

ORDER IN COUNCIL

XIX
2008

ratifying a Projet de Loi

ENTITLED

The Financial Services Commission (Enforcement Powers) (Bailiwick of Guernsey) Law, 2008

(Registered on the Records of the Island of Guernsey
on the 30th July, 2008.)



2008

ORDER IN COUNCIL



IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

30th day of July, 2008 before John Russell Finch, Esquire, Lieutenant Bailiff;
present:- David Charles Lowe, OBE, Derek Martin Le Page, Stephen Edward
Francis Le Poidevin, Alan Cecil Bisson, The Reverend Peter Gerald Lane, Michael
Henry De La Mare, Michael John Tanguy, Esquires, Susan Mowbray, Barbara
Jean Bartie, David Osmond Le Conte, and John Ferguson, Esquires, Jurats.

The Lieutenant Bailiff having this day placed before the
Court an Order of Her Majesty in Council dated 9th July 2008 approving and ratifying a
Projet de Loi entitled “The Financial Services Commission (Enforcement Powers)
(Bailiwick of Guernsey) Law, 2008”, THE COURT, after the reading of the said Order in
Council and after having heard Her Majesty’s Comptroller thereon, ORDERED;

1. That the said Order in Council be registered on the records of this Island;
and
2. That an extract of this present Act, together with a copy of the said Order in
Council be sent by Her Majesty’s Greffier to the Greffier of the Court of
Alderney and to the Sénéchal of Sark for registration on the records of those
Islands respectively.



At the Court at Buckingham Palace

THE 9th DAY OF JULY 2008

PRESENT,

THE QUEEN'S MOST EXCELLENT MAJESTY
IN COUNCIL

The following report from the Committee of Council for the Affairs of Jersey and Guernsey was today read at the Board:

"In accordance with Your Majesty's General Order of Reference of 22nd February 1952 the Committee have considered a Petition of the States of Guernsey:

"That, in pursuance of their Resolution of 25th July 2007, the States of Deliberation at a meeting on 30th January 2008 approved a *Projet de Loi* entitled *The Financial Services Commission (Enforcement Powers) (Bailiwick of Guernsey) Law, 2008* and requested the Bailiff to present a most humble Petition to Your Majesty in Council praying for Your Royal Sanction to it. That the States of the Island of Alderney at a meeting held on 9th January 2008 considered the *Projet de Loi* when a Resolution was passed agreeing to the application to Alderney. That the Chief Pleas of the Island of Sark at a meeting held on 21st February 2008 considered the *Projet de Loi* when a Resolution was passed agreeing to the application to Sark. That the *Projet de Loi* is as set forth in the attached Schedule. The Petition most humbly prays that Your Majesty might be graciously pleased to sanction *The Financial Services Commission (Enforcement Powers) (Bailiwick of Guernsey) Law, 2008*, and to order that it shall have force of law in the Bailiwick of Guernsey.

"The Committee have considered the *Projet de Loi* and have agreed to report that it may be advisable for Your Majesty to approve and ratify it."

Her Majesty, having taken the report into consideration, was pleased, by and with the advice of Her Privy Council, to approve and ratify the *Projet de Loi* (a copy of which is annexed to this Order) and to order that it, together with this Order, shall have the force of law in the Bailiwick of Guernsey and shall be entered on the Register of the Island of Guernsey and observed accordingly.

Her Majesty's Officers in the Bailiwick of Guernsey, and all others whom it may concern, are therefore to take notice of Her Majesty's Order and to proceed accordingly.

Judith Simpson

PROJET DE LOI

ENTITLED

The Financial Services Commission (Enforcement Powers) (Bailiwick of Guernsey) Law, 2008

THE STATES, in pursuance of their Resolution of the 25th July, 2007^a, have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the Bailiwick of Guernsey.

Amendment of 1987 Law.

1. The Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended^b ("**the 1987 Law**"), is further amended as follows.

2. Section 11B of the 1987 Law^c is repealed.

3. After section 11A of the 1987 Law^d insert the following cross-heading and sections -

"General enforcement powers of the Commission"

^a Article IV of Billet d'État No. XIX of 2007.

