

Guernsey legal and regulatory update

An overview of Guernsey legislative and regulatory developments
January to March 2019 inclusive

1 Guernsey's endorsement as a co-operative jurisdiction

Guernsey has been endorsed by the Economic and Financial Affairs Council of the EU (ECOFIN) as a 'co-operative jurisdiction' with respect to good tax governance. The endorsement follows Guernsey's implementation of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 (the **Substance Regulations**) on 1 January 2019 which were introduced to address the EU's concerns 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.

The endorsement is in response to the recommendation of the EU Code of Conduct Group (Business Taxation), the EU body responsible for assessing Guernsey against the three standards of tax transparency, fair taxation and compliance with anti-Base Erosion and Profit Shifting (BEPS) measures.

2 Substance requirements – legislative updates

As noted above, the Substance Regulations are a new measure to ensure that real economic activity is being carried on in Guernsey in respect of the profits and income of companies tax resident in Guernsey (a **resident company**).

Essentially, a resident company carrying on a specified activity or business in respect of accounting periods beginning after 31 December 2018 (and every following accounting period) is required to demonstrate that it has substantive presence in Guernsey.

The Substance Regulations were amended on 19 December 2018 ahead of their commencement on 1 January 2019 to, most notably:

- exclude their application to Guernsey foundations (or their non-Guernsey equivalent);
- clarify that they apply to a resident company with income from carrying on business as a partner or member of a partnership, ie not just on its own account; and
- permit the Director of Revenue Service (the **Director**) to have a defaulting resident company struck off the Register of Companies in its **first** and **third** accounting periods of default – not just in its **fourth** accounting period of default as originally drafted - provided that the Director is satisfied that there's no realistic possibility of the resident company complying with the Substance Regulations. Note that this ultimate sanction would be in addition to the imposition of a fine (£10,000, £50,000 and £100,000 respectively) and disclosure to a competent authority in accordance with any approved international agreement or international tax measure relating to the spontaneous exchange of information.

For a general overview on economic substance requirements for Guernsey companies, read our latest Update [here](#).

3 The Revised Handbook

The Guernsey Financial Services Commission (the **Commission**) has issued the revised Handbook on Countering Financial Crime and Terrorist Financing (the **Revised Handbook**) in final form.

The Revised Handbook together with the revised legislation, namely the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 are intended to bring the Bailiwick'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.

A number of revisions have been made to the Revised Handbook since the last draft published back on 12 November 2018, including:

- clarification that the role of the Money Laundering Compliance Officer is to monitor the firm's compliance with its internal controls reporting to the board on the outcome of its monitoring, the board having ultimate responsibility for the firm's compliance with statutory and regulatory requirements (section 2.8.1 – Money Laundering Compliance Officer);
- removal of the requirement to verify multiple nationalities, focusing on an individual's primary nationality (section 5.3 – verification of the identity of natural persons); and
- inclusion of senior government posts to the list of domestic PEPs following restructuring of Guernsey's civil service (Appendix E – List of Domestic PEPs).

The Commission has also confirmed that it no longer requires notice of any changes to a firm's Nominated Officer as of 28 February 2019, ie an online Form PQ or online Appointment. This change has been made ahead of the Revised Handbook coming into effect on 31 March 2019 (which does not require notice of such appointments). Firms must however continue to notify the Financial Intelligence Service within 14 days of any such change.

The Revised Handbook is effective on 31 March 2019 at which time it will replace the Financial Services Business and Prescribed Businesses Handbooks currently in force.

While transitional provisions have been included to give firms sufficient time to revise their internal frameworks and bring their policies, procedures and controls up to date in line with the new regime, firms are expected to:

- carry out and document business risk assessments in respect of AML and CFT requirements as soon as reasonably practicable after 31 March 2019;
- have reviewed their business risk assessments and have the revised AML and CFT assessments approved by their board no later than four months after the later of 31 March 2019 (the effective date of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Amendment) Ordinance, 2018) or the publication of the Bailiwick's National Risk Assessment; and
- have reviewed and revised their policies, procedures and controls which must have been approved by the firm's board by no later than three months from the above deadline for the approval of the revised business risk assessments.

The Revised Handbook is available [here](#).

