

Guernsey legal and regulatory update

An overview of Guernsey legislative and regulatory developments
October 2018 to December 2018 inclusive

1 Substance requirements for Guernsey tax resident companies

The Income Tax (Substance Requirements) (Guernsey) (Amendment) Ordinance, 2018 (the **Amendment Ordinance**) has been passed and effective from 1 December 2018.

The purpose of the Amendment Ordinance is to address the concerns of the EU Code of Conduct Group for Business Taxation that certain Guernsey tax resident companies may be used to artificially attract profits that are not commensurate with economic activities and substantial economic presence in Guernsey. Similar changes in Jersey and the Isle of Man are being made to their local laws to address the EU's concerns in those jurisdictions.

The Amendment Ordinance amends the Income Tax (Guernsey) Law, 1975 (the **Income Tax Law**) and gives the States of Guernsey's Policy and Resources Committee the ability to make regulations, namely the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 (the **Regulations**), which require Guernsey tax resident companies carrying on specified activities in respect of accounting periods beginning after 31 December 2018 (and every following accounting period) to demonstrate that they have substantive presence in Guernsey.

The specific activities are: banking, insurance, fund management, financing and leasing, shipping, intellectual property, headquartering, distribution and service centres and holding companies (although holding companies are treated separately under the Regulations). The substance requirements vary for each key activity to reflect the different needs of the companies involved.

Essentially, such companies will have to demonstrate that they each have substance in Guernsey by (i) being directed and managed in Guernsey, (ii) having adequate people, premises and expenditure in Guernsey and (iii) conducting core income generating activities (**CIGA**) in Guernsey.

For further information, including the questions to consider in determining whether the substance test applies to a company and whether that test will be met, refer to our guide [Guernsey's economic substance requirements](#).

2 Company residency

Another recent amendment to the Income Tax Law is the revision of the definition of 'resident' in relation to the tax residency of a company.

A company is currently tax resident in Guernsey if (i) it is controlled in Guernsey ('control' is essentially the ability of a person to secure, by means of the holding of shares, the possession of voting power or being a loan creditor, that the affairs of the company are conducted in accordance with the wishes of that person) or (ii) it is incorporated in Guernsey and has not been granted tax exempt status.

The Income Tax (Guernsey) (Amendment) (No. 2) Ordinance, 2018 amends the definition of 'resident' so that, with effect from 1 January 2019, a Guernsey company which would otherwise be tax resident in

Guernsey (on the basis of (i) or (ii) above), will not be treated as tax resident in Guernsey in a year of charge if it satisfies the following conditions:

- (a) the company is, under the domestic law of another territory (**Territory A**), tax resident in Territory A;
- (b) its business is centrally managed and controlled in Territory A;
- (c) either:
 - (i) the company is tax resident in Territory A under the domestic law of Territory A by virtue of a double tax agreement or an international tax measure made between Territory A and Guernsey; or
 - (ii) the highest rate of tax on a company in Territory A is at least 10 per cent; and
- (d) the company's tax resident status in Territory A is not motivated by the avoidance, reduction or deferral of the liability of any person to tax under Guernsey's Income Tax Law.

This is a positive development for Guernsey providing enhanced flexibility for holding companies and adding clarity in respect of dual resident companies, including in the analysis of whether a Guernsey company is tax resident for the purposes of economic substance.

3 The Revised Handbook

The Guernsey Financial Services Commission (the **Commission**) has issued a final draft of the revised Handbook on Countering Financial Crime and Terrorist Financing (the **Revised Handbook**) ahead of the formal approval of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Amendment) Ordinance, 2018 (the **Ordinance**).

The Ordinance, which has since been approved by the States of Guernsey and is effective 31 March 2019, replaces and updates the Criminal Justice (Proceeds of Crime) Regulations for financial services business and prescribed business by inserting three new schedules into the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999. One of the schedules is concerned with **both** financial services businesses and prescribed businesses (now collectively referred to as 'specified businesses') and imposes statutory obligations upon them.

The Revised Handbook, together with the revised legislation, are intended to bring the Bailiwick of Guernsey's AML/CFT framework into line with international standards issued by the Financial Action Task Force in 2012 and to address recommendations made by MONEYVAL in its 2015 evaluation of Guernsey.

The current Handbook, which was last updated in June 2017, remains effective for now. The Commission will be formally making the rules in the Revised Handbook during the first quarter of 2019 to allow any technical issues within the rules and guidance to be addressed.

The Revised Handbook is essential reading, particularly for those in senior positions in specified businesses operating in Guernsey.

The key changes to the Revised Handbook are set out in our Legal Update [here](#).

4 Non-resident capital gains tax on UK commercial property

In the November 2017 budget, the UK government signalled its desire to impose a charge to UK capital gains tax (**CGT**) on gains on direct and indirect disposals of UK commercial property by non-UK residents from 6 April 2019. This represents the application of CGT to a non-resident's capital gains on UK commercial property for the first time since the introduction of CGT in 1965. The charge will arise not only in relation to disposals of direct holdings of UK commercial property but also, in some cases, to 'indirect' disposals of 25 per cent or more interests in 'property rich' holding vehicles such as companies and unit trusts.

