



ISLE OF MAN
FINANCIAL SERVICES AUTHORITY

Lught-Reill Shirveishyn Argidoil Ellan Vannin

DISCUSSION PAPER

DP19-01/T20

**FORTHCOMING AMENDMENTS TO
PRIMARY LEGISLATION - FINANCIAL
SERVICES (AMENDMENTS) BILL**

Issue Date: 1 September 2019

Closing Date: 31 October 2019

DISCUSSION PAPER – DP19-01/T20

This Discussion Paper is issued by the Isle of Man Financial Services Authority ('the Authority'), which is the regulatory body for financial services in the Isle of Man.

The purpose of this Discussion Paper is to set out the Authority's policy intention to update some of the Island's primary legislation pertaining to the Authority and its functions.

It also includes, at a high-level, the matters that are likely to be included in the Financial Services (Amendments) Bill ('the draft Bill'), and seeks initial views from all interested parties in respect of these matters in order to help the Authority refine its plans and considerations before drafting instructions for the draft Bill are issued.

In due course, during 2020, the draft Bill will be issued for detailed consultation.

The closing date for comments is **31 October 2019**.

Please send comments in writing and preferably by email to:

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If you have a query in relation to how this consultation has been carried out, please contact the Authority's Policy and Authorisations Division by email at Policy@iomfsa.im or by telephone on +44 (0) 1624 646000.

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GLOSSARY

Term	Meaning in this document
Authority	Isle of Man Financial Services Authority
CIS	Collective investment schemes
CISA08	Collective Investment Schemes Act 2008
Controlled Function	Any of the functions set out at Appendix 2 of the Authority's Regulatory Guidance - Fitness and Propriety
DBROA15	Designated Businesses (Registration and Oversight) Act 2015
FSA08	Financial Services Act 2008
IA08	Insurance Act 2008

1 EXECUTIVE SUMMARY

1.1 Overview

The Authority is the Island's financial services regulator and has functions under various Acts of Tynwald. From time to time those Acts require amendment and the Authority intends to amend the following four Acts via one amendment Bill, rather than four separate Bills:

- Collective Investment Schemes Act 2008 ('CISA08'),
- Designated Businesses (Registration and Oversight) Act 2015 ('DBROA15'),
- Financial Services Act 2008 ('FSA08'), and
- Insurance Act 2008 ('IA08').

Other Acts are outside the scope of this review and amendment Bill.

1.2 What is the purpose of this Discussion Paper?

The Authority is publishing this Discussion Paper to communicate its policy intention to make amendments to the four Acts; and to provide information, at a high level, relating to the matters likely to be included within those amendments. This will give early notice to the Authority's stakeholders of these changes and also assist the Authority to refine its plans and considerations before the draft Bill is written.

The changes will aim to clarify and enhance the regulatory framework so as to help the Island to continue to meet international standards and safeguard the Island's reputation as a well-regulated financial services jurisdiction.

In carrying out its functions, the Authority is mindful of the need to operate in a manner which is consistent with the principles of good regulation, including maintaining competitiveness and minimising any adverse effects of regulation. Therefore, the Authority invites interested parties to assist it to ensure that the regulatory framework remains effective and proportionate and, as far as possible, does not detract from the competitiveness of the Island.

1.3 Who may be affected by this Discussion Paper?

This Discussion Paper is relevant to all regulated entities, collective investment schemes, designated businesses, as well as functionaries and advisers to those sectors.

2 CONSULTATION PROCESS

2.1 The Authority's regulatory objectives

The Authority's regulatory objectives are set out in section 2(2) of the FSA08 as —

- (a) securing an appropriate degree of protection for policyholders, members of retirement benefits schemes and the customers of persons carrying on a regulated activity;
- (b) the reduction of financial crime; and
- (c) the maintenance of confidence in the Island's financial services, insurance and pensions industries through effective regulation, thereby supporting the Island's economy and its development as an international financial centre.

