

mourant

FinReg Update

Guernsey – Q2 2020



Quick Fire Updates

1. COVID-19: Economic Substance

Current restrictions on travel and social distancing as a result of COVID-19 pose additional challenges for companies which are in-scope of economic substance, in particular their ability to hold quorate board meetings in Guernsey and to demonstrate that their core income generating activities are in Guernsey.

Guidance issued by Guernsey's International Business Association (the **Guidance**) indicates that Guernsey's Revenue Service would take a pragmatic approach, such that companies which have had to adjust their normal operating practices to compensate for the outbreak (to the extent that they are required to mitigate the threats from the outbreak), will not be treated as having failed the economic substance test.

In-scope companies are however advised to 'maintain and retain relevant records that show what their policy was in respect of restrictions on travel for the company officers and the period of time for which that policy was in place' and to consider appointing local alternate directors who can attend meetings in Guernsey to address any short-term practical difficulties arising (subject to regulatory consent).

View the Guidance [here](#).

2. COVID-19: Insolvency

Consideration is being given by the Guernsey government to potential temporary changes to Guernsey's insolvency laws, in particular regarding wrongful trading, though there are no clear proposals to date.

Guernsey's wrongful trading provisions are somewhat more relaxed than the UK equivalent. Once a director concludes (or ought to have concluded) that there was no reasonable prospect of the company avoiding insolvency winding up, the director has a duty to take every step to minimise losses to creditors 'he ought reasonably have taken'.

The Guernsey test introduces a reasonableness qualification on the every step test not expressed in the UK statute.

3. COVID-19: Financial stability; directors' duties and financial returns

The Guernsey Financial Services Commission (the **GFSC**) has announced that it is postponing all routine supervisory visits in order to allow firms to focus on supporting their customers and staff.

Firms are expected to manage their financial and operational resilience, including actively managing their liquidity.

Directors of licensees are specifically reminded of financial resources requirements, both capital and liquidity, and are expected to be acting appropriately before making decisions to issue dividends, upstream excess capital or liquidity, make intercompany loans or any other decision that materially financially weakens the local business.

The submission of audited financial returns with the GFSC has been postponed to the end of October 2020 and the deadline for

submission of unaudited financial returns has been extended by one month to the original deadline.

View the GFSC announcements [here](#), [here](#) and [here](#).

4. COVID-19: ID verification via video conference

The GFSC has provided welcome guidance on how businesses can verify the identity of individuals and certify identification documents by video conference, given that it is not currently possible to do so in person.

The video conference must enable simultaneous two-way visual and verbal contact and be of sufficient quality to enable the individual's face and (original) identity document to be clearly seen. Checks on the authenticity of the identity documents should also be made during the call.

The date and time of the video conference, the individual's address, how the identity verification was achieved and by whom, should all be recorded and an electronic copy of the identification document must also be retained.

As with any method used to verify an individual's identity, the approach must be risk based and assessments of the business relationship, and the validity and veracity of the identification data used, should continue to be made throughout.

View the GFSC announcement [here](#).

5. COVID-19: the Handbook

The GFSC has published updated operational guidance and amendments in relation to deadlines and timeframes in the Handbook on Countering Financial Crime and Terrorist Financing (the **Handbook**) to reflect current restrictions imposed because of COVID-19.

The changes include a four-month extension to the deadline for Board approval of the business risk assessment, and revised policies and procedures to 30 September 2020.

View the GFSC announcement [here](#).

6. COVID-19: Data Protection

The Office of the Data Protection Authority (the **ODPA**) has published a helpful Q&A page to address particular issues arising out of the COVID-19 lockdown.

The ODPA has provided tips on how personal data can be better protected when working from home and suggests additional steps which can be taken to mitigate any increased risk of data breach or misuse, for example undertaking a data protection impact assessment, ensuring all employees are aware of and can implement the organisation's existing data protection policies, and ensuring that all network connections used by employees and clients are secure and up to date.

View the ODPA Q&As [here](#).

7. COVID-19: Loans and financial support

The States of Guernsey has agreed to underwrite 80 per cent of any qualifying loan made by participating banks to any trading business with less than GBP 10 million turnover.

Businesses regulated by the GFSC are excluded.

8. Revision of laws

Legislation amending a number of Guernsey's supervisory and regulatory laws has been published and, while a date is yet to be set, is expected to go before the States for approval in July (with a live date likely to be sometime in the following 12 months).

Guernsey's financial services industry is governed by laws that were implemented as and when the need arose. While each law has generally been effective in enabling supervision of the activities it covers (Investments / Banking / Fiduciary / Insurance), the differences within each of the laws in relation to supervisory practices and procedures have resulted in confusion and inconsistencies in approach. The key aim of the new legislation is to ensure that the Bailiwick's regulatory regime is as user-friendly as possible, while still complying with the relevant international standards.

View the legislation [here](#).

9. Open consultation on the Handbook

A consultation on proposals to amend the Handbook to reflect Guernsey's National Risk Assessment ([here](#)) is now open.

The proposed amendments, amongst others, aim to provide additional guidance to help firms in identifying high-risk countries and territories for AML and CFT obligations.

The consultation, which closes on **22 May 2020**, is available [here](#).

10. GFSC Enforcement

The GFSC has issued two recent public statements.

The first concerns a local licensee, and its directors, who failed to ensure compliance with regulatory requirements and the minimum criteria for licensing under both the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 and the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (the **POI Law**),

The other concerns the failure of a local licensee, and two individuals, to fulfil the minimum criteria under the POI Law and the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002.

View the GFSC's public statements [here](#) and [here](#).

