

Summary of Responses Received on the Consultation on the Financial Services (Appointment of a Manager) Order 2008

Three sets of comments were received during the consultation process. A summary of the responses is detailed below.

Some changes have been made to the draft Order following the consultation period. Most of these were as a result of the consultation comments and so are detailed in the response to the comment provided in the table.

In addition, some of the comments prompted the Commission to look at the powers in the Order from a different perspective. As a result of this, a new paragraph has been inserted to cover two possible situations.

The first situation is where the Commission intends to suspend or revoke a licence but there is still some regulated activity that will need to be carried out or the business will need to be transferred elsewhere before the company is wound up.

The second situation is where the Commission is satisfied that it is necessary to apply to the Court for the appointment of a manager for another reason, despite there being no evidence of inadequate management or breaches, and where no regulatory action has been taken. The reasons for this may include avoiding a loss of confidence in the licenceholder or protecting the interests of customers and creditors. In all cases it should be noted that the Commission is not the final arbiter of the decision – it simply makes an application to the Court. It is a decision of the Court having regard to all relevant circumstances as to whether or not to appoint a manager.

Reference	Comments	Response
Paragraphs 1, 3, 4, 5, 6 and 7 of the Schedule	There appears to be a much lower burden imposed on the Commission which states “Where it appears to the Commission...” than in the equivalent provisions within the Jersey legislation. A suggestion was made that this be changed in line with Jersey which states “Where the Commission is satisfied that there is sufficient evidence to show...” to ensure that any application to the Court is based on evidence and in order that procedural fairness is established.	Advice was taken on the use of this wording in legislation. It was indicated that both the “appears” and “is satisfied” tests are subjective, but that “satisfied” does suggest a greater degree of certainty about the matter. As a result of these comments paragraphs 1, 3, 4, 5, 6 and 7 have been amended in the draft Order.
Paragraph 1 of the Schedule	It was suggested that there may be circumstances where	It is not considered necessary to specify this point as if the

	<p>there is evidence that the relevant person has been inadequately managed but the problem has been resolved, for example directors have been replaced or satisfactory new procedures have been adopted; therefore, the words “and are likely to continue to be inadequately managed” should be inserted.</p> <p>It was felt that there was a danger in trying to define everything that would constitute inadequate management in case a situation arises that is not listed.</p>	<p>problem had been resolved by other means then the Commission would not seek to appoint a manager, and nor would the Court be likely to agree to this.</p> <p>It was agreed that this was a good point but the amendment suggested by the respondent did not achieve the desired outcome. Consequently, the words “including but not limited to” have been added to the paragraph.</p>
Paragraph 2 of the Schedule	<p>It was suggested that the wording of this paragraph was unnecessarily restrictive and it was proposed that the words “indicated that it wishes to” be deleted. This would provide a mechanism for the Commission to seek an Order where a person has abandoned their regulated business.</p> <p>It was felt that, under these circumstances, it might be more appropriate for the Commission to appoint a receiver rather than a manager so this paragraph should be removed.</p>	<p>It is agreed that this paragraph needed more work. However, the suggestions provided have not been accepted as there may be situations where a licenceholder is carrying on more than one regulated activity and wishes to only cease one of these. The paragraph has been reworded to remove references to winding up and liquidation as in these cases it would be more appropriate to appoint a receiver or liquidator. Paragraph 2 still covers the closure or transfer of the relevant business. A new paragraph 3 has been inserted to cover situations where the Commission has revoked or suspended a licence but there is still some business that needs to be dealt with before the company is wound up or transferred.</p>
Paragraph 3 of the Schedule	<p>The respondent also suggested that paragraph 3 has an unnecessarily wide scope. It</p>	<p>It was agreed that the words “or resolve” should be removed from the draft Order.</p>

	<p>was felt that a failure to resolve a complaint should not be included in the paragraph as licenceholders may not be able to resolve every complaint received.</p> <p>The examples of failures given appear to be further examples of inadequate management and so should be included in paragraph 1.</p>	<p>It is considered that persistent failure is not necessarily the same as inadequate management; therefore, this paragraph has been left as it is.</p>
Paragraph 5 of the Schedule	<p>The respondent was concerned that the wording of paragraph 5 might infer a new responsibility upon non-trustee licenceholders and may well have unintended implications for banks and others.</p> <p>Paragraph 5(b) was considered to be too subjective and a further example of inadequate management that could be considered an extension of 1(b).</p>	<p>The proposal for 5(a) has not been included as, on reflection, it is considered to be already covered in 1(c). The paragraph is not directed to trust business only: for example, a deposit taker may hold other people's assets in safe custody and investment businesses may hold client title documents. Additionally the licenceholder is responsible for its own assets and could fail to protect these.</p> <p>It was agreed that article 5(b) should be removed as the failure to protect the financial interests of a customer is subjective and suggests that these interests may need to be ascertained. In the event that a licenceholder is under any fiduciary duty in regard to its customer's interests this is already covered by 1(b). If, on the other hand, a licenceholder has given bad advice then that is covered by Rule Book breaches at 1(d).</p>
Paragraph 6	<p>It was considered that the wording of this paragraph should be amended so as to provide an opportunity for the person subject to a direction to comply with its provisions before an application to appoint a manager is made.</p>	<p>The wording has been amended as suggested.</p>

