

# Guidance Note: Integrity and Competence

Issued: 19 July 2018

## 1 Background

- 1.1 This guidance note is in response to comments made by the Royal Court in the judgment handed down in *Francis v JFSC* on 4 December 2017 **[2017] JRC203A** following his unsuccessful appeal against the decision of the Board of Commissioners.

## 2 Integrity

- 2.1 From a regulatory perspective, ensuring regulated entities and individuals conduct themselves with integrity is of fundamental importance to maintaining the Island's reputation as a finance centre.
- 2.2 Article 9<sup>i</sup> of the Financial Services (Jersey) Law 1998, as amended (FS(J)L) establishes threshold conditions that apply on an on-going basis – the fit and proper assessment – to registered persons, principal persons and key persons<sup>ii</sup>. This assessment process includes consideration of integrity, competence, financial standing, structure and organisation.
- 2.3 The JFSC's Policy Statement: Licensing Policy in respect of those activities that require registration under the FS(J)L includes the following:

### 5. Integrity

- 5.1 *To a very large extent, the integrity of an applicant, especially where an applicant is a small or medium sized organisation, is a reflection of the individuals employed by or associated with the applicant.*
- 5.2 *An applicant must be able to demonstrate that it intends to, and on an ongoing basis through compliance with the relevant Codes of Practice, will:*
- 5.2.1 *conduct its business with integrity;*
  - 5.2.2 *have due regard for the interests of its customers; and*
  - 5.2.3 *provide appropriate supervision and training to those employed by or associated with it.*
- 5.3 *In assessing the integrity of an applicant and those persons employed by or associated with it, it is the JFSC's policy to consider whether any of their past actions or conduct impact on their ability to meet the expected standards in respect of integrity. Further information in this area may be found in the application form*

*relevant to the proposed regulated activity of the applicant (see section 14 of this paper for links to the application forms).*

- 5.4 *The JFSC considers the provision of information that is both complete and accurate to be an indication that an applicant is acting with integrity. Failure of an applicant to complete any form or supply any information required in respect of an application in an honest manner, or the intentional omission of any relevant material, will be taken into account by the JFSC.*
- 2.4 Principle 1 under each of the Codes of Practice issued by the JFSC states that a registered person must conduct its business with integrity.
- 2.5 The JFSC's established approach to integrity is based on English legal authorities.
- › **Hoodless and Blackwell v FSA** (3 October 2003): the Financial Services and Markets Tribunal expressed the following view:  
*" 'integrity' connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest and dishonest by ordinary standards."*
  - › **Milan v Vulkelic v FSA** (13 March 2009): the complainant was found to be "not dishonest but lacked integrity" in turning a blind eye to the obvious. The Tribunal did not disagree with what was said about integrity in **Hoodless & Blackwell** but stated that did not take it as being a comprehensive test which is of general application beyond the facts of that case. They added:  
*"In an area of life giving rise to circumstances of great variety and complexity there may well be many other circumstances in which the FSA could fairly conclude that an applicant lacked integrity, a concept elusive to define in a vacuum but still readily recognisable by those with specialist knowledge and/or experience in a particular market."*
  - › **Atlantic Law LLP and another v FSA** (1 March 2010): the Tribunal considered "integrity" in the assessment of "fitness and propriety" by the Financial Conduct Authority and stated that it would be *"unwise to attempt a comprehensive definition of integrity."*
  - › **First Financial Advisors Ltd v FSA** (21 June 2012): the Upper Tribunal concluded:  
*"[e]ven though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity."*
- In that case the complainant's failure to appreciate or manage conflicts of interest was held to go to the question of a person's integrity and reputation and also competency and capability. The Tribunal did not accept that there was *"any distinction between a conflict of interest and a potential conflict of interest."*
- › **Karan v FSA** (20 December 2011): it was stated:  
*"we are nonetheless satisfied that the duty of integrity can be breached where someone else initiates the wrongdoing and where the person in question is put in a position of choosing to go along with it."*

- › **Newell-Austen v Solicitors Regulatory Authority** (3 March 2017); it was noted:
  - “1) Integrity connotes moral soundness, rectitude and steady adherence to an ethical code.
  - 2) Lack of integrity is capable of being identified as present or not by an informed tribunal by reference to the facts of a particular case.
  - 3) Lack of integrity and dishonesty are not synonymous. A person may lack integrity even though not established as being dishonest.”
  