11. Mandatory Disclosure Rules

Regulations have been made to implement the OECD's (2018) Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures (**MDR**) into Guernsey's domestic law.

This follows on from the States of Guernsey's commitment to introduce legislation for MDR by 31 December 2019, the timetable set for EU countries.

MDR is not endorsed as an international standard but is considered by the OECD as 'best practice' based on the Base Erosion and Profit Sharing Initiative (**BEPS**). It is intended to be a further preventative control to address the concern that arrangements and schemes still exist which seek to circumvent Common Reporting Standard (**CRS**) reporting.

MDR and these Regulations focus on the use of CRS avoidance arrangements and opaque offshore structures as a means of avoiding the reporting obligations of the CRS. They require intermediaries in respect of such arrangements or structures to disclose them to the Director of Guernsey's Revenue Service if they make the arrangement or structure available for implementation, or provide relevant services in respect of the arrangement or structure, through an office or branch located in Guernsey; or are resident or have their place of management in Guernsey; or if they are incorporated in, or established under the laws of, Guernsey.

The Regulations were made on 11 March 2020 but are not yet in force.

12. Preferred Debts and BDCS

Proposed amendments to the Preferred Debts (Guernsey) Law, 1983 (**PD Law**) have been published and are likely to go before the States on 20 May.

Essentially, the amendments will give the Guernsey Banking Deposit Compensation Board priority in the winding up of a defaulting bank over all other preferred debts where it has exercised its right of subrogation under the Banking Deposit Compensation Scheme (Bailiwick of Guernsey) Ordinance, 2008 (**BDCS**) in respect of a 'qualifying deposit' and paid the total capped amount as compensation under the BDCS.

View the Policy Letter [here](#).

There are also proposals to amend the BDCS Ordinance to provide for negative interest rates; to increase the existing aggregate payment cap from GBP 1m to GBP 2m in any calendar year and remove the 3 years profits cap. The proposals would also effect changes to the payment timescales for compensation levies by participant banks and clarify that each participant bank's duty to co-operate includes the provision of personal data and requires participant banks to provide data promptly to the Board.

View the Ordinance [here](#).

13. Beneficial Ownership Framework

Various amendments are proposed to the Beneficial Ownership of Legal Persons (Guernsey) Law, 2017, including:

- to clarify, for consistency purposes, that the Registrar of Beneficial Ownership's (the **Registrar**) administrative enforcement powers do **not** apply to businesses licensed by the GFSC

- to introduce a requirement that the Registrar consider specific factors before imposing a disqualification order, ie the seriousness of the failure, whether it was inadvertent, and the potential financial consequences of imposing the penalty (which are in line with the factors currently applicable to imposing a financial penalty or making a public statement)
- to specify the particulars that must be recorded in respect of corporate beneficial owners
- to clarify that the Registrar's powers to enforce compliance with the requirements relevant to beneficial ownership extend to the requirements relating to nominee relationships
- to widen the Registrar's information gathering powers to include matters relating to risk and to extend the application of those powers to third parties such as liquidators of a legal person
- to permit the Director of the Revenue Service to inspect the beneficial ownership register.

View the Policy Letter [here](#).

14. Use of offshore structures

A recent English case has confirmed that the use of offshore structures does not, of itself, constitute a ground for believing that such structures were intended to be/being used for wrongful purposes and that there had to be some additional evidential basis for such a belief.

View our Update [here](#).

15. LIBOR TRANSITION

Despite the challenges created by COVID-19, there continues to be progress on the sterling LIBOR transition (**London Interbank Offered Rate**), which is to be fully retired by the end of 2021.

LIBOR is an interest rate based on submissions provided by a panel of 20 banks, which is intended to reflect the interest rate at which banks could borrow money on unsecured terms in wholesale markets.

The continued reliance of financial markets on LIBOR is considered by the FCA and the Bank of England's Financial Policy Committee to pose a risk to financial stability and as such, lenders are expected to make alternative products available, such as SONIA, before the deadline.

16. Data Protection

28 personal data protection breaches were reported to the ODPa in the first two months of 2020, representing the lowest figure in a year, with a further 30 for the two months leading up to the end of April. In each case, the majority arose from accidental disclosure of personal data.

View the full figures [here](#).

In other news, the ODPa has issued a public reprimand to the States Policy & Resources Committee (**P&R**) and more recently, the Channel Islands Financial Ombudsman (**CIFO**), for breach of the Data Protection (Bailiwick of Guernsey) Law, 2017. No fine has yet been levied by the ODPa for any such breach.

17. MO FINREG FORUM

If you would like to participate in our FinReg Forum which provides quarterly updates on similar matters for each of Guernsey, Jersey (where the forum is hosted) and Isle of Man (provided by Cains) please let us know.

Contacts



Abel Lyall
Partner, Mourant Ozannes
Litigation
+44 1481 739 364
abel.lyall@mourant.com



Christopher Edwards
Partner, Mourant Ozannes
Litigation
+44 1481 739 320
christopher.edwards@mourant.com



Darren Bacon
Partner, Mourant Ozannes
Corporate
+44 1481 731 503
darren.bacon@mourant.com



Frances Watson
Partner, Mourant Ozannes
Corporate
+44 1481 739 331
frances.watson@mourant.com



Gordon Dawes
Partner, Mourant Ozannes
Litigation
+44 1481 731 479
gordon.dawes@mourant.com



Helen Wyatt
Partner, Mourant Ozannes
Corporate
+44 1481 731 408
helen.wyatt@mourant.com



John Lewis
Partner, Mourant Ozannes
Corporate
+44 1481 731 505
john.lewis@mourant.com