4 Revision of regulatory laws project – feedback

The Commission has published feedback on the draft regulatory laws which were the subject of industry consultation during the course of last year. The feedback statements aim to address the most common concerns and comments raised by stakeholders and set out how the Commission has sought to address them.

Copies of the feedback statements are available on the Commission's website [here](#).

5 BREXIT – UK's National Private Placement Regime

The Commission has signed a memorandum of understanding (MoU) with the Financial Conduct Authority (FCA). The MoU with the FCA ensures that Guernsey funds can continue to access UK investors through private placement after BREXIT.

6 BREXIT - data protection

The States has approved the Data Protection (Authorised Jurisdiction) (Bailiwick of Guernsey) Ordinance, 2019 to designate the UK as a 'designated jurisdiction' for the purposes of the Data Protection (Bailiwick of Guernsey) Law, 2017 in the event of the withdrawal of the UK from the EU. This will ensure the status quo

regarding the free-flow of data between the Bailiwick of Guernsey and the UK is maintained in the event of a no-deal Brexit from the EU.

7 BREXIT - definition of 'regulated market'

Regulations have been made to ensure that the definition of 'regulated market' in the Companies (Guernsey) Law, 2008 continues to encompass both EU and UK regulated markets in the event of BREXIT. The Regulations, namely the Companies (Regulation of Auditors) (Brexit) (Guernsey) Regulations, 2019 which are effective on exit day, also substitute a new definition of 'transferable securities' so that this will remain appropriate for both EU and UK market traded companies after exit day.

For a general update on BREXIT and its implications on Guernsey as a Crown Dependency, read our latest Update [here](#).

8 SEC recognition of the TISE

The International Stock Exchange (TISE) has been recognised by the US Securities and Exchange Commission (SEC) as a Designated Offshore Securities Market (DOSM) meaning that securities listed on TISE can benefit from an exemption under Regulation S of the Securities Act, 1933 which permits securities to be issued outside the US without having to be registered with the SEC.

The revised Listing and Membership Rules are now in force, effective 1 January 2019 and are available [here](#).

9 Asian Infrastructure Investment Bank

The States has agreed to enact new legislation under the Privileges and Immunities (Bailiwick of Guernsey) Law, 2004 extending the Asian Infrastructure Investment Bank (AIIB) Articles of Agreement to Guernsey.

The AIIB is a multilateral development bank¹ launched by the Chinese Government in 2015. Its focus is to support access to finance for infrastructure projects and to boost investment across a range of sectors in Asia and to date some 57 countries have signed the AIIB Articles of Agreement, including the UK.

Guernsey's finance sector has welcomed the proposed extension of the AIIB Articles of Agreement as a means of further demonstrating Guernsey's connections with, and commitment to, Asia as well as assisting with business development and investment opportunities for Guernsey businesses.

10 Increase in Q4 2018 investment statistics

The December 2018 quarter investment statistics show an increase of 0.6 per cent, the net asset value of total funds under management and administration having increased by £1.7 billion. For the year since December 2017, total net asset values increased by £11.7 billion, an increase of 4.3 per cent.

A breakdown of Q4 statistics is available [here](#).

11 Judgment – 'just and equitable' winding up

A recent judgment made by the Royal Court acts as a reminder of its oversight powers in relation to Guernsey companies.

The applicants to the proceedings were investors and majority shareholders in an SPV set up to develop commercial and residential property. They became aware of various factors giving them cause for concern in the way in which the company was being managed.

The Royal Court found that the shareholders had a justified lack of confidence in the management of the company by the directors. These included findings that:

- the directors had improperly exercised their powers by issuing additional shares to their own family company, thus removing the applicants' majority shareholding;
- the motivation behind the above share issue was not to raise capital but to protect the interests of the

¹ A 'multilateral development bank' is essentially an institution created by two or more countries which provide financial and professional advice for the purpose of promoting economic development.

directors and their family;

- the company property was transferred to another company related to the directors without any explanation nor indeed even informing the shareholders; and
- the directors were in breach of their obligations under company law to provide accounts and financial information to the shareholders, despite repeated requests over a number of years.

Accordingly, the company was ordered to be liquidated.

This is a rare example of a company being wound up in Guernsey on the 'just and equitable' ground.

For further information, read our Update [here](#).

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