^b Ordres en Conseil Vol. XXX, p. 243; amended by No. XX of 1991; No. XIII of 1994; No. II of 1997; No. II of 1998; No's. XVII and XXI of 2002; No's. III and XXII of 2003; the Machinery of Government (Transfer of Functions) (Guernsey) Ordinance, 2003 (No. XXXIII); and the Financial Services Commission (Bailiwick of Guernsey) (Amendment) Ordinance, 2005 (No. XXXIV).

^c Section 11B was inserted by No. XXII of 2003.

^d Section 11A was inserted by No. XXII of 2003.

Disqualification orders against auditors.

11B. (1) Where the Commission is satisfied that a person who is or has been an auditor of a licensee -

- (a) has failed to comply with any duty imposed on him by or under the regulatory Laws, or
- (b) is for any other reason unfit to be an auditor of a licensee (whether by reason of lacking the necessary skills or resources to carry out effectively his responsibilities as auditor or otherwise),

or that for any other reason it is in the interests of the public or any class thereof to do so, the Commission may, subject to the provisions of section 11E, make an order (a "**disqualification order**") disqualifying him from being the auditor of any licensee or any particular class of licensee.

(2) The Commission may, on the application of the person named in a disqualification order or of its own motion, and subject to the provisions of section 11E, vary or revoke a disqualification order.

(3) A "**licensee**" means a person who holds or is deemed to hold a licence, consent, registration, permission or authorisation from the Commission under the regulatory Laws.

Public statements.

11C. (1) Where the Commission is satisfied that a licensee, former licensee or relevant officer -

- (a) has contravened in a material particular a provision of, or made under, the prescribed Laws, or
- (b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him,

it may, subject to the provisions of section 11E, publish a statement to that effect.

(2) In deciding whether or not to publish a statement under this section and, if so, the terms thereof the Commission must take into consideration the following factors -

- (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 publishing a statement, and

- (f) the action taken by the Commission under this section in other cases.

(3) A "**relevant officer**" means a person who when the contravention or non-fulfilment in question took place was a director, controller, partner, manager, general representative or authorised insurance representative of a licensee or former licensee.

Discretionary financial penalties.

11D. (1) Where the Commission is satisfied that a licensee, former licensee or relevant officer -

- (a) has contravened in a material particular a provision of, or made under, the prescribed Laws, or
- (b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him,

it may, subject to the provisions of section 11E, impose on him a penalty in respect of the contravention or non-fulfilment of such amount not exceeding £200,000 as it considers appropriate.

(2) In deciding whether or not to impose a penalty under this section and, if so, the amount thereof the Commission must take into consideration the following factors -

- (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.

(3) Where a penalty is imposed on a person under this section, the Commission may publish his name and the amount of the penalty.

(4) Any sums which the Commission receives in any calendar year in respect of penalties imposed under this section on persons who are licensees, former licensees or relevant officers for the purposes of a particular regulatory Law shall be taken into account by the Commission in determining the fees payable to it pursuant to that regulatory Law in the following calendar year or, if that is not reasonably practicable, in the subsequent calendar year.

Notice of intended decision.

11E. (1) Where the Commission proposes to make a decision in respect of which a right of appeal is conferred by section 11H it shall serve on the

person concerned a notice in writing -

- (a) stating that the Commission is proposing to make the decision,
- (b) stating the terms of, and the grounds for, the proposed decision,
- (c) stating that he may, within a period of 28 days beginning on the date of the notice, make written or oral representations to the Commission in respect of the proposed decision in such manner as the Commission may from time to time determine, and
- (d) giving particulars of the right of appeal which would be exercisable under section 11H if the Commission were to make the decision.

(2) The Commission shall consider any representations made in response to a notice served under subsection (1) before giving further consideration to the proposed decision.

(3) The period of 28 days mentioned in subsection (1)(c) may be reduced in any case in which the Commission considers it necessary to do so in the interests of the public or any class thereof, or any particular persons, or the reputation of the Bailiwick as a finance centre.