The Authority is required to give consideration to certain factors when discharging its functions in accordance with paragraph 3 of Schedule 1 to the FSA08. The most relevant factors for this Discussion Paper are considered to be as follows:

Factor	Information
The need for the regulatory, supervisory and registration regimes to be effective, responsive to commercial developments and proportionate to the benefits which are expected to result from the imposition of the regulatory burden	Updating primary legislation helps to maintain the effectiveness of the regulatory regime
The need to use resources in an efficient and economic way	Using one Bill to update four items of primary legislation provides efficiencies for stakeholders, the Authority and Tynwald

2.2 Responding to the Discussion Paper

Open dialogue with stakeholders is an essential element for successful development of the Authority's proposals and constructive feedback will help the Authority reach an informed decision on the content of the draft legislation.

As responses to the Discussion Paper may be subject to publication or disclosure in accordance with access to information regimes, respondents should state if they wish their response to remain confidential and, if so, the reasons for this.

All submissions received by the closing date of the Discussion Paper will be considered but may not result in a change to the proposals.

Professional bodies, trade associations and other representative groups are asked to provide a summary of the people and organisations that they represent when responding to a Discussion Paper, as well as the methodology used to gain members' input.

The Authority requests that submissions are not made anonymously as they will not be considered or included in the Feedback Statement.

This Discussion Paper has been published on the Authority's website and the Isle of Man Government's Consultation Hub¹. A list of specific representative groups to which this Discussion Paper has been sent is shown in Appendix A.

Please submit your responses by email using an extractable format (such as Word) if possible, rather than in hard copy or as scanned images.

3 THE INTENDED AMENDMENTS

Given that primary legislation is amended infrequently, the nature of amendments varies from material changes to minor / housekeeping matters.

This Discussion Paper only sets out the material matters, and not those which are minor (such as amending typographical errors or updating terminology). Furthermore, some matters will be general in nature or pertinent to more than one piece of primary legislation, and others will be more specific.

When the draft Bill is consulted upon, all changes, including minor matters, will be set out, and more information will be provided on each topic.

3.1 General amendments

3.1.1 To provide the ability for civil penalties to be imposed upon certain individuals

The IA08 already provides the Authority with the ability to impose civil penalties on individuals, but the other Acts do not. The opportunity will be taken to harmonise the civil penalty provisions as far as possible to achieve better consistency of approach.

It is likely that the 'individual' civil penalty regime will be limited to the holders of certain roles only, such as controllers, directors or chief executives of regulated entities or designated businesses, and members of the governing bodies of collective investment schemes ('CISs').

¹ <https://consult.gov.im/>

In order to introduce such a regime, secondary legislation will also be required, and this will be the subject of detailed consultation in the future. The amendments planned to the Acts are to provide the Authority with the legal vires to develop the necessary secondary legislation in due course.

3.1.2 To make improvements and clarifications to the Authority's powers of inspection and investigation

For example:

- to make it clear that powers of inspection (under all Acts) apply whether or not a breach is suspected; and
- to ensure that in cases of misleading practices (s38 FSA08) and misleading statements (s37 FSA08) the powers may be used also with regard to persons that are not regulated or exempt.

3.1.3 To prevent non-disclosure agreements from constraining employees and others from informing the Authority of matters relevant to the Authority's functions

In order to protect the reputation of the Isle of Man, and to assist individuals that may sign such agreements under duress or undue influence, the Authority intends to seek a provision in each Act that would make void any contractual provision between a regulated entity or its group companies, designated business or CIS and another person (whether employee, officer, skilled person etc.) which purports to prevent that individual from providing information to the Authority that is relevant to the exercise of its functions.

3.1.4 To ensure that when an individual is presented for appointment to a Controlled Function for an existing regulated entity, or CIS, it is for the regulated entity to satisfy the Authority that the individual is fit and proper, rather than for the Authority to establish that they are not

Applicants to become regulated entities are required to satisfy the Authority that they and their staff are fit and proper. However, if an entity is already a regulated entity the current position is that the Authority is required to determine an individual who is taking up a Controlled Function is not fit and proper, rather than the regulated entity and individual having to satisfy the Authority that they are fit and proper.

