



Guernsey Association of Trustees

**Comments on the Guernsey Registry's Consultation Paper\* on Amendments to Legislation Administered by the Guernsey Registry issued on 2 December 2022**

(\*the **Consultation Paper**)

By email only to [economicdevelopment@gov.gg](mailto:economicdevelopment@gov.gg)

**Introduction and background to our comments**

We have reviewed the Consultation Paper and discussed the same at a meeting of a joint GAT/STEP Technical Committee. An identical response will be sent on behalf of STEP Guernsey.

The comments below take into account the matters discussed at the meeting held at Sir Charles Frossard House on 10 January 2023 which was attended by Richard Walker of P&R, the Law Officers and representatives of GAT, GIFA and the Commercial Bar Association, and the follow-up email\* circulated by Richard Walker on 23 January 2023 (\*the **23 January 2023 Email**) to the attendees of that meeting, which attached an Addendum to the Consultation Paper and a draft Policy Letter on Amendments to Legislation Administered by the Guernsey Registry.

This response is submitted on behalf of GAT, an industry association representing the regulated fiduciary sector in Guernsey, and represents the views of the above-mentioned joint GAT/STEP Technical Committee. As these are the views of that committee, and do not represent the views of any single individual, the matters discussed at the meeting on 10 January 2023, and the follow up email circulated on 23 January 2023 (the **23 January Email**) have been circulated to the members of that committee for the purposes of preparing our response.

**General comments**

We are grateful for the opportunity to provide feedback to the Consultation Paper.

We note that the rationale given in the Consultation Paper for the proposed amendments focuses on a perceived need for greater consistency between the Commercial Laws and that the principal benefit set out in the Consultation Paper is greater efficiencies at the Registry.

We understand from our meeting on 10 January 2023 that the amendments are also intended to comply with aspects of FATF's Recommendations 24 (Transparency and Beneficial Ownership of Legal Persons) and 40 (Other Forms of International Cooperation) (the **FATF Recommendations**) in respect of which P&R/the Law Officers have identified potential gaps in the existing legislation.

Our general comments, which underpin our detailed responses to specific aspects of the proposals which are set out below, are as follows:

1. Consistency between the Commercial Laws is not necessarily appropriate in all respects – the types of legal persons administered by the Registry have different characteristics and are used for different purposes and in different sectors (e.g. limited partners are predominantly used in the funds sector whereas as foundations are mainly used in the private wealth



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sector). The Commercial Laws necessarily differ in some respects and consistency for consistency's sake should not be a driver for the changes.

2. We understand that the rationale for some of the proposed changes is operational efficiencies at the Registry. However, any changes should minimise the additional administrative burden on legal persons and their officers and not lead to inefficiencies on their side – most of the changes will lead to additional administration, which inevitably will lead to resourcing issues and increased costs.
3. The Charities Law is not an appropriate benchmark for the proposed changes in enforcement measures and the Registry's information gathering and sharing powers. The Charities Law is a different type of law to the Commercial Laws – the purpose of this law is to regulate charities and non-profit organisations, which are dealing with public money and which may not otherwise be subject to AML/CFT regulation.
4. Entities registered under the Commercial Laws can only be registered by a Guernsey licensed corporate services provider (**CSP**), subject to supervision by the Guernsey Financial Services Commission (the **GFSC**) and AML/CFT obligations. In addition, the majority of such entities will have a continuing relationship with a CSP, either through the provision of full administration services or as a resident agent, director, general partner, council member etc. The ML/TF risks in respect of such entities is therefore already minimised through the CSP's own AML/CFT obligations, and the enhanced supervisory powers of the Registry (in terms of enforcement and information gathering and sharing powers) are not necessary or appropriate where a CSP provides services. In other words, we do not consider that it is appropriate that the Registry effectively regulates the already-regulated fiduciary sector, which will be one of the consequences of the proposed amendments.
5. We also have concerns as to whether the Registry has the necessary resources and infrastructure to perform the additional functions and powers it will be given under the proposals (e.g. enforcement and information gathering powers). By comparison, the GFSC is already experienced and well-resourced as a regulator with such powers. The Consultation Paper is silent on how the Registry will ensure it is sufficiently resourced to perform its additional functions and exercise its additional powers – e.g. additional staffing requirements and training requirements, and how this will be funded. We note the recent staffing issues with the Guernsey Revenue Service, and their impact on service levels, and are concerned that service levels at the Registry could suffer as a result of the additional workload.
6. Following on from the above two points, we consider that there should be a distinction between the regulated and unregulated sectors in how the Commercial Laws are amended to deal with aspects of the FATF Recommendations – we consider that the Guernsey regulatory framework for financial services regulated by the GFSC already provides for technical compliance and effective AML/CFT systems. There is a risk of duplication in CSPs effectively being subject to two supervisory bodies in respect of AML/CFT and also a risk of conflict in the event the GFSC and Registry take a different approach where a potential



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breach may fall under both of their jurisdictions. We have brought our concerns to the attention of the GFSC, as the regulator of the fiduciary sector, and have sent them a copy of this letter.

