



Guernsey Financial
Services Commission

Consultation Paper

**Application of new
discretionary financial
penalties**

April 2016

Introduction

On the 26th January 2016, the States of Deliberation approved proposals to revise “The Financial Services Commission (Bailiwick of Guernsey) Law, 1987” as follows: -

1. to increase the maximum level of financial penalties available to the Guernsey Financial Services Commission for licensees and former licensees (other than personal fiduciary licensees) from the current level of £200,000 to £4,000,000, with any fine over £300,000 being limited to a maximum of 10% of the turnover of the licensee/former licensee in question;
2. to increase the maximum level of financial penalty available for relevant officers and personal fiduciary licensees from £200,000 to £400,000 together with the inclusion of an additional criterion for consideration by the Guernsey Financial Services Commission, namely emoluments arising in respect of the relevant officer's or personal fiduciary licensee's position;
3. to empower the Policy Council to make regulations which it considers to be appropriate in relation to discretionary financial penalties, and by way of example, these should include the meanings of “turnover” and “emoluments”; and the bandings of financial penalties within the new maximum levels taking into account the factors specified in section 11D(2) of the Law;
4. to require the Guernsey Financial Services Commission to issue and publish guidance as to its general approach to enforcement; and
5. to include an enabling provision permitting the States to revise the provisions on financial penalties powers in the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, by Ordinance.

The legislation (Projet de Loi) to give effect to the above proposals was approved by the States of Deliberation at their meeting on 2nd March 2016 but has not yet been enacted.

In relation to 1 and 2 above, the Commission is proposing to introduce a schedule of bandings as a guide to how it intends, in general terms, to apply the revised levels of discretionary penalties in a proportionate manner. The Commission is seeking comments in relation to the proposed schedule which is shown as appendix B.

Background

The ability of the Commission to impose financial penalties is pertinent in relation to contraventions in a material particular of a provision of statutory or regulatory requirements or failing to fulfil any of the requirements of the statutory minimum criteria for licensing. In assessing the level of financial penalties to be applied in each case the Commission takes into account the public interest and the reputation of the Bailiwick as a financial centre.

In addition, section 11D(2) of “The Financial Services Commission (Bailiwick of Guernsey) Law, 1987” sets out factors which the Commission must also take into account in deciding whether or not to impose a financial penalty and the amount of such penalty including: -

- (a) whether the contravention or non-fulfilment was brought to the attention of the Commission by the person concerned;
- (b) the seriousness of the contravention or non-fulfilment;
- (c) whether or not the contravention or non-fulfilment was inadvertent;
- (d) what efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent a recurrence;
- (e) the potential financial consequences to the person concerned, and to third parties including customers and creditors of that person, of imposing a penalty; and
- (f) the penalties imposed by the Commission in other cases.

General or specific prohibitions alongside public statements can also be used by the Commission separately from, or in addition to, financial penalties.

Statutory rights of appeal exist where the Commission does not act reasonably, proportionately and within its powers.

Bandings for Discretionary Financial Penalties

In respect of the new regime for discretionary financial penalties, the Commission intends to publish and maintain a schedule setting out the bandings of financial penalties which takes into account those factors specified in section 11D(2) of “The Financial Services Commission (Bailiwick of Guernsey) Law, 1987” (see above).

A draft schedule is attached as Appendix B to this consultation paper setting out the Commission’s current thinking.

Comments are invited on the proposed approach set out in the draft schedule.

Responses will assist the Commission in reaching a conclusion on whether, and to what extent, changes might be required to the final version of the schedule.

Comments

The Commission invites comments on the proposals set out in this Consultation Paper. Comments should reach the Commission Secretary by Friday 17th June 2016. Responses should either be emailed to CSecretary@gfsc.gg or be marked for his attention and sent to:

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Appendix A

List of representative bodies who have been sent this Consultation Paper

- States of Guernsey Policy Council
- States of Guernsey Commerce and Employment Department
- States of Alderney Policy and Finance Committee
- Chief Pleas of Sark Policy and Performance Committee
- Guernsey International Business Association
- Association of Guernsey Banks
- Guernsey Investment Fund Association
- Guernsey Investment Managers and Stockbrokers Association
- Guernsey International Insurance Association
- Bailiwick Insurance Intermediary Association
- Guernsey Association of Trustees
- Guernsey Bar Council
- Commercial Bar Association
- Institute of Directors
- NED forum

Discretionary Penalties – proposed schedule of bandings

Appendix B

Band 1	Band 2	Band 3	Band 4
Potential Sanctions – Firms			
£0* – £50,000	Up to - £200,000	Up to - £500,000 (from £0.3 million, based on up to 10% of firm’s turnover in the relevant accounting period, up to the maximum of £500,000)	Up to - £4 million (from £0.3 million, based on up to 10% of firm’s turnover in the relevant accounting period, up to the maximum of £4 million)
Potential Sanctions – Individuals			
£0* - £25,000	£25,001 - £100,000	£101,001 - £250,000	£250,001 - £400,000 (with consideration to the total emoluments the individual has received during their connection to the firm)
Characteristics			
Small number of regulatory failings	Several regulatory failings	Significant failings but not systemic	Systemic failings
Licensee was open and co-operative with the Commission	Risk of loss to clients of the licensee	Loss or significant loss to clients of the licensee	Significant risk of loss to clients or actual loss to clients
Small risk of financial crime or being used to facilitate financial crime	Risk to the reputation of the Bailiwick	Significant risk to the reputation of the Bailiwick	Significant risk to the reputation of the Bailiwick
Licensee brought breaches to the Commission’s attention	Licensee was open and co-operative with the Commission	Licensee was not open and co-operative with the Commission	Licensee was not open and co-operative with the Commission
Steps taken to rectify breach(es) and prevent recurrence	Risk of financial crime or being used to facilitate financial crime	Significant risk of financial crime or being used to facilitate financial crime	Financial crime committed or licensee used to facilitate financial crime
	Licensee acknowledged, straight away, or within a short time, breaches when brought to their attention	Licensee failed to acknowledge breaches	Licensee deliberately withheld the breaches from the Commission in order to either obtain a benefit or mitigate a loss
	Steps taken to rectify breach(es) and prevent recurrence but insufficient	Few steps taken to rectify breach(es) and prevent recurrence and steps insufficient	No steps taken to rectify breach(es)
	Previous regulatory breaches	Previous regulatory breaches	Poor regulatory history

*** We may not enforce on the characteristics within this band if supervisory action is more appropriate.**

The table above is only a guide and the sanctions recommended in individual cases may differ. Each case will be assessed on its own merits taking into account the characteristics outlined in the table as well as any other aggravating or mitigating factors such as the financial consequences to the firm/individual (taking into consideration the total emoluments an individual has received from a firm during the time they have been connected with them) and, most importantly, the reputational risk to the Bailiwick. Whether the proposed sanction(s) will have the appropriate deterrent effect is also a consideration. The relevant person of a licensee will be assessed against the failings of the licensee and the role that they may have played in that process. In essence, they will be assessed against the minimum criteria for licensing on whether they, as an individual, are fit and proper. In doing so, consideration will be given, amongst other things, to their probity, competence, experience, and soundness of judgement and the integrity and skill in which they carried out their duties. Dependent upon the severity of the findings made against the firm, consideration will then be given to who held the key responsibilities and should be accountable for the failings identified.