

Island of



Guernsey

## Ordinance of the States

**XVII**  
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## **The Protected Cell Companies (Amendment) Ordinance, 2006**

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# **The Protected Cell Companies (Amendment)**

## **Ordinance, 2006**

**THE STATES**, in pursuance of their Resolutions of the 28<sup>th</sup> September, 2005<sup>a</sup> and the 26<sup>th</sup> April, 2006, and in exercise of the powers conferred on them by section 1 of the Companies (Enabling Provisions) (Guernsey) Law, 1996<sup>b</sup> and all other powers enabling them in that behalf, hereby order:-

### **Non-cellular assets not to be used to satisfy cellular liabilities.**

1. The Schedule (which amends the Protected Cell Companies Ordinance, 1997<sup>c</sup> ("**the 1997 Ordinance**") to provide that non-cellular assets shall not, subject to any recourse agreement, be used to satisfy cellular liabilities) shall have effect.

### **Further provision on cell shares.**

2. In section 5 of the 1997 Ordinance (cell shares and share capital) after subsection (5) insert the following subsection -

"(6) For the avoidance of doubt -

- (a) cell shares may be shares with a par value or shares of no par value within the meaning of the Companies (Shares of No Par Value)

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<sup>a</sup> Article XIII of Billet d'État No. XIV of 2005.

<sup>b</sup> Order in Council No. XII of 1996.

<sup>c</sup> No. V of 1997, amended by No. XV of 1998 and XXI of 2005.

Ordinance, 2002<sup>d</sup>),

- (b) a protected cell company may purchase cell shares of its own cells in accordance with the Companies (Purchase of Own Shares) Ordinance, 1998<sup>e</sup>, and
- (c) a protected cell company may give financial assistance for the acquisition of its cell shares in accordance with the provisions of the Companies (Financial Assistance for Acquisition of Own Shares) Ordinance, 1998<sup>f</sup>."

**Companies which may be protected cell companies.**

3. (1) In section 7(1) of the 1997 Ordinance (companies which can, with the consent of the Commission, be protected cell companies) after paragraph (b) insert the following paragraph -

"(ba) which is administered and whose affairs are administered (or which will and whose affairs will, when incorporated, be administered) by a licensed person with a place of business in Guernsey (provided that the company is not itself a licensed person) and for the purposes of this paragraph a licensed person means -

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<sup>d</sup> No. VI of 2002.

<sup>e</sup> No. VII of 1998.

<sup>f</sup> No. V of 1998.

- (i) a person who carries on a controlled investment business within the meaning of the Protection of Investors (Bailiwick of Guernsey) Law, 1987<sup>g</sup> and who holds a licence under section 4 of that Law,
- (ii) a person who is a licensed institution within the meaning of the Banking Supervision (Bailiwick of Guernsey) Law, 1994<sup>h</sup>,
- (iii) a person who is a licensee within the meaning of the Insurance Business (Bailiwick of Guernsey) Law, 2002<sup>i</sup> or the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey)

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<sup>g</sup> Ordres en Conseil Vol. XXX, p. 281; amended by Vol. XXX, p. 243; Vol. XXXI, p. 278; Vol. XXXII, p. 324; No. XIII of 1994; No. XII of 1995; No. II of 1997; No. XVII of 2002; and by No's XV and XXXII of 2003. Also amended by Recueil d'Ordonnances Tome XXIV, p. 324; Tome XXVI, p. 333; Ordinances X and XX of 1998; and the Machinery of Government (Transfer of Functions) (Guernsey) Ordinance, 2003.

<sup>h</sup> No. XIII of 1994; amended by Nos. XVII and XXI of 2002; No. XVI of 2003; and the Machinery of Government (Transfer of Functions) (Guernsey) Ordinance, 2003.

<sup>i</sup> No. XXI of 2002; amended by the Machinery of Government (Transfer of Functions) (Guernsey) Ordinance, 2003.

Law, 2002<sup>j</sup>, or

- (iv) a person who holds a full fiduciary licence within the meaning of the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000<sup>k</sup>, or".

(2) The Protected Cell Companies (Prescribed Company) Regulations, 2005<sup>l</sup> (which prescribe types of companies which can be protected cell companies) are repealed.

