

# The new Enforcement Law in summary

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This article focusses on the approach to enforcement taken by the Commission and the concomitant new Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 ("the Enforcement Law").

## Themes and principles informing enforcement by the Commission under the amended legislation

The overall theme of the legislative amendments has been to convert and consolidate what was previously existing and/or good practice whether on the part of the Commission or any licensee into legislative requirements, both in terms of expanded duties upon licensees and others, and enhanced and expanded powers for the Commission in the enforcement of these requirements. These have been codified in the Enforcement Law.

## The Enforcement Law itself

The Enforcement Law is a very lengthy and comprehensive piece of legislation, running to over 400 pages in length. It is beyond the scope of this article to examine its wide-ranging provisions in detail. However, by way of basic overview:

- The Enforcement Law contains a comprehensive definition of all of the laws relating to oversight and regulation of the financial services industry in Guernsey, and incorporates principles of conduct for licensees. This is largely, as indicated above, a **codification of existing principles of conduct** which had existed in other forms previously;
- Section 6 provides the Commission with extensive **powers to obtain information and documents**, and to conduct investigations into suspected offences including the issuance of warrants by the Bailiff;
- Sections 14 to 22 relate to **disclosure** and related matters, and are complimentary to the existing anti-money laundering and anti-terrorist financing laws already in place in Guernsey;
- Sections 23 and 24 provide the Commission with **powers to enforce legal obligations** against

certain persons. This includes making objections to existing holders of supervised roles, the suspension and revocation of licenses, and at sections 36 to 41 the power to make private reprimands, obtain enforceable undertakings, make public statements, impose discretionary and/or administrative penalties and to make public announcements in respect of enforcement proceedings;

- Sections 42 to 45 provide for **disqualification orders** against auditors and actuaries;
- Sections 46 to 48 provide for the obtaining by the Commission of **injunctive relief**, restitution and other remedies, including the repayment of monies from unlawful business and restitution orders, and injunctions to restrain unlawful business activities, and for the appointment of receivers;
- Section 64 provides the Commission with **powers to make investigations** in support of a relevant supervisory authority including foreign supervisory authorities;
- Sections 65 to 66 provide for **financial penalties and offences**, and for powers of the Royal Court to impose financial penalties for non-compliance with various statutory obligations;
- Sections 67 to 70 relate to powers of the Commission to **investigate criminal offences**, including the delegation of certain functions of HM Procureur. Sections 109 to 116 also provide for **criminal proceedings** against those who may contravene the supervisory laws; and
- Sections 71 to 79 deal with the **dissolution and winding up of licensees**, and sections 80 to 92 provide a regime for the administration of licensees.

As the Commission has noted on its website, there is little value in having a comprehensive and world-class set of regulatory laws if these are not effectively enforced by an active regulator. It is clear that effective enforcement has been a priority of the Commission, which in turn serves as both a deterrent to malfeasance and an assurance to those seeking to do business in Guernsey, and a contributing factor towards the good reputation of the Bailiwick as an offshore financial centre. This can be expected to continue under the amended legislative regime.

It remains to be seen exactly how, in practice, the Commission will exercise its expanded powers under the legislative amendments. However, a number of themes may be drawn from the policies and conduct of the Commission over the past few years, which serve to inform the conduct of the Commission going forward particularly as the Enforcement Law is a codification of existing practice.

### **Themes from prior enforcement conduct of the Commission- principles of enforcement**

In its own explanatory note relating to the use of prohibition orders, the Commission states that it strives to take a fair and proportionate approach to enforcement, choosing to engage with any person or licensee before taking measures against them, in appropriate cases:

*" Where appropriate, the Commission will address contraventions or misconduct by agreement with the person concerned through ordinary supervisory processes, and will endeavour to agree with that person the implementation of a remedial action plan to restore that person to compliance as soon as possible. This may involve agreement to changes in corporate governance, management and internal controls, agreement to discontinue some or all of the person's operations or areas of activity or agreement to amended or additional licence conditions framed to encourage or ensure compliance going forward."*

The above approach obviously relies on the Commission being made aware with full and frank disclosure of all relevant matters pertaining to any business or licensee. The subjects of Commission regulation can only rely on the goodwill of the Commission to the extent they themselves cooperate in terms of their conduct, and the timely disclosure to the Commission of any difficulty or contravention of any relevant legislative requirement. Indeed, many of the Prohibition Orders imposed by the Commission have been as a result of a failure to make full and frank disclosure to the Commission of important facts relevant to the discharge of its regulatory functions.

