

UPDATE

Revision of Laws – changes to the enforcement sanctions

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In this Update, we consider some of the key changes to the enforcement sanctions made by Guernsey's Revision of Laws project

Introduction

We recently wrote about the key changes that the new Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 (the **New Enforcement Law**) made to Guernsey's enforcement regime ([here](#)).

In this Update, we focus on the changes to the enforcement sanctions.

In keeping with the States of Guernsey's policy of consolidating the enforcement powers into one law, the provisions concerning sanctions are now all found in the New Enforcement Law, rather than spread across the industry-specific laws. However, the changes are more expansive than a simple consolidation; the enforcement and sanctions regime is now more far-reaching. Further, the New Enforcement Law gives the Guernsey Financial Services Commission (the **Commission**) wider powers to police enforcement itself.

Notable Changes

The Commission has a range of powers at its disposal to sanction conduct breaching the regulatory regime. We have outlined what we consider to be the most notable changes to the enforcement sanctions below.

Prohibition Orders

The Commission now has the power to issue a prohibition order against a much wider group of individuals. It may issue a prohibition order against an individual who is not, or no longer, fit and proper to perform functions as or on behalf of (a) a licensee in relation to a regulated business (b) an authorised or registered collective investment scheme, or (c) the holder of a supervised role in respect of, or an officer or employee of, a licensee or authorised or registered collective investment scheme.

The definition of '*regulated business*' is wide, now covering business which requires a regulatory licence or is otherwise exempt. This means that a Prohibition Order could now relate to exempt activities.

Further, it has been added that, for the avoidance of doubt, a prohibition order may be made in respect of an individual whether or not that individual has performed, or has been required, authorised or appointed to perform, the function which the order prohibits. This widens the scope of the regulatory perimeter.

It has been added that the Commission '*subsequently renew on one or more occasions*' a prohibition order and it can be for a specified period or indefinite. This latter amendment addresses an issue that was raised in the Guernsey Court of Appeal in *Guernsey Financial Services Commission v Y* [2019] GCA076.

Importantly, there is a new provision making an individual who performs or agrees to perform any function in breach of a prohibition order personally liable, without limitation of liability, for any debts and liabilities of the licensee relating to the regulated business or scheme in respect of which the contravention was

committed which were incurred at any time when that individual was acting in contravention of the prohibition order. This is a significant change and could, at least theoretically, be used to make an individual breaching a prohibition order liable to investors for losses suffered.

Discretionary Financial Penalties

The maximum financial penalties have not changed, but there is a revised Schedule of Bandings Explanatory Note ([here](#)).

The persons against whom a financial penalty may be issued has been expanded. Previously, this was a licensee, former licensee or relevant officer. Now, *'or other person'* has been added. *'Other person'* is not defined and thus could apply to any person (as defined in section 137, schedule 1), for example an employee, a lawyer or an accountant.

Further, the Commission may issue a financial penalty not only when there is a contravention in a material particular of the various laws or a non-fulfilment of the minimum criteria for licensing, but also where there is a contravention in a material particular of *'any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under any such provision'*. In effect this means that the Commission can police enforcement; it can issue an enforcement sanction (a discretionary financial penalty) for the breach of another enforcement sanction.

In addition, where there is a contravention in a material particular of *'any prohibition, restriction, condition...etc'* as outlined above, the Commission may issue a public statement and/or disapply the exemption from requiring a licence to be a director of more than six companies.

Public Statements

The factors that the Commission may take into account when deciding whether to issue a public statement now include *'any other matter the Commission considers relevant'*.

The Commission now has the power to rectify publications to correct information that is misleading, inaccurate or incomplete, or where it appears is necessary or desirable in the interests of the public or the reputation of the Bailiwick as a finance centre to do so.

Perhaps controversially, the presumption that an appeal to the Royal Court concerning a decision to issue a public statement will be heard in private has been removed. Now, any such appeal will be in public unless the parties agree or the Royal Court orders otherwise.

Public announcement of enforcement proceedings

The Commission may now publish a statement that a person or entity named in the publication is the subject of proceedings, other enforcement action, sanction, and/or investigation.

This new provision is potentially detrimental to the subject of such an announcement who may suffer reputational damage from it before any finding has been made against them. However, there are safeguards: an announcement may only be made with the prior written authority of the Director-General of the Commission, and only if the Commission thinks it necessary or desirable to do so in the interests of the public or the reputation of the Bailiwick as a finance centre, or for the purposes of the performance of its functions.

We suggest obtaining advice at an early stage of any investigation or enforcement action to explore the possibility of seeking the Commission's agreement not to publish names until the enforcement process (and any appeal) is concluded.

Private reprimand

The Commission's view was that it had the power to issue a private reprimand, although under the previous regime this was not expressly stated in the legislation and the authors were not aware of any being issued. This has now been clarified and we are already aware of at least one example.

Enforceable undertakings

These are a useful new tool aimed at facilitating early resolution of enforcement matters. The person giving the undertaking (the promisor) undertakes to the Commission to take specified steps to rectify non-

compliant aspects of their activities or conduct. Entering into an enforceable undertaking may avoid the matter being escalated to receive the harsher enforcement sanctions, such as a Prohibition Order and/or Discretionary Financial Penalty. If the promisor contravenes the undertaking, the Commission may enforce it at the Royal Court.

Conclusion

The enforcement sanctions regime is now much more powerful and wide-ranging. In our previous Update ([here](#)), we talked about the regulatory perimeter being expanded, and this applies equally to sanctions. Of particular note is the Commission's power to police enforcement, and the widening of the net to potentially impose sanctions against those who were not covered under the previous regime.

Early advice is crucial.

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