**Receivership orders subject to secured interests.**

4. For section 17(5) of the 1997 Ordinance (no proceedings may be taken and no security enforced during operation of receivership order) substitute the following subsections -

"(5) When an application has been made for, and during the period of operation of a receivership order, no proceedings may be commenced or continued against the protected cell company in relation to the cell in respect of which the receivership order was made except with the consent of the receiver or the leave of the Court and subject (where the Court gives leave) to such terms and conditions as the Court may impose (but, for the

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<sup>j</sup> No. XXII of 2002; amended by the Machinery of Government (Transfer of Functions) (Guernsey) Ordinance, 2003.

<sup>k</sup> Order in Council No. I of 2001; amended by No. XIV of 2003; and by the Machinery of Government (Transfer of Functions) (Guernsey) Ordinance, 2003.

<sup>l</sup> GSI No. 31 of 2005.

avoidance of doubt and without limitation, rights of set-off and secured interests, including security interests (within the meaning of the Security Interests (Guernsey) Law, 1993)<sup>m</sup> and rights of enforcement thereof, are unaffected by the provisions of this subsection).

(5A) In subsection (5), "security" means any mortgage, charge, hypothèque, lien or other security, and "secured interest" shall be read accordingly."

#### **Administration orders subject to secured interests.**

5. For section 22(6) of the 1997 Ordinance (no proceedings may be taken and no security enforced during operation of administration order) substitute the following subsections -

"(6) When an application has been made for, and during the period of operation of an administration order in respect of a protected cell company or a cell thereof, no proceedings may be commenced or continued against the protected cell company in relation to the company or (as the case may be) the cell except with the consent of the administrator or the leave of the Court and subject (where the Court gives leave) to such terms and conditions as the Court may impose (but, for the avoidance of doubt and without limitation, rights of set-off and secured interests, including security interests (within the meaning of the Security Interests (Guernsey) Law, 1993) and rights of enforcement thereof, are unaffected by the provisions of this subsection).

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<sup>m</sup> Order in Council No. III of 1993.

(6A) In subsection (6), "security" means any mortgage, charge, hypothèque, lien or other security, and "secured interest" shall be read accordingly."

**Criminal penalties.**

6. After section 25 of the 1997 Ordinance (offences) insert the following section -

**"Criminal penalties.**

25A. (1) Where a protected cell company is liable to any criminal penalty, whether under this Ordinance or otherwise, due to the act or default of an officer acting in relation to a cell thereof, the penalty -

- (a) may only be met by the company from the cellular assets attributable to the cell, and
- (b) shall not be enforceable in any way against any other assets of the company, whether cellular or non-cellular.

(2) Where a protected cell company is liable to any criminal penalty, whether under this Ordinance or otherwise, due to the act or default of an officer acting in relation to the core, the penalty -

- (a) may only be met by the company from non-cellular assets, and
- (b) shall not be enforceable in any way against any cellular assets."

**Interpretation.**

7. (1) In this Ordinance, "**the 1997 Ordinance**" means the Protected Cell Companies Ordinance, 1997.

(2) References in this Ordinance to an enactment are references thereto as from time to time amended, re-enacted (with or without modification), extended or applied.

**Citation.**

8. This Ordinance may be cited as the Protected Cell Companies (Amendment) Ordinance, 2006.

**Commencement.**

9. This Ordinance shall come into force on the 1<sup>st</sup> day of May, 2006.

**Savings.**

10. Sections 1, 4 and 5 shall not have any effect upon transactions or securities entered into or liabilities incurred before their coming into force.

SCHEDULE  
NON-CELLULAR ASSETS AND CELLULAR LIABILITIES

1. The Protected Cell Companies Ordinance, 1997 is amended as follows.

2. In section 2 (purpose of creation of cells) for the words "the purpose of segregating and protecting cellular assets" substitute the words "the purpose of segregating and protecting cellular and non-cellular assets".

3. After section 2 insert the following section -

**"Demarcation of the core.**

2A. The core is the protected cell company excluding its cells."

4. In section 3(6) (non-cellular assets) for the words "assets of the company which are not cellular assets" substitute the words "assets of the core".

5. After section 3 insert the following section -

**"Recourse agreements.**

3A. (1) A recourse agreement is a written agreement between a protected cell company and a third party which provides that, pursuant to an arrangement effected by the protected cell company (within the meaning of section 14A), protected assets (within the meaning of section 4) may, notwithstanding the provisions of this Ordinance, be subject to a liability owed to that third party.