This is not considered appropriate, and it is proposed that the burden should remain on the regulated entity / individual to satisfy the Authority of the individual's fitness and propriety when they seeking to take up a Controlled Function.

It is accepted, however, that where an individual is already in a Controlled Function (rather than applying to hold an additional one) and the Authority later considers they

are no longer fit and proper, the current burden is correct, and it is for the Authority in that circumstance to demonstrate a lack of fitness and propriety, so this will not be amended.

Future state:

Applicant firm seeking to become regulated	It must satisfy the Authority that individuals planned for Controlled Functions are fit & proper (burden on applicant)
Existing regulated entity seeking to place an individual in a Controlled Function they do not already hold	It must satisfy the Authority that the individual planned for the Controlled Function is fit & proper (burden on regulated entity)
Existing regulated entity and individual already in a Controlled Function	If the Authority considers the individual in no longer fit & proper, the Authority must demonstrate this (burden on Authority)

3.1.5 Amendments to some defined terms across the Acts will be made to ensure consistency

For example, the terms ‘controller’, ‘director’ and ‘associate’ which vary slightly between Acts at present.

3.2 Collective investment scheme specific amendments

3.2.1 To provide a direct investigation power into collective investment schemes (‘CIS’)

The Authority currently has to rely on indirect routes to address such matters in CISs, for example, by using powers in company law or the Company Officers (Disqualification) Act 2009. It would be preferable for the Authority’s powers of inspection and investigation set out in the FSA08 to extend to CISs and former CISs and thus provide a direct route for investigations. This would provide for more timely intervention and protection for investors.

3.2.2 To improve the provisions for winding up CISs established as companies

The grounds to apply for the winding up of a CIS are wider and more pertinent to CISs and their investors in the CISA08 than in company law. Where a CIS is constituted other than as a company this is sufficient and workable; but where a CIS is constituted as a

company, company law provisions apply which are narrower and do not sufficiently protect the investors in the CIS.

It is planned to add to the CISA08 a provision to specify that if the Authority applies for a winding up order due to circumstances set out in section 11 of that Act, this will satisfy the 'public interest' test under company law. This will ensure the situation is the same no matter how a CIS is constituted.

It will still fall to the Court to assess whether the CISA08 test is satisfied, and whether it is just and equitable to order winding up.

3.3 Financial services specific amendments

3.3.1 Amendments to Schedule 4 to make amendments to the Financial Services Ombudsman Scheme

The Office of Fair Trading is considering whether to make some changes to the Financial Services Ombudsman Scheme, and if it determines to do so, those changes will be added to the draft Bill and consulted on by the Office of Fair Trading in due course.

3.4 Insurance specific amendments

3.4.1 Amendment of s51 IA08 to provide for the ability for modifications and exceptions from the Corporate Governance Codes of Practice to be made in specific circumstances on the application of, or with the consent of, an insurer, insurance manager or insurance intermediary

This will reflect the ability that the Authority already has to modify or except from the Financial Services Rule Book in specific licenceholder-related circumstances where it is appropriate to do so.

3.4.2 Amendment to the definition of manager in IA08 to broaden its application in a way that is consistent with the FSA08 concept of 'key person' and to provide flexibility

The amendment envisaged will add to the definition at section 29E of the IA08 an ability for an individual to be determined by the Authority to be a manager if it appears to the Authority that the individual has significant powers or responsibilities with respect to the insurance activity undertaken. This is important so as to focus on the substance of an individual's role, and to prevent a job's description or title from determining how it is classified.

3.4.3 Amendment of the IA08 to provide for breaches of certain matters to be addressed as (civil) supervisory issues as an alternative to them being criminal offences

Currently, breaches of certain sections in the IA08 are addressable only as criminal offences. This is not considered proportionate, and therefore the ability to address these breaches by regulatory action will be sought to ensure more appropriate outcomes and use of resources.

3.4.4 The addition of a table of matters in the IA08 that are appealable to the Financial Services Tribunal

This will provide clarity and consistency with the position under the FSA08.

