

**POLICY COUNCIL AND
COMMERCE AND EMPLOYMENT DEPARTMENT**

**AMENDMENT OF THE FINANCIAL SERVICES COMMISSION
(BAILIWICK OF GUERNSEY) LAW, 1987**

1. Executive Summary

- 1.1 The purpose of this Policy Letter is to recommend changes to The Financial Services Commission (Bailiwick of Guernsey Law), 1987 (“the 1987 Law”), which will amend aspects of governance in relation to the Guernsey Financial Services Commission (“the GFSC”).
- 1.2 The recommendations are being made following a consultation under the title “A Regulatory Framework for the 21st Century”, which was carried out in 2013 and concluded in 2014. The purpose of the consultation was to seek to ensure that the GFSC will be able to continue to maintain the Island’s reputation as a jurisdiction that is regulated in accordance with the highest international standards whilst enabling it to embrace innovation that will allow the ongoing development of the finance sector.
- 1.3 Specifically the Policy Council and Commerce and Employment Department (“the Department”) recommend:
 - new statutory primary and secondary objectives for the GFSC;
 - the removal of the statutory cap on the number of Commissioners, alignment of the term of office of the Chairman with the post-holder’s term of office as a Commissioner, the ability to appoint a Commissioner to replace the Chairman for up to three years should the Chairman step down before the expiry of his or her term of office and an increase in the age of compulsory retirement of Commissioners;
 - that there is provision for the introduction of an appeals mechanism in relation to regulatory decisions of the GFSC; and
 - a statutory requirement for the GFSC to maintain a complaints procedure.

2. Background

- 2.1 The Policy Council is responsible for the policy framework for the regulation of the financial services sector and the Department is responsible for promoting the interests of the financial services sector. Whilst the relationship of the GFSC with the States is therefore through the Policy Council, both the Policy Council and the Department have an interest in the effective regulation of the sector.

- 2.2 This Policy Letter is therefore a joint document from the Policy Council and the Department.
- 2.3 Both the Policy Council and the Department recognise that the financial services sector is a key element of the Guernsey economy and they believe that maintaining a strong and vibrant financial services industry is essential to ensure continued economic prosperity. Furthermore, the Island enjoys the reputation of a well regulated jurisdiction and must maintain that reputation in order to continue to attract good quality business.
- 2.4 The existing legislative governance framework for the GFSC is established by the 1987 Law. Whilst it is acknowledged that this legislation has served the Bailiwick well, in 2013 the Policy Council and the Department considered that there was merit in reviewing the law in order to ensure that, in light of the continuing rapid pace of international developments, the GFSC would be able to:
- continue to maintain the Island's reputation as a jurisdiction that is regulated in accordance with the highest international standards; and
 - embrace innovation and further development of the financial services sector.
- 2.5 Against this background, in 2013, working closely with the Policy Council, the Department led a consultation entitled "A Regulatory Framework for the 21st Century".
- 2.6 In September 2014, the Department published a feedback document that summarised the outcome of the consultation and set out a number of detailed conclusions, which were informed by the consultation responses, on a range of issues.
- 2.7 Some of the conclusions require the amendment of the 1987 Law, and this Policy Letter contains joint recommendations from the Policy Council and the Department for the proposed amendments. It also contains two revisions considered appropriate by the Policy Council and the Department relating to the ability to appoint a Commissioner to replace the Chairman for up to three years should the Chairman step down before the expiry of his or her term of office and an increase in the age of compulsory retirement of Commissioners.

3. Primary Statutory Objectives

- 3.1 One of the most important factors in achieving the right balance of regulation in any economy is ensuring that regulatory objectives strike an appropriate balance between a range of factors, including public policy, economic growth, consumer

protection and financial stability without compromising the reputation of the jurisdiction.

- 3.2 In order to achieve an appropriate balance between the factors mentioned above it is common to provide regulators with primary objectives.
- 3.3 Overarching functions, some of which can be characterised as objectives, are contained in the 1987 Law, but whilst they have served the Island well, there have been significant developments internationally in financial services regulation.
- 3.4 Based on the feedback received from the consultation, the following statutory primary objectives for the GFSC are proposed instead:
 - to effectively administer the supervisory legislation which confers functions on the GFSC;
 - to provide appropriate protection to consumers of financial services products;
 - to maintain and support the efficiency, competitiveness and transparency of financial markets located in the Bailiwick and take such steps as the GFSC considers appropriate to support this elsewhere;
 - to combat financial crime and the financing of terrorism in the financial services industry, in co-operation with the other Bailiwick authorities charged with related duties;
 - to reduce, and support the reduction of, prudential risk in the financial services sector and the maintenance of financial stability in the Bailiwick and take such steps as the GFSC considers appropriate to support this elsewhere; and
 - to protect the Bailiwick of Guernsey's reputation as a competitive and well regulated international finance centre, taking account of the policy framework for the regulation of financial services set by the States.
- 3.5 The new primary objectives will, where appropriate, replace the current objectives.
- 3.6 The Policy Council and the Department propose that there should be provision for the States of Guernsey to amend the primary objectives by Ordinance to take account of any relevant changes in circumstances.