7. The Commercial Laws should not be amended in such a way that goes beyond what is strictly required by the FATF Recommendations and should remain in line with the approach taken in the corresponding legislation of Guernsey's competitor jurisdictions (particularly Jersey). We understand that the Commercial Bar Association is looking closely at such legislation and we consider that its feedback to the Consultation Paper, as legal experts, should be taken into account in any comparison with the laws of Guernsey's competitor jurisdictions.
8. We note that considerable effort and resources have been invested in producing the Consultation Paper, and in carrying out the research and analysis that sits behind the paper. However, we do consider that industry input should have been invited much earlier in the process, to avoid both misunderstandings and/or irrelevant points being considered.

#### **Detailed comments**

##### ***Paras. 7 – 10: Basic governing powers***

We note the requirement in the FATF Recommendations for the “basic regulating powers” of legal entities to be recorded at the Registry and publicly available.

As suggested in the Consultation Paper, a standard form to capture the relevant information for limited partnerships, LLPs and foundations is a pragmatic and proportionate way to meet the requirement. The form should be user-friendly and simple to complete, ideally with drop-down options for selection so that the form can be completed quickly and efficiently, and so that information collected and publicly available is consistent and to avoid the risk of the inadvertent disclosure of confidential information if the form allows for free text.

We understand that the Commercial Bar is considering the contents of such a form and consider that they are well-placed to provide that input. We would be happy to review any draft form(s) from a practical perspective, given that CSPs will need to complete such forms.

##### ***Para. 11 – Name and address of a foundation's registered agent***

We have no issue with the name and address of a foundation's resident agent appearing in Part 1 of the Register of Foundations on the basis that this information will already be publicly available in the annual validation.

##### ***Paras. 13 and 14 – Location of company records and Content of records: Proof of incorporation and legal form and status***

In practice, the majority of the information identified in these paragraphs will be kept at the entities' registered office, particularly where a CSP provides registered office and other services as this information will need to be kept in order to comply with its AML/CFT obligations.



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However, the requirement to “keep and maintain” information leads to a meaningless and circular result where the original document/record is actually issued by the Registry. Specifically, the requirement to keep and maintain evidence of legal form and status could be problematic in practice as this evidence is created by the Registry (e.g. evidence of legal form (the certificate of incorporation/registration issued by the Registry) and evidence of legal status (a certificate of good standing issued by the Registry)). This would create a repetition of information and an additional administrative burden on both the entity and the Registry (e.g. in order to “maintain” evidence of status at an entity’s registered office the Registry would need to regularly issue a certificate of good standing or similar to confirm the entity’s current status).

To avoid additional and unnecessary administration, and to avoid uncertainty, the legislation should clarify that the requirement to keep evidence of the company’s legal form and status will be met by keeping a copy of the certificate of incorporation/registration at the registered office and that documents can be “maintained” at the registered office in electronic form and by way of accessing the Registry’s online services.

Also, any new record-keeping requirements should allow for records to be kept and maintained in electronic form, consistent with existing record-keeping obligations under the Commercial Laws and the Electronic Transactions (Guernsey) Law, 2000. (This comment also applies to the proposals at paragraphs 15 and 16.)

***Para. 15 – Record of beneficiaries (foundations)***

In practice, a record of beneficiaries will already be kept at the registered office, particularly where a CSP provides registered office services as this information will need to be kept and maintained by the CSP in order to comply with its AML/CFT obligations.

Basic information on a beneficiary’s interest in the foundation is usually set out in the foundation’s rules, a copy of which will also be kept at the registered office. This should continue to not be made publicly available as it often contains sensitive and confidential information.

***Para. 16 – Register of members (LLPs)***

The nature and extent of a member’s interest in the LLP will derive from their rights under the relevant partnership agreement and will be commercially sensitive and confidential information.

We note the requirement in para. 24.4 of the FATF Recommendations to include the nature of the associated voting rights for shareholders or members of companies, and that footnote 70 requires countries to take into account the different forms and structures of other legal persons. We consider that the requirement in respect of LLPs would be met by referring to a member’s capital contribution/commitment rather than the nature and extent of their interest, which will vary over time (e.g. depending on profits or other contributions).

***Paras. 17 and 17B – Inspection of a company’s shareholder register***

We feel very strongly that the amendment proposed at paragraph 17 (and consequently paragraph 17B set out in the Addendum) should be withdrawn.