If by reason of those interests the Commission considers that the decision in question needs to be taken immediately as a matter of urgency then the

procedure prescribed in this section may be dispensed with altogether.

- (4) For the avoidance of doubt -
 - (a) a notice about a proposal to publish a statement must set out the terms of the statement, and
 - (b) a notice about a proposal to impose a financial penalty must state the amount of the penalty.

Notice of decision.

11F. Where the Commission decides (having taken into account, where appropriate, any representations made by the person concerned) to make a decision in respect of which a right of appeal is conferred by section 11H it shall serve on the person concerned notice in writing of the decision -

- (a) stating the terms of, and the grounds for, the decision, and
- (b) giving particulars of the right of appeal conferred by section 11H.

Disclosure of reasons for decisions.

11G. (1) Where the Commission makes a decision in respect of which a right of appeal is conferred by section 11H, the person concerned may, whether or not he institutes an appeal, but subject to the provisions of subsection (2), require the Commission to furnish him with a written statement of the reasons for the decision.

- (2) Subsection (1) does not require the Commission to specify

any reason which would in its opinion involve the disclosure of confidential information the disclosure of which would be prejudicial to -

- (a) a criminal or regulatory investigation (whether in the Bailiwick or elsewhere).
- (b) co-operation or relations with investigatory, regulatory or prosecuting authorities in any other place. or
- (c) a third party (wherever situated).

(3) Where, pursuant to subsection (2), the Commission omits any matter from a statement of reasons, it shall inform the person concerned of the fact that there has been such an omission and give particulars of the right of appeal conferred by section 11H.

Appeals against decisions.

11H. (1) A person aggrieved by a decision of the Commission -

- (a) to make or vary a disqualification order against him under section 11B,
- (b) to refuse to vary or revoke a disqualification order made against him under section 11B,
- (c) to publish a statement relating to him under section 11C,
- (d) to impose a financial penalty on him under section 11D,

- (e) to publish his name under section 11D(3) as a person on whom such a penalty has been imposed, or
- (f) to omit, pursuant to section 11G(2), any matter from a statement of reasons given to him,

may appeal to the Court against the decision.

(2) The grounds of an appeal under this section are that -

- (a) the decision was ultra vires or there was some other error of law,
- (b) the decision was unreasonable,
- (c) the decision was made in bad faith,
- (d) there was a lack of proportionality, or
- (e) there was a material error as to the facts or as to the procedure.

(3) An appeal under this section shall be instituted -

- (a) within a period of 28 days immediately following the date of the notice of the Commission's decision, and
- (b) by summons served on the Chairman of the Commission stating the grounds and material facts on

which the appellant relies.

(4) The Commission may, where an appeal under this section has been instituted, apply to the Court, by summons served on the appellant, for an order that the appeal shall be dismissed for want of prosecution; and on hearing the application the Court may -

- (a) dismiss the appeal or dismiss the application (in either case on such terms and conditions as the Court may direct), or
- (b) make such other order as the Court considers just.

The provisions of this subsection are without prejudice to the inherent powers of the Court or to the provisions of rule 52 of the Royal Court Civil Rules, 2007.

(5) On an appeal under this section the Court may -

- (a) set the decision of the Commission aside and, if the Court considers it appropriate to do so, remit the matter to the Commission with such directions as the Court thinks fit, or
- (b) confirm the decision, in whole or in part.

(6) On an appeal under this section against a decision of the Commission the Court may, on the application of the appellant, and on such terms as the Court thinks just, suspend or modify the operation of the decision pending the determination of the appeal.

This subsection is without prejudice to the operation of section 11E(3).

(7) An appeal against a decision to publish a statement in respect of a person shall be held in private unless -

(a) the parties agree that all or part of the hearing should be held in public, or

(b) the Court so orders.

(8) Where an appeal against a decision to publish a statement under section 11C or 11D(3) is upheld the Commission shall, if the appellant so requests, publish a statement of that fact.

This subsection applies where pursuant to section 11E(3) the appellant did not have an opportunity to make representations before the decision was made.