- 3.7 For the avoidance of doubt, these proposals only relate to the 1987 Law and they will not replace functions assigned to the GFSC by other legislation, for example specific functions under regulatory, financial crime and commercial legislation.

4. Secondary Objectives

- 4.1 In addition to primary objectives, other jurisdictions set out secondary objectives which regulatory authorities must take into account when carrying out their regulatory functions. These secondary objectives provide guidance to the regulator on how it should go about achieving its primary objectives. They set the “tone” of regulation, are subordinate to the primary objectives and are a secondary, although still important, factor in any regulatory decision making.
- 4.2 It is proposed that the GFSC should be required to have regard to the following secondary matters:
- the economic importance of financial services to the Guernsey economy and the need for its status as a competitive high quality international financial centre to be preserved;
 - the need to maintain confidence in the Bailiwick’s financial services sector;
 - the need to ensure cost effective and proportionate regulation;
 - the need to ensure that it uses its resources in an efficient manner;
 - the need to engage in appropriate consultation with the finance industry and the general public;
 - the need to enable competition and innovation in financial services;
 - the need to achieve good quality outcomes through regulation, rather than simply policing processes, taking proper account of the standards of process required by relevant international regulatory standards;
 - that the primary responsibility for achieving regulatory outcomes rests with the owners and senior managers of financial services businesses, to the extent that this is compatible with the proper and proportionate application of relevant international regulatory standards; and
 - the need to adhere to generally accepted principles of good corporate governance.
- 4.3 The Policy Council and the Department also propose that there should be provision for the States of Guernsey to amend the secondary objectives by Ordinance to take account of any relevant changes in circumstances.

5. Number of Commissioners

- 5.1 At present the law provides for a maximum of 7 Commissioners although it has functioned with 5 or 6 for much of its existence. The States has appointed a range of suitably experienced candidates including both locally resident and off-Island Commissioners. The general policy has been to appoint a majority of on-Island Commissioners.
- 5.2 The current legislation limits the number of Commissioners to a maximum of 7 and the Commissioners are appointed for a three year term. It is also prescriptive in the length of term that can be served by Commissioners. For example, if there is a casual vacancy during the three year term, any person appointed to fill that vacancy can only be appointed for the remainder of the term of the departed Commissioner, rather than being appointed for a full term.
- 5.3 This can result in the States having to fill a casual vacancy and re-appoint that same person a few months later when the remainder of that term expires. This can lead to uncertainty and also uses valuable States time unnecessarily. This occurred in 2011 when the States appointed three new Commissioners in a very short period.
- 5.4 Furthermore, the current restriction on the number of Commissioners prevents the States from appointing “over-lapping” Commissioners. If the terms of office of more than one were to expire in quick succession it is not possible to appoint one or two replacements early so that there can be a transition from the retiring Commissioners to those incoming.
- 5.5 The Policy Council and the Department believe that it would be better from a corporate governance perspective to allow for over-lapping appointments. This would ensure a degree of continuity within the GFSC and also permit the States to better plan future appointments.
- 5.6 Therefore, it is proposed to:
 - abolish the statutory maximum number of Commissioners (and, as a matter of policy, to aim for between 7 and 9 Commissioners, with a minimum of 5);
 - allow the term of office (from commencement to termination) of a Commissioner to be specified by the States with a maximum term of 3 years from the date of commencement. This will allow a replacement Commissioner to serve up to 3 years, rather than the current arrangement of filling the unexpired term of a departing Commissioner. This will increase the flexibility of appointments and, over time, allow for more even appointment patterns, enabling better transition between incoming and outgoing Commissioners; and

- increase the statutory maximum age limit for a Commissioner from 72 to 75 to assist succession planning.