The Commission will continue to centre its regulatory response around the requirement of fitness and propriety for any relevant person engaging in certain regulated activities. It is anticipated that the Commission will continue to issue guidance on this subject to which individuals should make reference.

## **Prohibition Orders**

In certain instances, the Commission recognises that the conduct of a party or business is of such a nature as to warrant more severe sanction, particularly when it considers it necessary to protect the public.

The Commission maintains and indeed publishes a list of those persons who have been made the subject of prohibition orders, setting out the period of such order and the nature and scope of the prohibition. It also makes public statements setting out the particulars of enforcement instances. The Commission will generally consider imposing a Prohibition Order where the contravention or misconduct is by an individual with greater responsibility or who undertakes a more senior role or where the behaviour of an individual, irrespective of their level, is such that it considers that the contravention has caused or is likely to cause damage to the reputation of the Bailiwick or the individual poses a risk to Customers or the public. The Commission will balance this requirement against the serious detrimental effects that Prohibition Orders can have on the reputation, livelihood or businesses of individuals.

There is a presumption in favour of the publication of such prohibition orders and other sanctions which also serves to act as a deterrent to regulatory misconduct and this practice is expected to continue.

The Commission currently lists 29 persons by their full names and addresses as being under prohibition orders of varying natures. It also has made detailed public statements relating to cases of enforcement, as referred to in the section below.

### **Instances of enforcement - themes and principles from Commission Public Statements**

A review of the enforcement matters listed shows a wide range of enforcement activity by the Commission across all the supervisory laws (see the Commission's website at [Public Statements | GFSC](#)). However there are some consistent themes that can be drawn out:

- **Inadequate risk assessments and processes.** There has been enforcement against a fiduciary licensee dealing with ultra-high net worth business, in relation to compliance failures comprising inadequate risk assessments, anti-money laundering and due diligence processes, failure to monitor existing business relationships, and having no evidence on file as to the basis for large cash deposits and withdrawals. The Commission also found failures concerning required disclosures, and lack of consideration of money laundering risks. The MLRO was found to be of insufficient experience and qualifications for the role.
- **Backdating Documents.** The Commission found that a company engaged in the sale of Guernsey registered shelf companies had engaged in backdating of documentation, and had provided a public body with false and/or misleading information.
- **Lack of qualifications and skill.** In an investment context, the Commission found that persons holding applicable licences under the POI Law did not meet minimum criteria for such licensing. Thus is also a common theme in enforcement generally, whether on the basis of lack of fitness and propriety or on the basis of lack of requisite qualifications and skill.
- **Failing to administer funds in accordance with constitutional documents.** The Commission found in an investment fund context, where licenses were held under the POI Law and other Laws that licensed persons had failed to comply with their obligations by failing to administer the funds in accordance with the applicable principal documents and information particulars, and that there had also been conflicts of interest. Lack of fitness and propriety as a licensee in this sort of context is another common enforcement theme together with lack of soundness of judgment, and lack of compliance with rules, codes, guidance and principles issued by the Commission.

In the Royal court judgment in *Bordeaux Services (Guernsey) Limited and Ors v The Guernsey Financial Services Commission* the Royal Court confirmed that even adhering to the contractual documents is not sufficient, there must also be appropriate oversight in place avoiding conflicts of interest.

- **Irregular trading/market manipulation.** The Commission investigated and published a detailed statement relating to irregular trading on the Channel Islands Stock Exchange, and market manipulation.

- **Lack of probity of trustees.** The Commission has found directors of a trust company to be guilty of lack of probity, competence and soundness of judgment, and also to have allowed compliance failures. This is once again a common theme of Commission enforcement.
- **Inadequate systems of control under the Insurance Law.** The Commission found failure to implement adequate systems of control, in particular in relation to the Claims Fund for insurance purposes. The failure to implement adequate systems of control is a common theme in Insurance Law related enforcement by the Commission.
- **Using licence for private purposes.** The Commission has found a licensee not to fit and proper for taking on work in breach of his conditions of employment, and also using his employer's licence for private business purposes in his separate accounting business. Any abuse of a licence or activity by a licensee beyond the terms of such licence is taken very seriously by the Commission.

Please do be aware that the above is a summary only of certain provisions in the Enforcement Law. We recommend that licensees should contact their usual Ogier contact or the authors to discuss any changes that may impact them.

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