(9) An appeal from a decision of the Court under this section lies to the Court of Appeal on a question of law.

(10) In this section "**the Court**" means the Royal Court sitting as an Ordinary Court, constituted by the Bailiff sitting unaccompanied by the Jurats; and for the purposes of an appeal under this section the Court may appoint one or more assessors to assist it in the determination of any matter before it.

Administrative financial penalties.

11I. (1) The Commission may, after consultation with the Committee,

the Policy and Finance Committee of the States of Alderney and the General Purposes and Advisory Committee of the Chief Pleas of Sark, by regulation make such provision as it thinks fit in respect of the charging of administrative financial penalties for -

- (a) the late payment of fees or charges required to be paid, or
- (b) the late filing or delivery of documents or information required to be filed or delivered,

by or under the regulatory Laws.

(2) Regulations under this section -

- (a) may prescribe the amount and / or basis of calculation of penalties payable in the circumstances described in subsection (1),
- (b) may provide for the payment and collection of fees, charges and penalties and for their recovery by the Commission as a civil debt,
- (c) may make provision in relation to appeals (including, without limitation, provision applying the provisions of section 11H subject to such exceptions, adaptations and modifications as may be prescribed), and
- (d) may make provision under the powers conferred by this Law notwithstanding the provisions of any

enactment for the time being in force.

(3) Regulations under this section shall be laid before a meeting of the States as soon as possible and shall, if at that or the next meeting the States resolve to annul them, cease to have effect, but without prejudice to anything done under them or to the making of new regulations.

Powers under prescribed Laws not affected.

11J. The provisions of sections 11B to 11I are without prejudice to the powers of the Commission conferred by or under the prescribed Laws."

4. After section 19(3) of the 1987 Law insert the following subsections

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"(4) For the avoidance of doubt, a function may be delegated under this section to a committee of members and / or officers.

(5) Notwithstanding the provisions of subsection (1)(c), any of the statutory functions mentioned in paragraphs (i), (ii) and (iii) of that subsection may be delegated to a committee of not less than 3 members."

5. In section 24(1) of the 1987 Law insert the following definitions at the appropriate places -

"**contravention**" includes failure to comply, and vice versa; and related expressions shall be construed accordingly,

"**the Court**" : see section 11H(10),

"disqualification order" : see section 11B(1),

"licensee" : see section 11B(3),

"prescribed Laws" means -

- (a) the regulatory Laws,
- (b) the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999^e,
- (c) the Drug Trafficking (Bailiwick of Guernsey) Law, 2000^f,
- (d) the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002,^g
- (e) the Disclosure (Bailiwick of Guernsey) Law, 2007^h,
- (f) the Transfer of Funds (Guernsey) Ordinance, 2007ⁱ,
- (g) the Transfer of Funds (Alderney) Ordinance, 2007^j,

^e Order in Council No. VIII of 1999; Order in Council No. II of 2005; Ordinance XXVIII of 1999, Ordinance XII of 2002, G.S.I. No. 27 of 2002.

^f Order in Council No. VII of 2000; No. II of 2005; and Ordinance No. XXXIII of 2003.

^g Order in Council No. VI of 2002.

^h Approved by Resolution of the States of Guernsey of 30th May, 2007.

ⁱ Approved by the Resolution of the States of Guernsey of 25th July, 2007.

- (h) the Transfer of Funds (Sark) Ordinance, 2007^k,
- (i) any other enactment or statutory instrument prescribed for the purposes of this section by regulations of the Commission made after consultation with the Committee, the Policy and Finance Committee of the States of Alderney and the General Purposes and Advisory Committee of the Chief Pleas of Sark,

"relevant officer" : see section 11C(3),".

6. In section 24(2)(c) of the 1987 Law before "amended" insert "from time to time".

Citation.

7. This Law may be cited as the Financial Services Commission (Enforcement Powers) (Bailiwick of Guernsey) Law, 2008.

S.M.D. Ross

Her Majesty's Deputy Greffier

^j Ordinance of the States of Alderney No. VI of 2007.

^k Ordinance of the Chief Pleas of the 5th July, 2007.

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