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This amendment would remove the current requirement to demonstrate a legitimate interest in inspecting a company's register of shareholders, which is an important protection for shareholders and consistent with the position in both Jersey (contrary to the assertion in the 23 January Email) and the UK.

Removing this protection is effectively making the shareholder register publicly available. This is not a requirement of the FATF Recommendations and not consistent with the other Commercial Laws, contrary to the assertion in this paragraph. It is also at odds with the European Court of Justice ruling in November 2022 that information held on beneficial ownership registers should not be publicly accessible.

We understood from the meeting on 10 January 2023 that the above points had been taken on board and the proposals would be revised. However, we note from the 23 January Email that this is not the case and the proposed changes remain under consideration.

We understand from the 23 January Email that there is a concern that the current inspection of register provisions under section 127 of the Companies (Guernsey) Law, 2008 suggest that the authorities cannot get the information in a timely way and that there is a potential tipping off risk. We do not agree - we consider that the GFSC and other competent authorities are already able to access the information contained in a company's shareholder register through other means, for example through the beneficial ownership regime and the certification process referred to at paragraph 37 of the Consultation Paper. We consider that such authorities are more likely to use those alternative means, whereby they are specifically given powers to access information, instead of relying on the provisions at section 127 which we assume were intended to give interested persons (other than authorities), who would not have any alternative means to access such information (e.g. other members), access rights in appropriate circumstances.

The 23 January Email refers to company inspection provisions in several other jurisdictions, including the UK and Cayman but we do not consider that the comparisons are appropriate or meaningful:

- **UK:** Whilst in the UK certain shareholder information can be obtained from UK Companies House, this is not an appropriate comparison because the UK does not have the same AML/CFT or beneficial ownership frameworks that are in place in Guernsey. Unlike the position in the UK, in Guernsey (i) only a CSP (which is subject to AML/CFT obligations which require it to identify and verify beneficial owners, and to supervision by the GFSC) can incorporate a company and (ii) subject to limited exemptions, a resident agent with beneficial ownership obligations must be appointed. There is therefore a framework in place in Guernsey which would allow for the authorities to access beneficial ownership information in appropriate circumstances. There is no such framework in place in the UK.
- **Cayman:** We understand that, whilst there are no equivalent provisions requiring persons wishing to inspect the register of members to disclose the purpose of such an inspection, that is because there is no right to inspect the register at all. So again, Cayman is not an appropriate comparison.



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We note from the 23 January Email that further research of other jurisdictions is being carried out and we would be interested in the findings of such research. We would also be interested in any findings by the Commercial Bar Association who we consider are well-placed to comment on other jurisdictions, particularly where its members are from firms in multiple jurisdictions.

***Para. 18 – Access to information upon a company’s liquidation or administration***

We do not consider that the liquidator or administrator should automatically become the resident agent in circumstances where a company in liquidation or administration has no resident agent. This is likely to deter liquidators and administrators from acting and is unlikely to achieve the desired outcome where the liquidator or administrator is not based in Guernsey (due to issues around access to information and enforceability).

We consider that a better approach would be to give the liquidator or administrator the choice to act as resident agent (or alternatively to assume the AML/CFT obligations of a resident agent without being appointed to the named role) or to appoint a Guernsey regulated CSP as the resident agent. Where the company is in compulsory liquidation, the liquidator will be a court appointee whose duties (and right to fees) will be determined by the Royal Court which could impose AML/CFT duties, and for solvent liquidations the solvency legislation could be amended to impose such duties.

Also, we note that the Companies Law includes the concept of a “recognised auditor” - it might be worth exploring the potential concept of a “recognised liquidator” to ensure the appropriate level of regulation.

***Paras. 19-21 – Beneficial ownership information for limited partners***

We agree with the proposal to amend the Limited Partnerships Law so that, as far as practically possible, the equivalent resident agent provisions that apply to companies, foundations and LLPs are applied to limited partnerships with legal personality.

However, we consider that a limited partnership should be allowed to appoint a CSP as the resident agent, rather than the resident agent duties automatically falling to the nominated general partner.

***Para. 24 and 25 – Enforcement measures - Consistency in sanctions and Publication of Sanctions***

We consider that the proposed enhancements to the Registry’s enforcement powers are not appropriate with regards to financial services businesses regulated by the GFSC. The GFSC already has powers to impose substantial penalties and other sanctions measures (e.g. public statements) for non-compliance by persons regulated by it, including Guernsey regulated CSPs which provide services to a significant proportion of entities set up under the Commercial Laws.

We consider that the Registry’s enforcement powers should distinguish between the regulated and unregulated sectors. Where a regulated business which provides services to a registered entity (e.g. where a regulated business acts as resident agent or provides directors) fails to comply with obligations under the Commercial Laws, the Registry should refer the matter to the GFSC for it to consider whether to exercise its enforcement powers in respect of the regulated business.



