

FSC Newsletter

Fitness and Propriety

Introduction

1. In order to discharge the duties placed on him by the Ordinances governing the regulation of the financial services industry, the Financial Services Commissioner is required, amongst other matters, to satisfy himself on the fitness and propriety of persons (including companies/partnerships) who carry on financial services businesses, or who occupy responsible positions in a regulated institution or company ('company' for the purposes of this guidance). The Ordinances differ slightly from one another in detail but, in broad terms, the Commissioner's approach to the assessment of fitness and propriety is the same across all the financial services sectors. This note is intended to provide an explanation of how the Commissioner reaches a judgement on a person's fitness and propriety. It is not intended to be prescriptive.

Background

2. The Commissioner must be satisfied that persons who carry on financial services business as defined in the Ordinances, and persons associated with them, are fit and proper to carry on the business concerned. In some instances, the Ordinances specify who these "notifiable persons" are. In other cases, a decision as to which persons are covered by the requirement is left to the discretion of the Commissioner. In practice, the Commissioner applies the criteria for fitness and propriety to applicants for authorisation or licensing under the Ordinances, persons associated with applicants, regulated companies, and persons who occupy a position of influence in regulated companies. The influential persons include shareholders who exercise a certain level of voting power ("controllers"), chief executives, managing directors, directors, and managers.

3. The Commissioner's duty to be satisfied as to the fitness and propriety of the persons mentioned above is an ongoing one. That is to say that should any event occur, or information come to hand, which might cast doubt upon the continuing fitness and propriety of a person who has already been considered satisfactory, the Commissioner would need to reassess that person's status. Similarly, if a change of ownership of, or personnel in, a regulated company is proposed, the Commissioner must be satisfied that the person nominated is fit and proper. In the event that the Commissioner determines that a person is no longer fit and proper, it will be necessary for that person to cease being associated with the carrying on of regulated business.

4. If the Commissioner determines that a person is not fit and proper, the likely effects are that an application for authorisation will be refused or, in the case of a person who has already been authorised, that a condition will be imposed on the authorisation which will remedy the situation. In either case, the person affected by the decision has a right to make representations and, if the decision is maintained, to appeal against the decision to the Supreme Court.

Definition

5. The term “fit and proper” is not defined in the legislation. It includes, amongst other considerations, the concepts of honesty, solvency and competence. This extends to the conduct of a business both in its dealings with the public and in the ordering of its internal affairs. The requirements to be met in order to be judged fit will vary with the nature of the business carried on by the company, and the responsibilities of a particular person within the company.

Proof of Status

6. The Commissioner has to be satisfied that a person is fit and proper before he can allow that person to carry on business in Gibraltar. This means, in essence, that the person must demonstrate that he is fit and proper to carry on the business concerned, or exercise the responsibility proposed; the Commissioner does not have to prove that a person is not fit and proper. A person must satisfy the Commissioner of his fitness and propriety in accordance with a civil, rather than criminal, standard of proof. In other words, the Commissioner’s judgement may be arrived at on the “balance of probabilities” rather than “beyond reasonable doubt”. This civil standard varies according to the context in which it is to be applied, and the seriousness of the matter in question.

7. In the context of the regulation of financial services business, the purpose of the fitness and propriety requirement is to protect the public from those who are not fit and proper. Accordingly, the standard which must be satisfied is a high one. If, therefore, the Commissioner is left with a substantial doubt as to the fitness and propriety of a person, the correct course would be for the person not to be approved.

Basic Elements

8. The Commissioner considers that the basic elements which are relevant to an assessment as to the fitness and propriety of a person are:

- ? honesty, integrity and reputation
- ? competence, ability to conduct business and organisation
- ? financial standing.

9. These elements are not intended to be exhaustive or definitive. The fit and proper test exists to protect the interests of customers or clients, actual and potential. It follows that anything which suggests that approval of a person may harm customers is relevant to the test, whether or not it can be subsumed under the foregoing elements.

10. When the Commissioner assesses the fitness and propriety of a company, he does so in respect of the company as a whole. This requires fit and proper assessments to be made of those individuals involved in key capacities within the company. Such individuals include: -

- (a) if a body corporate, each director, manager or controller of that body, and each director, manager or controller of any other body corporate in the same group;
- (b) if a partnership, each of the partners;
- (c) if a body of trustees, each of the trustees;
- (d) if an unincorporated association, each member of the governing body of that association or each officer or controller of the association.

? Honesty, Integrity and Reputation

11. The concepts of honesty, integrity and reputation have to be read in a broad sense as extending in particular, but not only, to:

- (a) fair dealing with customers;
- (b) establishment and maintenance of a proper compliance culture, which demonstrates proper respect for legal, regulatory and professional obligations;
- (c) candour and good faith in dealings with regulators.