(2) Before entering into a recourse agreement, each

director of the protected cell company who authorises it must make a declaration that he believes, on reasonable grounds -

- (a) that no creditor of the company will be unfairly prejudiced by the recourse agreement, and
- (b) that (unless the memorandum or articles provide to the contrary) -
  - (i) where the protected assets are assets attributable to a cell, the members of that cell, or
  - (ii) where the protected assets are non-cellular assets, the members of the company,have passed a resolution approving the recourse agreement.

(3) A director who makes a declaration under subsection (2) without having the grounds to do so is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the uniform scale.

(4) Any member or creditor of the protected cell company or cell thereof may, subject to such reasonable restrictions as the protected cell company may impose, inspect or request a copy of the directors' declaration.

(5) If a company fails to allow an inspection or refuses a

request for a copy under subsection (4), it is guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the uniform scale."

**6.** In section 4 (position of creditors) -

- (a) for subsections (1) and (2) substitute the following subsections -

"(1) Subject to the terms of any recourse agreement, the rights of creditors of a protected cell company shall correspond with the liabilities provided for in sections 10 and 10AA.

(2) Subject to the terms of any recourse agreement, no such creditor shall have any rights other than the rights referred to in this section and in sections 4A, 4B, 10 and 10AA."

- (b) in subsection (3) for the words "cellular assets attributable to any cell of the company in respect of a liability not attributable to that cell", in each place where they occur, substitute the words "protected assets",
- (c) in subsection (5), at the end, insert the following words "or (as the case may be) the core",
- (d) for subsection (6) substitute the following subsection -

"(6) In the event of any protected assets being taken in execution in respect of a liability to which they are not attributable, and in so far as such assets or compensation in respect thereof cannot otherwise be restored to the cell affected or (as the case may be) the core, the company shall -

(a) cause or procure its auditor, acting as expert and not as arbitrator, to certify the value of the assets lost to the cell affected or (as the case may be) the core, and

(b) transfer or pay, from the cellular or non-cellular assets to which the liability was attributable, to the cell affected or (as the case may be) the core, assets or sums sufficient to restore to the cell affected or (as the case may be) the core, the value of the assets lost.",

(e) subsection (7) is repealed,

(f) after subsection (8) insert the following subsection -

"(9) In this Ordinance "**protected assets**" means -

- (a) any cellular assets attributable to any cell of the protected cell company in respect of a liability not attributable to that cell, and
- (b) any non-cellular assets in respect of a liability attributable to a cell."

7. In section 4A (recourse to cellular assets by creditors) after the words "sections 4 and 10," insert the words "and subject to the terms of any recourse agreement,".

8. After section 4A insert the following section -

**"Recourse to non-cellular assets by creditors.**

**4B.** Without prejudice to the provisions of sections 4 and 10AA, and subject to the terms of any recourse agreement, non-cellular assets of a protected cell company -

- (a) shall only be available to the creditors of the company who are creditors in respect of the core and who shall thereby be entitled, in conformity with the provisions of this Ordinance, to have recourse to the non-cellular assets,
- (b) shall be absolutely protected from the creditors of the company who are not creditors in respect

of the core and who accordingly shall not be entitled to have recourse to the non-cellular assets."

9. In section 5A(11)(b) (reduction of cell share capital, assets insufficient to meet liabilities) for the words "(when account is taken of the company's non-cellular assets, unless there are no creditors in respect of that cell entitled to have recourse to the company's non-cellular assets)" substitute the words "(and, where the company has entered into a recourse agreement, the assets liable under that agreement)".

10. In section 10 (liability of cellular assets) -

(a) for subsection (1) substitute the following subsection -

"(1) Subject to the provisions of subsection (2), and to the terms of any recourse agreement, where any liability arises which is attributable to a particular cell of a protected cell company -

(a) the cellular assets attributable to that cell shall be liable,

(b) the liability shall not be a liability of any protected assets."

(b) for subsection (2) substitute the following subsections -

"(2) In the case of loss or damage which is

suffered by a particular cell of a protected cell company and which is caused by fraud perpetrated by or upon the core or another cell, the loss or damage shall be the liability solely of the company's non-cellular assets or (as the case may be) that other cell's assets, without prejudice to any liability of any person other than the company.",

- (c) in subsection (4)(a) for the proviso substitute the following proviso -

"Provided that the provisions of this paragraph shall not apply in any situation where there is a recourse agreement, or where any of the liabilities of the company's cellular assets arises from fraud such as is referred to in subsection (2).",

- (d) subsection (4)(b) is repealed.

