

GFSC: fit and proper guidance

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The Guernsey Financial Services Commission (GFSC) has this month released updated [guidance](#) on the requirement for those holding senior positions within institutions in the banking, fiduciary, insurance and investment sectors, to be “*fit and proper*” persons. While the requirement to be “*fit and proper*” is not a new requirement, the guidance seeks to provide clarity to individuals (and the entities that employ them) regarding the matters which the GFSC will consider when determining an individual’s fitness and propriety.

This regulatory standard applies to those in or seeking to take up “*prescribed positions*” in Guernsey entities. A “*prescribed person*” has been defined in the GFSC guidance as “*director, controller, partner, manager, senior officer, significant shareholder, shareholder controller, indirect controller, general representative, beneficial owner of a financial services business, company secretary and such other positions as may be prescribed*”.

So, what does “*fit and proper*” actually mean in practical terms? The GFSC guidance identifies three main aspects they will consider if they are asked to assess an individual’s fitness and propriety: competence, probity and solvency.

- **Competence** will be assessed by reference to objective criteria such as relevant experience and professional qualifications for the role. However, more subjective considerations will also be considered, such as the individual’s understanding of the role, the business model within which the role sits and the regulatory obligations associated with the role. The individual’s ability to dedicate sufficient time to the role will also be considered.
- **Probity** will be measured by assessing a person’s integrity, honesty and reputation. It is in this area that an individual’s approach to their role and past history in any previous role will be considered, as well as any sanction or formal action taken against the individual or which is pending. This will range from internal disciplinary proceedings at work to regulatory investigations or criminal charges. The concept of “*integrity*” is open to subjective interpretation but it is likely that the GFSC will follow the approach of English courts. The guidance cites the example of an English case where individuals were held to be lacking in integrity, even although they were not found to have been dishonest.
- **Solvency** is the perhaps the least demanding requirement of the three criteria. An individual will simply have to evidence that they have never been the subject of bankruptcy proceedings or similar, nor entered into settlements with their creditors.

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Whilst the concept of “*fit and proper*” will be familiar to fiduciary and licensed entities, the GFSC guidance provides a useful checklist of what licensees and those individuals holding or seeking to hold “*prescribed positions*” must satisfy in order to comply with the fit and proper standard. The guidance may also be useful for administrators when assessing promoters in connection with fast-track fund and licensing applications under the *Protection of Investors (Bailiwick of Guernsey) Law, 1987*.

From an employer’s perspective, it is important to make sure that recruitment and appointment processes are robust enough to ensure that the necessary background information and warranties regarding an individual’s satisfaction of the “*fit and proper*” standard are obtained early in the process.

However, the obligation does not end there – there is an ongoing duty on employers to ensure that the GFSC is kept updated of any matter which might affect an individual’s fitness and propriety. This would include, for example, the employer taking disciplinary action against that individual. This is a difficult obligation to satisfy and can have far reaching consequences if not managed appropriately. Issues for consideration include:

- Timing: when should the GFSC be notified of an issue or concern and how regularly should they be updated?
- Content: what should be notified to the GFSC and how much detail needs to be provided?
- Form: how should notifications be made to the GFSC and what form should they take?

The new guidance could therefore cause tension between the duties an employer owes to the GFSC as a licenced entity and the duties it owes to its employees. Whilst employers will always wish to ensure that they are fully compliant with any regulatory obligation, they need to be mindful of the need to uphold the implied term of trust and confidence which is a fundamental dimension of the employment relationship – a term which could, arguably, be breached by, for example, an inappropriate or unnecessary notification to the GFSC in respect of an individual’s conduct within the workplace.

As a result, the new guidance is likely to bring some challenges for employers who are now on notice of what the GFSC will consider in determining an individual’s fitness and propriety. Employers are therefore advised to get legal advice as soon as any circumstance arise where it is felt that an individual’s fitness and propriety might fall below the required standard because of conduct either in or outside of the workplace.

Overall, the guidance brings welcome clarification of the GFSC’s approach to the issue and one which adopts a prudent but balanced perspective to a matter of critical importance to upholding Guernsey’s reputation as a well-regulated financial centre.



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