12. Relevant to honesty, integrity and reputation will be consideration of whether a person:

- (a) has been adjudged bankrupt, has had a receiving or administration order made against him, has had a bankruptcy petition served on him, has had his estate sequestered, has entered into a deed of arrangement in favour of his creditors or other composition or arrangement with creditors, or is otherwise insolvent or financially unreliable;
 - (b) has at any time pleaded guilty, or been convicted of, any offence (excluding minor traffic offences) by a civilian or military court in Gibraltar or elsewhere, or has been subject to penalties for deliberate tax evasion;
 - (c) has ever, in connection with the formation or management of any corporation, been judged by a court civilly liable for any fraud, misfeasance or other misconduct, or has been the subject of any civil action which has resulted in a finding against him by a court in Gibraltar or elsewhere;
 - (d) has ever been the subject of any civil action, whether in Gibraltar or elsewhere, in respect of any matter other than the conduct of investment business which has resulted in a finding against him by a court, or a settlement being agreed;
 - (e) has in connection with the formation or management of any corporation, been disqualified from being a director or from acting in the management or conduct of any corporation, whether in Gibraltar or elsewhere;
 - (f) has ever been concerned with the management or conduct of affairs of any corporation at a time when it has been investigated by an inspector appointed under companies or other legislation, or been required to produce books and papers to inspectors appointed under companies legislation or to the police;
 - (g) has been refused, whether in Gibraltar or elsewhere, the right to carry on any trade, business or profession for which a specific licence, registration or other authority is required;
 - (h) has been, in Gibraltar or elsewhere, the subject of an investigation into allegations of misconduct or malpractice, or has been the subject of disciplinary proceedings whether or not resulting in an adverse finding, or has ever been censured, disciplined or publicly criticised by any professional body to which the individual has belonged, or is currently undergoing any such investigation or disciplinary process;
 - (i) has, in Gibraltar or elsewhere, been refused entry to any profession or vocation, or has ever been dismissed, or requested to resign from any office or employment;
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- (j) in Gibraltar or elsewhere, has been censured, disciplined or publicly criticised by, or made the subject of a court order at the instigation of any regulatory authority or any officially appointed inquiry or any other established body concerned with the regulation of a financial activity;
- (k) has been refused entry to any trade association connected with financial activities.

13. Other aspects of character are also relevant: for example a reckless or imprudent approach to business, or a lack of motivation to carry on business diligently.

14. Many of the factors listed above apply equally to a company as they do to individuals. The following additional factors may also be relevant to a determination of whether any company is fit and proper:

- (a) whether it has contravened any provision of financial services legislation or any rules, regulations, statements of principle or codes of practice made under it or made by the Commissioner;
- (b) whether it has contravened any provision of the rules or regulations of any other regulatory authority;
- (c) whether it has given the Commission false, inaccurate, misleading or incomplete information, or has failed to co-operate with the Commission;
- (d) whether it has failed to observe best market practice in any area of its business;
- (e) how it secures, or proposes to secure, the honesty of its staff.

15. In considering whether a company is of good reputation, the Commissioner may have regard, amongst other matters, to the existence and degree of publicity concerning the company, including material adverse to it. In determining a company's reputation, it is also material to consider the state of its relationships with customers/clients.

? **Competence, ability to conduct business and organisation**

16. Organisation for compliance is a major factor when determining fitness. The Commissioner will need to be satisfied not only about the soundness of a company's internal compliance arrangements (including recruitment, training and the supervision of staff) but also on the external underpinning of those arrangements, for example, the appointment of auditors with appropriate regulatory competence and experience. A company must be organised in a way which makes it capable of being appropriately monitored.

17. In determining competence and capability, the Commissioner will have regard to whether directors and senior staff are capable at all times of performing the role for which they have been employed, or for which they are being recruited. Account will be taken, as appropriate, of qualifications held and other training undertaken as well as more informal experience. The Commissioner will also consider whether the board or equivalent governing body of a company is composed of individuals with an appropriate range of skills and experience to understand its activities so that, as a whole, it is able to control and direct those activities effectively.

18. Efficiency is also a relevant consideration. The Commissioner will consider not merely whether a company conducts its business without negligence, but will also have regard to its responsibility to foster the provision of a good standard of service to the public.

19. The Commissioner will wish to ensure that the ownership structure of a company does not result in any unacceptable conflicts of interest.

? **Financial standing**

20. The Commissioner will have to be satisfied that a company has financial resources sufficient to meet commitments on a continuing basis, as well as the ability to withstand the financial risks to which the business is exposed. In many sectors specific, continuing capital requirements must be met. The financial positions of a company, its controllers and its key staff are also likely to throw light on their prudence and ability to withstand financial temptation.

Nature of Evidence and Final Assessment

21. The Commissioner is not a court of law. Therefore, the strict rules of evidence which would apply in a court of law do not apply to the Commissioner. Accordingly, it is proper for the Commissioner to consider all relevant evidence, including hearsay, or unsubstantiated information. As a general rule, the Commissioner considers that the best evidence will be in hard, written form and obtained from an independent source. In making a decision, the Commissioner may have regard to the cumulative effect of factors which, taken individually, may be regarded as insufficient to give rise to reasonable cause to doubt the fitness and propriety of a company or individual.

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