

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

POLICY & RESOURCES COMMITTEE

AMENDMENTS TO THE LEGAL FRAMEWORK RELATING TO BENEFICIAL OWNERSHIP OF
LEGAL PERSONS

The States are asked to decide:-

Whether, after consideration of the Policy Letter dated 2nd April, of the Policy & Resources Committee, they are of the opinion:-

- 1.1 To agree to amend the Beneficial Ownership of Legal Persons (Guernsey) Law, 2017, so as to:
 - i. remove the reference to “no beneficial owners” of a legal person;
 - ii. clarify the circumstances in which a legal person is subject to the administrative enforcement powers of the Registrar of Beneficial Ownership or to those of the Guernsey Financial Services Commission;
 - iii. specify the particulars that must be recorded in respect of corporate beneficial owners;
 - iv. set out the criteria that must be applied by the Registrar of Beneficial Ownership before making a disqualification order;
 - v. confirm the application of the Registrar of Beneficial Ownership’s powers to nominee relationships;
 - vi. widen the Registrar of Beneficial Ownership’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; and
 - vii. permit the Director of the Revenue Service to inspect the beneficial ownership register.

- 1.2 To agree to amend the Foundations (Guernsey) Law, 2012 so as to:
 - i. ensure consistency of language with other commercial legislation on matters relating to resident agents and beneficial ownership;
 - ii. introduce information gathering powers that correspond to those outlined at paragraph 1.1.vi above.

- 1.3 To agree to amend the Limited Partnerships (Guernsey) Law, 1995, the Companies (Guernsey) Law, 2008, and the Limited Liability Partnerships (Guernsey) Law, 2013 so as to introduce information gathering powers that correspond to those outlined at paragraph 1.1.vi above.

- 1.4 To agree to amend the Income Tax (Guernsey) Law, 1975, to permit the Director of the Revenue Service to share information with the Guernsey and Alderney Registrars of Beneficial Ownership.
- 1.5 To direct the preparation of such legislation as may be necessary to give effect the foregoing, including any necessary consequential and incidental provision.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

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LEGAL PERSONS

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

2nd April, 2020

Dear Sir

1. Executive Summary

- 1.1 The Beneficial Ownership of Legal Persons (Guernsey) Law, 2017 (“the Law”) has been in operation for two and a half years and has been instrumental in the implementation of Bailiwick measures for combatting financial crime. A review of the Law is now timely, and a number of amendments to the Law and related enactments are recommended.
- 1.2 These amendments relate to the information to be recorded in the record of beneficial ownership by resident agents; to certain definitions in the Law; to the functions, enforcement and information gathering powers of the Registrar of Beneficial Ownership (“the Registrar”); to the provision of information to the Registrar or to the Alderney Registrar of Beneficial Ownership (“the Alderney Registrar”) under income tax legislation; to the ability of the Director of Income Tax to inspect the register of beneficial ownership; and to aspects of the Foundations (Guernsey) Law, 2012 (“the Foundations Law”) and other commercial legislation to ensure consistency across the legal framework.

2 Amendments

Record of Beneficial Ownership

- 2.1 The Law requires the resident agent of a Guernsey legal person to maintain a record of the beneficial owners of the legal person. Section 10(5) of the Law states:

If a resident agent has ascertained that there are no beneficial owners in relation to a relevant legal person, he must record that fact in the record of beneficial owners.

This provision was included so as to ensure that there was no possibility of any gap in the beneficial ownership framework. In the two and a half years during which the Law has been in force it has become clear that there are no cases in which the above condition would be applicable; i.e. there is always a beneficial owner. This reflects both a change in the international understanding of what comprises beneficial ownership and the fact that the Bailiwick's beneficial ownership framework has proved successful in always requiring and obtaining beneficial ownership information.

- 2.2 Section 10(5) of the Law is therefore redundant. Furthermore, its inclusion might lead to confusion about Guernsey's beneficial ownership framework, both locally and internationally. This is reflected by the reference to section 10(5) and accompanying recommendation in the latest OECD Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Review Report (on the Exchange of Information on Request) on Guernsey. Removing section 10(5) would prevent future confusion. A corresponding change would then be made to commercial legislation governing the incorporation of legal persons and to the Beneficial Ownership (Definition) Regulations, 2017, which make reference to the language of section 10(5) of the Law.

