

• GFSC ENFORCEMENT ACTION AND THE RIGHT TO APPEAL

In the current economic climate it would seem (anecdotally at least) that the Guernsey Financial Services Commission is taking regulatory action more regularly and forcefully than in years gone by.

The Commission's enforcement powers are derived principally from the legislative frameworks that cover the four regulated industries in the finance sector, namely banking, fiduciary, insurance and investment.

It might be that if it deems it appropriate the GFSC, rather than taking formal enforcement action, will seek agreement to changes in a licensed entity's corporate governance, management and internal controls, or agreement to discontinue some or all of its operations or areas of activity, or to amended or additional licence conditions.

However, if the GFSC feels that action by agreement is not adequate, or where co-operation is lacking or where the misconduct in question is sufficiently serious, then it will invoke the use of its full statutory powers.

SPECIFIC ENFORCEMENT POWERS

The GFSC has a range of enforcement measures at its disposal, including being able to give warnings and private reprimands, to impose licence directions and conditions, to order the production of information and documents and to appoint an inspector. The Commission may also object to the directors of a licensed entity and even significant shareholders and persons deemed to control the entity.

Other enforcement powers that the GFSC has include what are termed prohibition orders and disqualification orders, which prohibit a regulated entity from carrying on all or parts of its business for a specific period of time (the GFSC can also apply to the Court for the disqualification of a director under the Companies Guernsey Law, 2008). Also, the GFSC may impose a discretionary financial penalty on an errant licensee, up to £200,000.

There are also various other orders that the Commission can seek from the Court including an order to restrain any unlawful business or to repay monies accepted or paid over in the course of carrying on an unlawful business, an order for the sale of the shares of a controller or significant shareholder or an order for the appointment of an administrative manager.

Ultimately, the GFSC can revoke an existing licence, which can then be used as the grounds upon which it makes an application to the Royal Court for the appointment of a liquidator and for the company to be wound up.

In addition to its above enforcement powers, when appropriate the GFSC may also refer a breach by a regulated entity to HM Procureur, in which case HM Procureur may decide to commence a criminal investigation. Also, the GFSC may refer the matter directly to the Guernsey Police or the Guernsey Border Agency, who themselves may then approach HM Procureur.

RIGHT TO APPEAL

Before taking any enforcement action, the Commission is obliged to serve on the person concerned a notice setting out what action it is going to take and the reasons for doing so. The notice must state that the recipient has 28 days in which to make representations to the GFSC and also setting out the recipient's right to appeal the decision. The GFSC must consider any representations made before giving further consideration to its decision to take enforcement action.

In addition to the right to make representations, there is a right to appeal against a decision of the GFSC that is set out in each of the regulatory laws governing the four regulated industries. An appeal must be made within 28 days of receipt of the GFSC's notice and must be made by summons served on the Chairman of the GFSC.

A person may appeal to the Court on the grounds that the decision was ultra vires (or there was some other error of law), that the decision was unreasonable, that the decision was made in bad faith, that there was a lack of proportionality, or there was a material error as to the facts or to the procedure taken by the GFSC. The Court may then dismiss the appeal or make such orders as it sees fit, including setting the decision of the GFSC aside or confirming the decision in whole or in part.

A decision of the Court is final as to any question of fact, but an appeal from such a decision can then be made to the Court of Appeal on any question of law.

WHAT TO DO IF YOU RECEIVE A NOTICE?

It is important to seek professional advice as soon as an enforcement notice is received from the Commission. It might be that the GFSC has erred in some material way, including exceeding its powers, and any such oversights and defects should be considered and, if appropriate, raised immediately with the GFSC.

It is important to keep a record of all representations made to the GFSC, written and oral, and to immediately start compiling information in respect of any appeal that might need to be made in due course.

In short, a recipient of a notice should not panic but should seek advice at the earliest opportunity. If the situation is dealt with properly, even at this late stage, it is possible that enforcement action might still be avoided.

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PLEASE CONTACT:**

MICHAEL ADKINS
SENIOR ASSOCIATE
t: +44 (0)1481 734231
e: michael.adkins@collascrill.com

Collas Crill Guernsey

Gategny Court, PO Box 140,
Gategny Esplanade, St Peter Port,
Guernsey, GY1 4EW
t: +44 (0) 1481 723191
f: +44 (0) 1481 711880
e: guernsey@collascrill.com
w: www.collascrill.com