3.5 Designated Businesses specific amendments

3.5.1 To add a requirement for Designated Businesses to be managed and controlled on the Isle of Man

Some businesses have registered under the DBROA15 despite having no presence on the Island apart from a registered office. This limits the effectiveness of the oversight regime, and gives rise to significant reputational risk to the Island. Therefore, building upon the Designated Businesses Registration Policy of October 2018, a requirement for Designated Businesses to be managed and controlled on the Island will remedy this issue.

3.5.2 To enable a civil penalty to be applicable where a Designated Business has failed to give notice of any change to the information required to be given to the Authority under s8 of the DBROA15

Currently, section 20(1) DBROA15 makes the lack of notification of these changes a criminal offence; however, it is considered disproportionate to seek prosecution in most cases where specified persons have changed. A civil penalty is considered more proportionate.

3.5.3 To provide a power for the Authority to direct that an individual is not to be appointed as a specified person where that person is not fit and proper

In the situation described in 3.5.3, the Authority would need to revoke the registration of the Designated Business as a whole. For single member businesses that is appropriate, however, for larger businesses it may be disproportionate to revoke the entire registration on the grounds of one person not being fit and proper. A power to permit the Authority to direct a Designated Business not to appoint a specified person is more

proportionate, and would be supplemented by the ability to make an appeal against the direction.

3.5.4 To provide a power for the Authority to warn an individual that their conduct may be prejudicial to their fitness and propriety

In the situation described in 3.5.3, the Authority would currently need to consider whether to revoke the registration of the Designated Business. However, it is more proportionate to have the power to issue a formal warning ahead of more serious action (should this be considered appropriate).

4 IMPACT ASSESSMENT

The amendments will provide for greater clarity and consistency between various Acts under which the Authority exercises functions. This is a positive development as consistency in legislation leads to consistency of application. More consistent legislation should also improve understanding, and in certain cases it can result in more efficient use of resources.

Other amendments, such as the ability to take regulatory action in certain cases as opposed to criminal action, will also result in better use of resource; and additionally, will provide for a more appropriate regulatory response to matters, which should benefit those subject to the regulation or oversight of the Authority.

The amendments planned will apply to businesses of all sizes, but enabling the Authority to take a more tailored and proportionate approach may be particularly useful to smaller firms.

5 QUESTIONS

Question 1

Do you have any comments relating to any of the matters that are intended to be the subject of amendment? If so, please provide specific comment.

Question 2

Are there any matters suitable for the draft Bill that you consider should be included in it that have not been highlighted in this Discussion Paper? If so, please provide details.

6 NEXT STEPS

Following closure of the discussion period, the Authority will review the responses received and publish a Feedback Statement document on the Authority's website and the Isle of Man Government's Consultation Hub².

A draft Bill will then be produced upon which a detailed consultation will take place.

² <https://consult.gov.im/>

APPENDIX A – LIST OF GROUPS AND BODIES TO WHICH THIS DISCUSSION PAPER HAS BEEN SENT

- Alliance of Isle of Man Compliance Professionals
- Association of Chartered Certificated Accountants (as oversight body)
- Association of Corporate Service Providers
- Chartered Institute for Securities and Investment
- Finance Isle of Man
- Financial Planners & Insurance Brokers Association
- Institute of Certified Bookkeepers (as oversight body)
- Institute of Chartered Accountants In England and Wales (as oversight body)
- Institute of Directors
- Institute of Financial Accountants (as oversight body)
- International Association of Bookkeepers (as oversight body)
- Isle of Man Wealth & Funds Association
- Isle of Man Association of Chartered Certified Accountants
- Isle of Man Association of Pension Scheme Providers
- Isle of Man Bankers Association
- Isle of Man Captives Association
- Isle of Man Chamber of Commerce
- Isle of Man Insurance Institute
- Isle of Man Law Society (as oversight body)
- Isle of Man Society of Chartered Accountants
- Isle of Man Wealth Management Forum
- London Institute of Banking and Finance
- Manx Insurance Association
- Society of Trust and Estate Practitioners