

## Regulatory investigations

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Guernsey licensees regulated by the Guernsey Financial Services Commission ("GFSC") have routine visits by the GFSC to check on their compliance with the local regulatory law, regulations and rules. The GFSC will examine and may identify deficiencies in a regulated licensee's corporate governance, management or internal controls. In those circumstances, the GFSC will require that the remediation work is carried out by the licensee to address any contraventions or misconduct, within a strict timetable to ensure that the entity is returned to full compliance, as soon as possible.

If that remediation work is inadequate and/or co-operation from the regulated entity is lacking, the GFSC can use its enforcement powers including the ability to issue fines, and prohibition orders as well as public statements. The critical question which a Guernsey licensee (or business) will need to swiftly address is how to respond and how to manage the situation.

The ethos behind enforcement action depends on a number of factors aimed at protecting the integrity of the Bailiwick as an offshore financial centre. A breach of the Regulatory Law or AML regime will be considered sufficiently serious if it poses a threat to clients or the reputation of the Bailiwick. There does not (strictly speaking) have to be any loss or damage suffered as a consequence of the regulatory breach. Another relevant consideration is if the breach was deliberate or premeditated rather than accidental, or if the party failed to self-report the matter to the Commission which gave rise to the breach.

As part of any response to the Commission it is important to remember Principle 10 of the Principles of Conduct of Financial Business – which states that "an entity must deal with the Commission in an open and co-operative manner and keep the regulator promptly informed of anything concerning the firm which might reasonably be expected to be disclosed to it".

In simple terms this means that, within reason, the GFSC can seek all the information it needs to investigate a licensee and the licensee is bound to not only provide information and/or documentation but is also obliged to tell the Commission if something has gone wrong within the business i.e. with the compliance procedures or business risk assessments.

It is important to remember that a regulatory enforcement action is different from normal adversarial litigation and it is much more difficult to resist requests for the production of documents. Failure, inability or refusal to cooperate with the Commission to rectify a breach, and a history of past breaches or poor regulatory compliance (which may give grounds to believe that the breach is likely to be repeated and/or is part of a systemic failure), will also be taken into account. Unlike normal litigation there is no prescribed method by which a licensee can appeal a document request to a Court although you might be able to apply for judicial review of a decision which is clearly unreasonable. Under the Enforcement legislation, the GFSC has wide-ranging powers to compel the production of documentation required for the purposes of an investigation.

The GFSC sets relatively short timeframes for the review and production of documents so the licensee (or business) may consider enlisting the services of a dedicated team to ensure that the rest of the organisation can continue with business as usual. Again, unlike normal litigation there is less ability to negotiate deadlines for the production of documents i.e. you need to be prepared to respond quickly and effectively.

One aspect worth considering is preserving legal advice privilege, which protects confidential communications between lawyers and their clients that have come into existence for the purpose of giving or receiving legal advice. A few points worth remembering:

- (a) When embarking on a regulatory investigation, consider instructing external lawyers at an early stage – this should prevent an argument being made that privilege cannot be maintained
- (b) Consider carefully who the 'client' is in respect of whom privilege might be claimed - who is specifically tasked with seeking and obtaining legal advice?
- (c) Legal advice should only be provided to a select committee within the organisation and only on a 'need to know' basis

The Enforcement Division has its own decision making process, however there are no fixed rules of procedure as with civil proceedings. There is, however, a duty to comply with the principles of natural justice which means in general terms that a licensee must be treated fairly. In the Commission's own words: "In all cases the Commission must remain satisfied that the process remains fair, proportionate, transparent, and timely."

There is a Guidance note on enforcement proceedings which was updated in November 2019. In that note it states that: "Each case will be considered on its merits and, in exceptional circumstances, the Commission may deviate from the process described in this document where it determines that it is necessary or appropriate to do so." So whilst the GFSC will broadly follow the decision-making process outlined in the Guidance note it can deviate from that process where the circumstances are justified. We have had experience of enforcement action

that was appealed to the senior decision maker and the Royal Court where the whole process took over three years. Conversely we have been involved in a enforcement action which was settled at a very early stage for the maximum possible settlement. In practical terms the key point is when a draft enforcement report is produced. At this point a licensee will generally know the case against it and the proposed sanctions. It is very difficult at this point to change the GFSC's position in relation to their findings of fact unless they have made a clear mistake. If the matter is forwarded to the senior decision maker, they commonly will not overturn the findings of fact although they may reduce the amount of the fine or the length of the prohibition orders.

Settlement discussions will only be held once the Commission has a sufficient understanding of the nature and gravity of the breach or misconduct and this has been accepted by the offending party. The Commission expects the offending parties to acknowledge the breach or regulatory failing and in this regard, settlement discussions are different to ordinary litigation where a party can settle with no admission of liability. The advantage of a settlement is twofold: a settlement discount of up to 30% may be negotiated and secondly you will have the opportunity to have input into the public statement issued by the GFSC.

The GFSC can be quite accommodating (within reason) as to the content of the public statement which will be important for local entities who want to protect their reputation and so the specific wording of the public statement can be important.

However, there is a difference when it comes to proposed prohibition orders affecting directors. These orders can be career ending and so there is understandably a real reluctance to accept a prohibition order if someone is subject to one of those orders.

If you are a director and you decide to contest the findings it will be vital to analyse your directors and officers insurance policy to make sure your legal costs are covered and also whether any fine payable is covered by insurers under the policy. Some policies do cover these kind of fines whilst others do not. Whether your legal costs are covered or not will often dictate whether a director decides to contest any enforcement action.

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