Definitions

- 2.3 The intention behind the Law, as set out in the Policy Letter recommending its introduction, was that the Registrar's administrative enforcement powers would not apply to firms licensed by Guernsey Financial Services Commission ("GFSC"). This was in order to avoid duplication of enforcement. Therefore, the Law distinguishes between those Guernsey legal persons that are controlled, administered or operated by a GFSC licensee (a legal person in this category is referred to in the Law as a "regulated relevant legal person") and those that are not (i.e. a "non-regulated relevant legal person" under the Law). The Registrar's enforcement powers do not apply to the former. However, over time it has become clear that in some circumstances a GFSC licensee will act as resident agent of a legal person but without controlling, administering or operating the legal person. For example, if a licensed firm acts as resident agent of a Guernsey company without providing any directors or administration services to it, the company would currently be defined as a non-regulated relevant legal person although it has a regulated resident agent. In this situation, the resident agent could then be subject to the Registrar's enforcement powers as well as to GFSC's powers applicable to all its licensees.
- 2.4 For consistency in this area, it is proposed to amend the Law to make it clearer that the Registrar's administrative enforcement powers do not apply to GFSC licensees. This will include amending the definitions of "regulated relevant legal person" and "non-regulated relevant legal person" so that the former will apply when the resident agent is a regulated person (including a person acting in the course of his or her duties as an employee of a regulated person). This will also include making it clear that when a legal person ceases to be a regulated person, that legal person will be subject to the powers of the Registrar.
- 2.5 A further amendment is proposed with regard to the definition of "required

particulars”, i.e. the particulars about a beneficial owner that must be maintained by a resident agent in the record of beneficial ownership. In the vast majority of cases, a beneficial owner will be a natural person. However, the Law also provides that a legal person may have a corporate beneficial owner in limited circumstances, i.e. where the legal person is a States Trading Company, so there is no realistic prospect of its being abused for criminal purposes, or where the corporate beneficial owner is listed on a recognised stock exchange or entered on the beneficial ownership register so is itself subject to transparency measures. As currently worded, the required particulars include matters such as date of birth and nationality that are only applicable to natural persons, and do not include corresponding particulars for corporate beneficial owners such as date and place of incorporation. It is therefore proposed that the required particulars should be revised to make provision for the particulars applicable to corporate beneficial owners in the limited situations in which they are permitted.

Functions and Powers of the Registrar

- 2.6 Section 3 of the Law specifies the functions of the Registrar. These include ensuring the accuracy of information relating to the beneficial ownership of Guernsey legal persons. As the Law, and regulations made under it (see paragraph 2.8 below), also include provisions relating to nominee relationships, for the avoidance of doubt, section 3 should be amended to also provide the Registrar with the function of ensuring the accuracy of information relating to nominee relationships in respect of Guernsey legal persons.
- 2.7 The Registrar’s administrative enforcement powers in the event of breach of the Law are to impose a financial penalty, to make a public statement and to make an order disqualifying a resident agent from acting as such. A review of these powers has identified that it would be beneficial to introduce a requirement for the Registrar to consider specific factors before imposing a disqualification order, in line with the factors currently applicable to imposing a financial penalty or making a public statement. These factors include matters such as the seriousness of the failure, whether it was inadvertent, and the potential financial consequences of imposing the penalty. Requiring consideration of these factors would reflect the likelihood of disqualification having at least as much impact on the subject as a public statement or financial penalty.
- 2.8 The Law also gives the Registrar the power to make regulations governing nominee relationships. This power has been exercised with the enactment of the Beneficial Ownership of Legal Persons (Nominee Relationships) Regulations, 2017 and by corresponding regulations applicable to limited partnerships. However, the Registrar’s oversight and enforcement powers do not specifically extend to compliance with these regulations. It is therefore proposed that the Law be amended to make it clear that the Registrar’s powers to enforce compliance of the requirements relevant to beneficial ownership extend to the requirements relating to nominee relationships. This would be subject to the exclusion with regard to GFSC licensees referred to above, to avoid dual administrative enforcement.

- 2.9 In order to further strengthen the Bailiwick’s beneficial ownership framework, it is also recommended that a provision be added to the Law enabling the Registrar to obtain information relating to legal persons so that he or she can identify, assess and understand risks to the Bailiwick of economic crime, money laundering and terrorist financing. This power should be capable of being exercised not only by the Registrar independently but also at the request of another authority with responsibilities in this area such as the Policy & Resources Committee, the Revenue Service or the GFSC. This will enable the Registrar to carry out his or her functions under the Law in a risk based way, in line with the existing approach taken by other authorities with functions relating to economic crime, money laundering and terrorist financing, as well as assisting other authorities to implement a risk based approach.
- 2.10 It is also proposed that the Registrar be given powers to obtain information from parties such as administrators or liquidators who will have control over a legal person in some situations. This will ensure that it will be possible for the Registrar to obtain information about a legal person even if its officials have resigned.
- 2.11 Finally, in order to ensure consistency across the legal framework, it is proposed that information gathering powers corresponding to those outlined above be introduced under commercial legislation governing the incorporation and operation of Guernsey legal persons.