- › **Wingate & Anor v The Solicitors Regulation Authority [2018] EWCA Civ 366 (07 March 2018)** the Court of Appeal, made the following observations:
  - 93. *“Honesty is a basic moral quality which is expected of all members of society. It involves being truthful about important matters and respecting the property rights of others. Telling lies about things that matter or committing fraud or stealing are generally regarded as dishonest conduct. These observations are self-evident and they fit with the authorities cited above. The legal concept of dishonesty is grounded upon the shared values of our multi-cultural society. Because dishonesty is grounded upon basic shared values, there is no undue difficulty in identifying what is or is not dishonest.*
  - 94. *The general law imposes criminal and/or civil liability for many, but not all, dishonest acts or omissions. As explained most recently in **Ivey**, the test for dishonesty is objective. Nevertheless, the defendant's state of mind as well as their conduct are relevant to determining whether they have acted dishonestly.*
  - 95. *Let me now turn to integrity. As a matter of common parlance and as a matter of law, integrity is a broader concept than honesty....*
  - 96. *Integrity is a more nebulous concept than honesty. Hence it is less easy to define, as a number of judges have noted.*
  - 97. *In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. See the judgment of Sir Brian Leveson P in **Williams** at [130]. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards.*
  - 100. *Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.*
  - 101. *The duty to act with integrity applies not only to what professional persons say, but also to what they do. It is possible to give many illustrations of what constitutes acting without integrity. For example, in the case of solicitors:*
    - i) *A sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules (**Eneana**);*
    - ii) *Recklessly, but not dishonestly, allowing a court to be misled (**Brett**);*
    - iii) *Subordinating the interests of the clients to the solicitors' own financial interests (**Chan**);*
    - iv) *Making improper payments out of the client account (**Scott**);*
    - v) *Allowing the firm to become involved in conveyancing transactions which bear the hallmarks [of] mortgage fraud (**Newell-Austin**);*
    - vi) *Making false representations on behalf of the client (**Williams**).*

102. *Obviously, neither courts nor professional tribunals must set unrealistically high standards, as was observed during argument. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public....*
103. *A jury in a criminal trial is drawn from the wider community and is well able to identify what constitutes dishonesty. A professional disciplinary tribunal has specialist knowledge of the profession to which the respondent belongs and of the ethical standards of that profession. Accordingly such a body is well placed to identify want of integrity. The decisions of such a body must be respected, unless it has erred in law."*

### 3 Conclusion

- 3.1 While the JFSC has always had regard to the developing English authorities as set out above, the JFSC will in future also be guided by the conclusion reached by the Royal Court in Francis [2017]JRC203A and will have particularly in mind the following passage from that judgment:

*"343. We did not hear full argument on this topic but for the purposes of this appeal, we proceed on the basis that dishonesty and lack of integrity are not synonyms and that the observations of Holman J in **Wingate** and of Morris J in **Newell-Austin** correctly describe the position. We found particularly helpful the quotation in the note to the Board referred to above, namely that 'even though a person might not have been dishonest, if they lack either an ethical compass or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity.'"*

- 3.2 In summary, the JFSC considers integrity and honesty are not the same, consequently a lack of integrity is not synonymous with dishonesty. Whether an individual has acted with, or without integrity will be assessed on the particular facts of each case as established to the required satisfaction of the Board of Commissioners.
- 3.3 Non-exhaustive examples of behaviours which may indicate a lack of integrity:
- 3.3.1 Turning a blind eye to matters that should raise obvious concern or cause enquiry.
  - 3.3.2 Failing to appreciate or manage conflicts of interest.
  - 3.3.3 Preferring personal interests above those of the customer.
  - 3.3.4 Producing misleading or back-dated documents.
  - 3.3.5 Making statements to others on which they will or may rely with reckless disregard as to whether they are truthful or with wilful disregard to information contradicting the truth of such statements.
  - 3.3.6 Failing to deal with the JFSC in an open, transparent and co-operative manner.
  - 3.3.7 Failing to comply with the law, regulatory requirements and professional standards expected.

### 4 Competence

- 4.1 In addition to integrity, competence is another of the threshold conditions established under Article 9 of the FS(J)L which apply on an on-going basis to registered persons, principal persons and key persons.

