

UPDATE

GFSC: Fit & Proper Guidance

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The minimum criteria for licensing require all individuals holding prescribed positions to be fit and proper. What does this require of individuals and those employing them?

The GFSC issued Guidance on 5 October 2018 regarding what it means to be fit and proper in the context of Guernsey regulation (Guidance linked [here](#)).

What is fit and proper?

The minimum criteria for licensing provide that in judging whether a person is fit and proper for a role, the GFSC considers:

- probity, competence, experience and judgment;
- diligence or likely diligence;
- risks to the interests of clients, investors, any other persons, or the reputation of the Bailiwick;
- qualifications, memberships of relevant bodies and continuing professional development;
- knowledge and understanding of the legal and professional obligations; and
- policies, procedures and controls to comply with regulatory requirements, and anti-money laundering legislation.

This standard is not clear and the Guidance provides substance to the GFSC's thinking on key points. The Guidance follows similar guidance from the JFSC (JFSC guidance linked [here](#)) responding to the Jersey Court's recommendations in *Francis v JFSC*. The *Francis* judgment recommended clarification on 'competence and integrity'. The Guidance therefore focuses upon competence, probity (of which integrity is a facet), and solvency.

Competence

Competence concerns skills, knowledge, capability and expertise. Aspects include:

- Experience, qualifications and training.
- Understanding of the structure, purpose and risks associated with the business model.
- Understanding of regulatory obligations.
- Ability to devote sufficient time.

Probity

Probity encompasses integrity, honesty and reputation.

Integrity is the key aspect. As per the *Francis* judgment the JFSC approach was that lack of integrity did not amount to dishonesty. The subsequent English Court of Appeal case *Wingate v SRA* [2018] confirmed that a person may lack integrity, even without a finding of dishonesty.

The Guidance quotes the UK authority *First Financial Advisers Ltd v FSA* (2012):

"[e]ven though a person might not have been dishonest, if they lack either an ethical compass or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity".

Aspects of probity include

- Honesty, diligence, independent-mindedness, ensuring the reputation of the Bailiwick and avoiding conflicts of interest.
- Ability to act in the best interests of the entity, rather than self-interest.
- Past convictions, pending cases, professional investigations and sanctions.
- Employment history.
- Co-operative interaction with the GFSC.

Solvency

Solvency is not specifically referred to in the minimum criteria for licensing.

It requires the GFSC to consider a person's financial soundness, focussing on formal procedures such as bankruptcy or arrangements with creditors.

Failures in Fitness and Properness

The requirement to be fit and proper is an ongoing one. Deficiencies on this standard may trigger sanctions of:

- Prohibition Orders - prohibiting individuals from certain functions in connection to a licensee; and
- Disapplying the Directorship Exemption – under the Fiduciaries Law which otherwise allows an individual to act as a director of up to six companies without requiring a personal fiduciary licence.

Key Lessons

The Guidance highlights recurring themes in GFSC regulation.

1. Build good policies and procedures - These allow employers to ensure the ongoing fitness and properness of staff. Consider engagement of HR functions and the board in this monitoring.
2. Subjectivity – The standards are subjective, requiring consideration in context. The circumstances of the individual and role are relevant to determining fitness and properness. Documenting the application of the standard and conclusions reached should be integrated into the procedures.
3. Consequences – Failures invite serious consequences. Should difficulties arise obtaining early advice can assist in mitigating problems, planning solutions and engaging productively with the GFSC.

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