6. Term of the Commission Chairman

- 6.1 Currently, the Chairman of the GFSC is reappointed on an annual basis. This process is a legacy arising from the decision by the States to remove the statutory requirement for the President of the then Advisory and Finance Committee to serve as Chairman of the GFSC. It has been the general practice of the States to renew the appointment of the Chairman until such a time as the Chairman offers his or her resignation. In practice, this does not achieve any significant policy objective and uses States resources unnecessarily with the preparation of the Billet d'Etat and States debating time.
- 6.2 It is therefore proposed that the term of the Chairman should be amended to be identical with the term of his or her appointment as a Commissioner. If the Chairman of the GFSC chooses to step down in the middle of the term of office there would be a power for the States to appoint one of the other Commissioners as Chairman for up to three years (which would, potentially, also mean extending that person's term of office as a Commissioner).

7. Decisions and Appeals

- 7.1 The role of Commissioners has encompassed both corporate governance and regulatory decision making. This has placed greater onus on the off-Island Commissioners for regulatory decision making in relation to enforcement matters. More fundamentally, the Commissioners have had to resolve the issues arising from the importance of ensuring appropriate corporate governance in relation to their own regulatory decisions.
- 7.2 Since the consultation, the GFSC has appointed a panel of Queen's Counsel to whom decisions on enforcement cases are delegated. This step does not remove the Commissioners' responsibilities for the decisions which are taken, but was taken in order to allow the Commissioners to focus on corporate governance.
- 7.3 The Policy Council and the Department will keep the need for a formal, statutory, regulatory decisions appeal mechanism under review. It is therefore proposed that the 1987 Law be amended to include an enabling power to introduce an appropriate mechanism by Ordinance at a later date if that is considered necessary.

8. Resolving Complaints

- 8.1 Where a matter does not relate to a regulatory decision, but instead is a complaint about other types of conduct by the GSFC, there is no statutory mechanism to deal with complaints made against the GFSC. For example, if a licensee believes that it has been dealt with in an unprofessional manner, there is no statutory right to have that complaint independently investigated.
- 8.2 The GFSC has a policy and procedure in place for dealing with complaints. This process currently provides that:
- a complaint must be made in writing to the Director-General, or if the complaint is about the Director-General, to the Chairman;
 - the Director-General will appoint a senior member of the GFSC's staff who is independent from the matter under complaint to investigate and report on the complaint;
 - after the investigation has been completed, the Director-General (or senior staff member) will write to the complainant advising on the outcome; and
 - if the complainant is dissatisfied, the matter will be referred to the Chairman, who will undertake a further review.
- 8.3 For the purposes of transparency, the Policy Council and the Department propose that there should be a statutory obligation for the GFSC to make and publish arrangements for the investigation of complaints and for it to consult the Policy Council in doing so. It should be a statutory requirement that the scheme is designed so that, as far as is reasonably practicable, complaints are investigated quickly and in a cost effective manner and that there should be provision for investigation by an external independent person where a complaint has not been resolved to the satisfaction of the complainant.
- 8.4 Such a scheme should also allow for the summary dismissal of vexatious, malicious or unfounded complaints and allow for the possibility of recovering costs from such complaints.

9. Consultation

- 9.1 The consultation led by the Department in 2013 was addressed to relevant organisations and was open to the public. The Department received a significant number of contributions amounting to many hundreds of pages of written material and held meetings with numerous industry representatives and the GFSC. This Policy Letter takes full account of this feedback.

9.2 The authorities in Alderney and Sark have been consulted and they have raised no objections to the proposals in this Policy Letter.

9.3 The Law Officers were consulted on the proposals contained in the consultation response document and have also been consulted on this Policy Letter.

10. Resources

10.1 There are no additional financial or staff resource implications for the States associated with the proposals and recommendations set out in this Policy Letter.

11. Recommendations

11.1 The Policy Council and the Department recommend the States to agree:

- (i) that the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 should be amended in order to:
 - (a) introduce new statutory primary objectives for the GFSC as outlined in paragraph 3.4;
 - (b) introduce new secondary matters to which the GFSC must have regard as outlined in paragraph 4.2;
 - (c) introduce the measures outlined in paragraphs 5.6 including removing the statutory cap on the number of Commissioners, amending their terms of office and increasing the compulsory retirement age of Commissioners;
 - (d) align the Chairman's term of office with that of his or her tenure as a Commissioner and introduce the ability to appoint a Commissioner to replace the Chairman for up to three years should the Chairman step down before the expiry of his or her term of office as outlined in paragraph 6.2;
 - (e) introduce an enabling power to allow for the introduction of a regulatory decisions appeal mechanism by Ordinance at a later date as necessary as outlined in paragraph 7.3; and
 - (f) introduce a statutory requirement for the GSFC to maintain a complaints procedure as set out in section 8; and
- (ii) to direct the preparation of such legislation that may be necessary so as to give effect to the above decisions, and of any necessary consequential, supplementary and transitional provisions not specified above, including, but not limited to, amendments to other legislation.

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