That November 2017 announcement was accompanied by an HM Revenue & Customs (**HMRC**) and HM Treasury (**HMT**) consultation document which drew significant industry responses. Concerns were raised about potentially prejudicial treatment of commonly-used, income tax transparent, offshore real estate funds, JPUTs and GPUs, and the tax exempt investors (such as pension schemes) investing heavily in UK real estate through those structures. Respondents highlighted that investors in those vehicles could suffer multiple tax charges on the same disposal, prejudicing exempt investors in formerly tax transparent structures. In July, HMRC and HMT acknowledged those concerns and offered proposals for welcome relief

for certain income transparent overseas collective investment vehicles, including offshore funds, JPUTs and GPUTs.

Please read our update on [Non-resident CGT on UK Commercial Property – Confirmation of Relief and Exemptions for Offshore Funds and Property Unit Trusts](#).

5 Electronic agents

Proposals have been approved to enact new legislation under the Electronic Transactions (Guernsey) Law, 2000 (the **Electronic Transactions Law**) regarding the use of 'electronic agents' in relation to the formation, execution, performance and termination of a contract and the legal status of the resulting contract.

While the laws of agency and contract formation were considered to be 'sufficiently robust to encompass electronic agents' at the time the Electronic Transactions Law was enacted, the Electronic Transactions Law was drafted to permit the States of Guernsey to legislate specifically for electronic agents and the legal effect of actions carried out by such means.

Under the Electronic Transactions Law, an 'electronic agent' is 'a computer program or electronic or other automated means used independently to initiate an action or to respond in whole or in part to information or actions in electronic form or communicated by electronic means, without review or action by a natural person'.

The new legislation will permit the formation of a contract by the interaction of electronic agents, acting on behalf of the parties without any human involvement at all, on the presumption that the natural persons (on whose behalf the electronic agents are acting) intended to create a legally binding contract. Alternatively, a contract can be formed by the interaction of an electronic agent acting on behalf of one party and a natural person acting on his own (or another party's) behalf. It will also allow an electronic agent to act on behalf of one or more parties to the same transaction.

6 TISE revised Listing Rules

The International Stock Exchange (**TISE**) has published a final draft of the new Listing Rules which, except for trading companies issuing equities and special purpose acquisition companies (**SPACs**), are effective from 1 January 2019.

New listing rules have already been incorporated into the **existing** listing rules in relation to trading companies issuing equities and SPACs (Chapter 6 and Chapter 10 respectively) and were effective from 5 October 2018 giving issuers the opportunity to use the enhanced provisions in these areas in the three months leading up to 1 January 2019.

The new Listing Rules, which are intended to reflect current market practices, are considered to be more concise, unambiguous and consistent throughout. They are aimed to increase the TISE's product offering and enhance flexibility enabling it to respond to developments in a rapidly changing market place. Some of the main changes include:

- new listing rules in relation to debt being offered directly to retail investors
- revisions to the Listing Rules relating to (i) trading companies issuing equity, including enhancing the attractiveness of the TISE to SMEs (small and medium sized enterprises) and (ii) SPACs to reflect evolving market practices
- enhanced flexibility.

The new Listing Rules are available [here](#).

7 Code of Market Conduct

Following a consultation earlier this year, the Commission has issued a new Code of Market Conduct (the **Code**) the purpose of which is to provide guidance on the types of behaviour that may (or may not) amount to market abuse.

Read our legal update [GFSC: A new Code of Market Conduct](#) which considers the key points of the Code and its potential implications for market participants. The full text of the Code itself is available on the Commission's website [here](#).

8 Green insurance in Guernsey

The Commission is seeking feedback on its discussion paper on the development of green insurance in Guernsey. The paper sets out how the Commission might support the development of green insurance in Guernsey through regulatory change and considers private sector opportunities. The discussion paper is available [here](#).

9 Cyber and information security

The Commission is undertaking a thematic review of cyber/information security across supervised firms, the outcomes of which will form the basis for further amendment to its existing guidance issued in March 2016.

A sample of firms have been requested to complete the questionnaire and any firm not in that sample group can request to take part by contacting the Commission. In the meantime, the Commission recommends that firms consider guidance published by the UK National Cyber Security Centre (and its resources), including the '10 steps to Cyber Security' and the recently released 'Board toolkit' (as protecting information is a board level responsibility).

For more information, please see the Commission's website [here](#).

10 Minimum criteria for licensing

The Commission has issued guidance on how to meet the 'fit and proper' standard set out in the relevant minimum criteria for licensing. The guidance explains what 'fit and proper' means, ie the standards that an individual being appointed to, or holding a 'prescribed position', for example directors, controllers, managers etc, needs to demonstrate both from the outset, and on an ongoing basis; how that is measured (the key factors being competence, probity and solvency); and how the Commission assesses an applicant's 'fitness and propriety'.

Other points to note from the guidance are:

- a new term of 'holder of a supervised role' will apply following the revision of laws project
- it includes a non-exhaustive list of where the Commission obtains its information to assess a person's fitness and propriety
- a licensee handling an individual's appointment is expected to assess that individual against the 'fit and proper' standard, and have the necessary processes in order to identify where that individual does not meet that standard, whether at the beginning of the appointment process or on an ongoing basis
- notification of any issues affecting a prescribed person's fitness and propriety must be made to the Commission on a timely basis.

The full text of the guidance is available [here](#).

11 Increase in Q3 investment statistics

The September quarter investment statistics show an increase of 1.4 per cent, the net asset value of total funds under management and administration having increased by £4 billion.

Q3 statistics are available [here](#).

Contacts



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



Caroline Chan
Partner, Mourant Ozannes
Guernsey
+44 1481 739 305
caroline.chan@mourant.com



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



John Rochester
Partner, Mourant LP
Guernsey
+44 1481 739 359
john.rochester@mourant.com



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



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

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED