



Guernsey Association of Trustees

GAT response to the GFSC Consultation Lending Credit and Finance Rules, Guidance and Implementation – submitted on 14/09/22

Exemptions & exclusions from licensing requirements

Is the scope of the exemptions proposed by the Commission appropriate?

Yes

Are there any other activities that should be specifically exempted, and if so, why?

GAT welcomes the Commission's confirmation regarding general exclusions (activities which are outside the scope of licensing).

However, GAT considers that some exclusions require further clarification:

Lending to family members:

We consider that the confirmation that lending to family members is outside the scope of the Law (and does not therefore require licensing) requires further clarification. The term "family" and scope of the class of "family members" means different things to different individuals and social groups. This is particularly relevant to the fiduciary sector where our client base is international and includes individuals from a wide variety of different cultures. We note that the term "family" was intentionally left undefined in the Commission's Private Investment Funds Rules concerning Family Relationship PIFs, to accommodate and thereby make the regime available to different types of families. However, we consider that the position is quite different with regards to exclusions from the Law where the risks of interpreting "family" to mean something other than the Commission's own interpretation could mean being in breach of the Law (should an unlicensed lender consider that they are lending to a family member but the Commission disagrees that the borrower is a family member).

Borrowing from a retirement annuity trust scheme ("RATS")/pension arrangement:

We refer to the exclusion for borrowing from a RATS/pension arrangement by the "beneficial owner" - we assume this term is intended to mean any beneficiary/member of the scheme, however we consider that this point needs clarification. We also consider that loans by the trustee of any trust to a beneficiary of that trust should be excluded as such loans are not commercial activity, but rather an exercise of the trustee's discretionary powers vested in them by the terms of the trust and/or applicable trusts law.

Activities to be exempted by the Commission (6.4 of the Consultation Paper):

GAT welcomes the Commission's confirmation that it intends to use its powers under the Law to exempt intra-group lending by administered entities, as indicated in our previous discussions with

the GFSC. We see this proposed exemption as very positive and helpful. However, we are not able to comment further until we have had sight of the draft exemption wording, which we hope will be subject to consultation.

We consider that:

(i) the exemption should extend to entities administered by any licensed fiduciary, not just entities that are administered by the same licensed fiduciary (so that the exemption will apply to lending between entities within one group that are administered by different licensed fiduciaries);
(ii) the exemption should clarify the meaning of “common beneficial ownership” (e.g. do the beneficial owners have to be exactly the same or will it be sufficient for there to be some overlap or connection between beneficial members, such as loans between trusts with beneficiaries who are connected parties/related?) We also welcome the Commission’s confirmation that it will consider discretionary exemptions for occasional transactions by administered entities. We envisage this being a widely used exemption and consider that further guidance (e.g. in a standalone note) on the criteria which the Commission will use to assess such exemptions may be helpful.

Consumer Credit & home finance (Part II) licensees

Are the Rules in respect of consumer credit providers appropriate?

Not Answered

If not, what alternative approach should be used?

GAT has no comment

Are the Rules in respect of home finance providers appropriate?

Not Answered

If not, what alternative approach should be used?

GAT has no comment

Are the arrangements in respect of brokers appropriate?

Not Answered

Is it reasonable to apply additional requirements for home finance brokers compared to consumer credit brokers?

GAT has no comment

Are the arrangements for high street retailers appropriate?

Not Answered

Is it reasonable to exempt Appointed Retailers from licensing where acting on behalf of a third party lender licensed in its own right?

GAT has no comment

Are the arrangements for motor traders appropriate?

Not Answered

If not, what alternative would you propose?

GAT has no comment

Are the thresholds for HNWI customers set at the appropriate level?

No

If not, what should they be?

We do not understand the rationale for the different thresholds for Consumer Credit and Home Finance. We also do not understand why consumers should be able to opt out of the protection of a regulated agreement in respect of Consumer Credit. Please could the Commission explain the rationale for the distinction. Whilst this does not directly affect the fiduciary sector, we consider that as a responsible industry association, which supports the new consumer protections, this difference in the protections available to HNWIs jumped out at us and in our view the Consumer Credit threshold should be increased to be the same as the proposed threshold for Home Finance.

Is the approach in respect of “buy now, pay later” arrangements reasonable?

Not Answered

If not, what alternative approach should be adopted?

GAT has no comment

Are the information requirements for licensees reasonable?

Not Answered

If not, what information should be required?

GAT has no comment

Is it reasonable to adopt APR calculations in line with those in the UK?

Not Answered

If not, what alternative method should be adopted?

GAT has no comment

Is it reasonable to apply limits on consumer credit charges as described?

Not Answered

If not, what limits should apply?

GAT has no comment

Is it reasonable to apply the proposed Rules for promotion?

Not Answered

If not, what alternative approach would respondents propose?

GAT has no comment

Is the proposed approach to cancellation, cooling off and periods of reflection reasonable?

Not Answered

If not, what alternative approach would respondents propose?

GAT has no comment

Is the approach to early repayment of fees reasonable?

GAT has no comment

Is the approach to unfair contract terms and greylisting reasonable?

Not Answered

Are there any other specific terms which should be included or excluded from this list?

GAT has no comment

Is the approach to forbearance and default reasonable?

Not Answered

If not, what alternatives would respondents propose?

GAT has no comment

Is it appropriate to allow small private lenders to be exempted from the requirement to hold a licence?

Not Answered

If not, what alternative arrangement should be adopted?

GAT has no comment

Are the arrangements for Appointed Service Providers appropriate?

Not Answered

If not, what alternative approach should be used?

GAT has no comment

Is it reasonable to exempt firms in run-off and permit them to make limited contract changes?

Not Answered

If not, what alternative approach should be used?

GAT has no comment

Is the approach to fees and commission payments reasonable?

Not Answered

If not, what alternatives would respondents propose?

GAT has no comment

Financial firm businesses - Part III FFB licensees

Is the approach to regulating FFBs reasonable to meet the licensing requirement?

GAT considers that the proposed approach to regulating FFBs is reasonable

If you provide loans to businesses, to what degree is lending part of your core business, and how do you satisfy AML/CFT obligations?

Not Answered

What impact will licensing have on this aspect of your business in future?

GAT has no comment

Are there specific Rules that should be applied to certain types of FFB?

Not Answered

If so, what rules should apply?

GAT has no comment

Is it reasonable to exempt authorised/registered collective investment schemes from the need for an individual licence?

Not Answered

Please comment below:

GAT has no comment

Is it appropriate to exempt administered entities in respect of intra-group lending within an administered structure from the requirement for licensing?

Yes - further comment below*

Virtual asset service providers - Part III VASP licensees

Is the Commission's approach to exemptions for VASP activities reasonable?

Yes

Are there activities which should be added or removed from the proposed exemptions?

In general, GAT considers that the Commission's approach to exemptions for VASP activities are reasonable. In particular, we welcome the proposed exemption under section 40 of the Law for licensed fiduciaries when they carry out VASP activities on behalf of a client structure, provided that the structure holds a VASP licence itself or is subject to an exclusion or exemption. We understand that many of our members have clients that are interested in holding virtual assets in their structures and we anticipate that the proposed exemptions will provide welcome clarity and comfort regarding those activities, which in turn will lead to further opportunities in this space. However, we consider that only allowing VASP activities to be provided to institutional and wholesale counterparties seems too restrictive. We note the Commission's concerns regarding the provision of VASP services to the retail public due to the risks and speculative nature of the investments, but HNWs and UHNWs (however eventually defined) and professional/sophisticated individual investors should be given the opportunity to partake in receiving VASP services from professional VASP licensees. We would suggest a regime similar to that in the investment sector which provides for enables VASP licensees to provide services to "qualifying investors" who meet certain criteria would be appropriate. We are not able to comment further until we have had sight of the draft exemption wording, which we hope will be subject to consultation.

Do you agree with the proposed environmental disclosure rules for VASPs?

Not Answered

If not, what disclosure rules should be applied?

GAT has no comment

Is the Commission's proposed approach to substance and outsourcing reasonable?

Not Answered

If not, what alternative approach should be adopted?

GAT has no comment

Crowdfunding & peer to peer (Part IV)

Is the approach to regulating peer to peer and crowdfunding services reasonable?

Not Answered

If not, what alternative approach should be adopted?

GAT has no comment

Is it reasonable to limit investment to 10% of an individual investor's net wealth?

Not Answered

If not, what alternative limits should apply.

GAT has no comment

Information reporting

Is the Commission's proposed approach to information reporting reasonable?

Not Answered

If not, why not? And what alternative approach should be adopted?

GAT has no comment

Applications

Is the Commission's proposed approach to applications reasonable?

Yes

If not, why not? And what alternative approach should be adopted?

GAT has no comments other than those in respect of fees made in our response to the Commission's Consultation Paper on Fee Rates for 2023.

Additional Comments

Do you have any comments regarding the clarity of the Rules?

GAT has no comment

Do you have any further comments regarding the topics covered by the Consultation?

*Further comment relating to Question 25:

Is it appropriate to exempt administered entities in respect of intra-group lending within an administered structure from the requirement for licensing? GAT welcomes this exemption and considers that it is appropriate on the basis that the administering licensed fiduciary(ies) will be responsible for CDD and compliance with AML/CFT for such transactions. However, as noted in our response to Question 1, we consider that the wording of the exemption itself should give clarity on the scope of the exemption. Any terminology used, e.g. "administered structure", should be clearly defined. We hope that the wording of the exemption will be subject to consultation and would welcome the opportunity to review it and provide feedback.