11. After section 10 insert the following section -

**Liability of non-cellular assets.**

**10AA.** (1) Subject to the provisions of subsection (2), and to the terms of any recourse agreement, where any liability arises which is attributable to the core of a protected cell company -

- (a) the non-cellular assets shall be liable,
- (b) the liability shall not be a liability of any protected assets.

(2) In the case of loss or damage which is suffered by the core of a protected cell company and which is caused by fraud perpetrated by or upon a cell, the loss or damage shall be the liability solely of the cellular assets of that cell, without prejudice to any liability of any person other than the company.

(3) This section shall have extra-territorial effect."

**12.** Section 14A(8) (court order following intra-cell arrangements, non-cellular assets to make up shortfall) is repealed.

**13.** In section 15 -

(a) in subsection (1)(a) (making of receivership order, assets insufficient to meet liabilities) for the words "(when account is taken of the company's non-cellular assets, unless there are no creditors in respect of that cell entitled to have recourse to the company's non-cellular assets)" substitute the words "(and, where the company has entered into a recourse agreement, the assets liable under that agreement)",

(b) in subsection (3)(b) (function of receiver) after the words "the distribution of the cellular assets attributable to the cell" insert the words "(and, where the company has entered into a recourse agreement, the assets liable under that agreement)".

**14.** For section 17(6)(b) (receiver of cell deemed a director of company

in respect of non-cellular assets) substitute the following paragraph -

"(b) where the company has entered into a recourse agreement, the receiver of the cell shall be deemed a director of the protected cell company in respect of the assets liable under that agreement."

**15.** Section 19(b) (receiver of a cell remunerated from non-cellular assets) and the word "and" immediately before it are repealed.

**16.** In section 20 -

(a) in subsection (1)(a) (making of administration order, assets insufficient to meet liabilities) for the words "(when account is taken of the company's non-cellular assets, unless there are no creditors in respect of that cell entitled to have recourse to the company's non-cellular assets)" substitute the words "(and, where the company has entered into a recourse agreement, the assets liable under that agreement)",

(b) for subsection (3) (function of administrator) substitute the following subsection -

"(3) An administration order is an order directing that, during the period for which the order is in force -

(a) the business and assets of or

attributable to the cell,

(b) where the company has entered into a recourse agreement, the assets liable under that agreement, or (as the case may be),

(c) the business and assets of the company,

shall be managed by a person (an "**administrator**") appointed for the purpose by the Court.",

(c) for subsection (4)(b) (purposes for which administration order may be made) substitute the following paragraph -

"(b) the more advantageous realisation of -

(i) the business and assets of or attributable to the cell,

(ii) where the company has entered into a recourse agreement, the assets liable under that agreement, or (as the case may be),

(iii) the business and assets of the

company,

than may be achieved by a receivership of the cell or (as the case may be) by the liquidation of the company."

**17.** For section 22(7)(a)(ii) (administrator of a cell deemed a director of company in respect of non-cellular assets) substitute the following subparagraph -

"(ii) where the company has entered into a recourse agreement, the administrator of the cell shall be deemed a director of the protected cell company in respect of the assets liable under that agreement,".

**18.** Section 24(a)(ii) (administrator of a cell remunerated from non-cellular assets) and the word "and" immediately before it are repealed.

**19.** In section 27(1) (interpretation) -

- (a) in the definition of "cell" for the words "the purpose of segregating and protecting cellular assets" substitute the words "the purpose of segregating and protecting cellular and non-cellular assets",
- (b) insert the following definitions in the appropriate place in alphabetical order -

""**core**"" means the protected cell company excluding its cells,"

""**protected assets**"" means -

- (a) any cellular assets attributable to any cell of a protected cell company in respect of a liability not attributable to that cell, and
- (b) any non-cellular assets in respect of a liability attributable to a cell,"

""**recourse agreement**"" means a written agreement between a protected cell company and a third party which provides that, pursuant to an arrangement effected by the protected cell company (within the meaning of section 14A), protected assets may, notwithstanding the provisions of this Ordinance, be subject to a liability owed to that third party,".