Foundations

- 2.12 When the Law was introduced, it built upon the resident agent provisions that were already in place under commercial legislation applicable to companies and limited liability partnerships. However, those provisions differed from other resident agent provisions that were then in place with regard to foundations under the Foundations Law.
- 2.13 The Foundations Law was therefore amended to introduce resident agent provisions that would enable the beneficial ownership register to be populated effectively. However, as this was done by building on existing provisions, the language of the Foundations Law in this area is not fully in line with the language in the legislation applicable to other Guernsey legal persons. While this has not presented any practical difficulties to date, it is proposed that the opportunity be taken now to amend the Foundations Law so as to ensure consistency across the legal framework.

Collaboration between the Registrar and the Director of the Revenue Service (“the Revenue Service”)

- 2.14 The recent process of assessing the money laundering and terrorist financing risks to the Bailiwick (referred to as the National Risk Assessment) has emphasised the need to ensure that the relevant authorities have the ability to work together to combat financial crime, money laundering and terrorist financing.
- 2.15 Both the Registrar and the Revenue Service have to undertake supervisory activities,

which include ensuring the accuracy of beneficial ownership information that has been provided to each of them separately (i.e. through the Beneficial Ownership Register for the Registrar and the OECD Common Reporting Standard for the Revenue Service).

- 2.16 Whilst the Law includes provisions to enable the Registrar to exchange information with the Revenue Service, the Income Tax (Guernsey) Law, 1975 (“the Income Tax Law”) does not include an equivalent provision. Similarly, although under Alderney’s beneficial ownership legislation the Alderney Registrar may share information with the Revenue Service, there is no reciprocal provision under the Income Tax Law.
- 2.17 In order to ensure that the authorities are able to work collaboratively to compare the data that they hold, it is recommended that the Income Tax Law is amended to provide a legal gateway to exchange information that is relevant for the purposes of the Registrar and the Alderney Registrar carrying on functions. Furthermore, the Law should be amended to enable the Revenue Service to inspect the Register for the purposes of carrying on its functions.

3 Recommendations

- 3.1 To agree to amend the Beneficial Ownership of Legal Persons (Guernsey) Law, 2017, so as to:
- i. remove the reference to “no beneficial owners” of a legal person;
 - ii. clarify the circumstances in which a legal person is subject to the administrative enforcement powers of the Registrar of Beneficial Ownership or to those of the Guernsey Financial Services Commission;
 - iii. specify the particulars that must be recorded in respect of corporate beneficial owners;
 - iv. set out the criteria that must be applied by the Registrar of Beneficial Ownership before making a disqualification order;
 - v. confirm the application of the Registrar of Beneficial Ownership’s powers to nominee relationships;
 - vi. widen the Registrar of Beneficial Ownership’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; and
 - vii. permit the Director of the Revenue Service to inspect the beneficial ownership register.
- 3.2 To agree to amend the Foundations (Guernsey) Law, 2012 so as to:
- i. ensure consistency of language with other commercial legislation on matters relating to resident agents and beneficial ownership;
 - ii. introduce information gathering powers that correspond to those outlined at paragraph 3.1.vi above.
- 3.3 To agree to amend the Limited Partnerships (Guernsey) Law, 1995, the Companies

(Guernsey) Law, 2008, and the Limited Liability Partnerships (Guernsey) Law, 2013 so as to introduce information gathering powers that correspond to those outlined at paragraph 3.1.vi above.

3.4 To agree to amend the Income Tax (Guernsey) Law, 1975, to permit the Director of the Revenue Service to share information with the Guernsey and Alderney Registrars of Beneficial Ownership.

3.5 To direct the preparation of such legislation as may be necessary to give effect the foregoing, including any necessary consequential and incidental provision.

4 Compliance with Rule 4

4.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.

4.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications. She has advised that there is no reason in law why the Propositions should not to be put into effect.

4.3 In accordance with Rule 4(4), it is confirmed that the proposition accompanying this policy letter is supported unanimously by the Policy & Resources Committee.

4.4 In accordance with Rule 4(5), the Policy & Resources Committee has consulted with the Registry and the GFSC.

Yours faithfully

G A St Pier
President

L S Trott
Vice-President

A H Brouard
J P Le Tocq
T J Stephens