiwick as a finance centre to do so.

Do you anticipate any unintended consequences in relation to this area?

9. Defined terms

(i) Winding up event

This term is used as a ground to revoke a licence (s. 16); when the Commission may make a winding up or dissolution application in relation to a certain prescribed persons (s. 52); in relation to the making of an administration management order (s. 54A) and in relation to remedies against delinquent persons (s. 54L).

Does the term as defined raise unanticipated consequences?

(ii) “relevant person” in relation to information gathering powers. (s. 72B)

The definition of “relevant person” relates to the exercise of the Commission of its power to request and obtain information and documents, require a person to attend an interview and to appoint an inspector. The “relevant persons” for the purpose of these powers is wider than was previously the case.

Do you foresee any unanticipated consequences from this definition?