- 4.2 Section 6 of the JFSC's Policy Statement: Licensing Policy in respect of those activities that require registration under the FS(J)L states:

**6. Competence**

- 6.1 *Competency, with respect to those employed by or associated with an applicant may be evidenced by the attainment of relevant qualifications or by having sufficient relevant experience for the function they are charged with performing.*
- 6.2 *An applicant must be able to demonstrate that it is, and will have procedures that will assist it to remain, competent to undertake its regulated activities, including the ability to comply with the aspects of the regulatory framework relevant to the proposed regulated activities of the applicant.*
- 6.3 *An applicant must be able to demonstrate appropriate supervision and training of both entities and individuals charged with performing particular functions.*
- 6.4 *The JFSC has specific interest in the collective competence of those that govern the entity, for example, the Board of the applicant; a Board (or its equivalent) should comprise individuals with a wide range of relevant skills and competence.*
- 6.5 *In assessing the competence of an applicant, the JFSC will consider the particular regulated activities it proposes to undertake, in particular the volume and type of business and the jurisdictions in which it will be offering its services.*
- 6.6 *Further information in respect of competency is provided in the relevant Codes of Practice.*
- 4.3 By way of example section 3.3 of the Code of Practice for Trust Company Business includes the following reference to competence:

**3.3 Integrity and competence**

- 3.3.1 *A registered person must:*
- 3.3.1.1 *Ensure its directors, partners, senior managers and all other employees are fit and proper for their roles.*
- 3.3.1.2 *Assess and monitor the working practices, competence and probity of its directors, partners, senior managers and other employees.*
- 3.3.1.3 *Obtain and retain documentary evidence, which is used by the registered person to assess, both initially and on an on-going basis, the competence of its employees. Evidence may include, but not be limited to:*
- 3.3.1.3.1 *employer references; and*
- 3.3.1.3.2 *with respect to trust company business employees, copies of documentary evidence of qualifications held, as appropriate.*
- 3.3.1.4 *Ensure that its trust company business employees collectively have a balance of qualifications necessary to fulfil their technical functions and suitable skills and experience to fulfil their non-technical functions.*
- 3.3.1.5 *Ensure the following competency levels are met, at all times:*

- 3.3.1.5.1 *75% of the Category A trust company business employees must be suitably qualified;*
  - 3.3.1.5.2 *75% of Category A and B trust company business employees cumulatively must be suitably qualified; and*
- 3.3.1.6 *Notify the JFSC in writing if the percentage of suitably qualified Category C trust company business employees that are either qualified or in the process of studying towards a qualification contained in the TCB professional qualifications guidance note falls below 50%.*
- 3.3.2 *Where complex transactions are undertaken or complex structures are administered (either by the nature of the entity or the jurisdiction or the proper law or form of that entity), the registered person must consider requiring more specialised qualifications, experience and other competencies such that they can demonstrate that the trust company business employees are competent and adequately supervised.*
- 3.3.3 *Where a registered person wishes to request a variance to the professional qualifications requirements to recognise an alternative qualification, such a request must:*
  - 3.3.3.1 *be made in writing;*
  - 3.3.3.2 *include a description of the role of the individual;*
  - 3.3.3.3 *include an explanation as to why the registered person considers the alternative qualification to be appropriate for that trust company business employee; and*
  - 3.3.3.4 *include confirmation that a copy of the syllabus studied or equivalent is available to the JFSC on request.*
- 3.3.4 *Where a Category A, B or C trust company business employee is awarded a qualification other than by way of direct examination a registered person must notify the JFSC in writing.*

## 5 Conclusion

- 5.1 It is self-evident from the above, ensuring registered, principal and key persons demonstrate competence is also a key aim of the JFSC.
- 5.2 In summary, the JFSC considers competence means someone possessing the required level of skill, knowledge and qualifications to discharge their duties appropriately. Determining whether an individual has, or lacks, competence is assessed on the particular facts of each case as established to the required satisfaction of the Board of Commissioners. Such assessment would generally consider such factors as the experience, seniority and length of service of the individual.
- 5.3 Non-exhaustive examples of behaviours which may indicate a lack of competence:
  - 5.3.1 Failing to document concerns, report them to the board members and the JFSC.
  - 5.3.2 Authorising a transaction without fully understanding it.

- 5.3.3 Failing to act when presented with unusual situations/red flags.
- 5.3.4 Acting in a capacity for which the person lacks appropriate skills.
- 5.3.5 Failing to adhere to professional standards or codes of conduct.
- 5.3.6 Failing to abide by laws, orders and other regulatory requirements.
- 5.3.7 Failing to seek independent advice/guidance.

---

<sup>i</sup> Similar provisions to Article 9 of the *FS(J)L* are contained within the other regulatory laws, The Banking Business (Jersey) Law 1991, as amended.  
The Collective Investment Funds (Jersey) Law 1988, as amended.  
The Insurance Business (Jersey) Law 1996, as amended.

<sup>ii</sup> *Registered person, principal person and key person* are defined in Article 1 of the *FS(J)L* and carry the same meaning in the Code.