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The Registry should not have the power to impose sanctions measures on regulated businesses – this would effectively lead to regulated businesses being regulated twice, and potentially being subject to double penalties.

We also have concerns that if the Registry is given such extensive enforcement powers, it will be under pressure to demonstrate the effectiveness of such powers ahead of Moneyval’s visit.

In any event, we consider that the enforcement powers listed at paragraph 24 need further definition in order to comment fully – e.g. do they extend to non-compliance with all obligations, or only those relating to beneficial ownership information or AML/CFT risks? How will the Registrar assess and measure “misconduct”?

***Para. 27 – Consistency in enforcement process***

Whilst we do not agree that the Charities Law is an appropriate benchmark for the enforcement process under the Beneficial Ownership Law, we are comfortable with the proposals at (a) and (b) in this paragraph.

However, we are concerned that the proposed removal of the requirement for the Registrar to issue a “sanctions proposal notice” compromises the due process that currently applies before the Registrar makes an enforcement decision. Giving an entity or person a sufficient opportunity to make representations is an important aspect of the current process. We are not comfortable with the proposal to replace the current process with an enforcement policy which would not have the same status as law.

We note that an alternative proposal has been put forward which would be to keep the current 28 day period for representations but to provide the Registrar with the ability to reduce this period where necessary to do so in the public interest or for the reputation of the Bailiwick, or if by reason of those interests a decision needs to be taken immediately as a matter of urgency to dispense with this requirement with the prior confirmation by a suitable authority (to be determined if respondents are comfortable with this alternative proposal).

We are grateful that our initial concerns have been taken into account and we welcome retaining the current 28 day period for representations – it is important that an entity or person has sufficient time to consider any proposed sanctions and to take advice where appropriate. We note the similarity to the provisions under section 103 of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 and in principle agree that this is a fair and transparent process to apply to the Registry’s enforcement process.

However, we do have some concerns as to whether the Registrar is in a position to determine whether reducing the period is in the public interest or for the reputation of the Bailiwick – we would question how the Registrar will make that determination and note that the GFSC, which makes that determination under the Enforcement Powers Law, is more qualified to make that determination.



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***Paras. 30 to 35 – Information gathering and sharing powers***

As noted above, we do not agree that the Charities Law is the appropriate benchmark for the Registrar’s information gathering powers. The Registrar’s role under the Charities Law is quite different to their role under the Commercial Laws and we consider that the new information gathering and sharing powers are excessive for the Registrar’s primary role in respect of the registration of legal persons under the Commercial Laws.

We do not understand the rationale for giving the Revenue Service information gathering powers under the Commercial Laws. We note that the Revenue Service’s powers to call for information from the taxpayer or any other person under sections 75A and 75B of the Income Tax (Guernsey) Law, 1975 are currently limited to purposes and documentation principally relating to tax liability. However, we consider that those provisions are drafted in such a way that, to the extent that it is relevant, such information would already include ownership information.

***Para. 36 – Tipping off***

We do not consider it appropriate to include tipping off provisions in the Commercial Laws. No general offence of tipping off exists outside of AML/CFT legislation and creating such an offence under the Commercial Laws would fundamentally extend the concept of tipping off.

Given that this would affect criminal law investigations and proceedings, we consider that the views of the Commercial Bar Association on this point should be taken into account.

***Paras. 37 – 39 – Cooperation with Bailiwick authorities by resident agents and nominated general partners***

We have no issue with the proposal to extend the certification/notification process to enable other Bailiwick AML/CFT and sanctions authorities to obtain beneficial ownership information when required for the purposes of criminal or regulatory investigations or proceedings.

However, this should only apply to obtaining beneficial ownership information. We consider that the proposal to extend the process to “*any information that could be of assistance to Bailiwick authorities in the exercise of their functions*” is far too wide and uncertain, and fundamentally changes the role of the resident agent. We consider that this process should be limited to the beneficial ownership information which the resident agent already holds, or is obliged to hold, in accordance with its statutory obligations.

We understand the rationale behind this proposal is FATF’s Recommendation 24 and the methodology statement at 24.8 but do not interpret this as requiring resident agents to provide *any* information that could be of assistance – it is clear from the introductory wording at 24.8 that cooperation is required “in determining the beneficial owner” and read this as applying to sub-paragraphs (a) to (c), and so the resident agent’s obligations to provide information and assistance is limited accordingly. Any amendments to legislation should be clear on the scope of the resident agent’s obligations.



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Please see our comments above in respect of paragraph 21 for our feedback on the role of nominated general partners in this process (we consider that this process should only apply to the resident agent, which may be a general partner if appointed to that role by the limited partnership).

***Para. 40 – Transitional Provisions***

The proposed changes will have a significant impact on existing registered entities, and also on CSPs providing services to registered entities which will need time to update policies, procedures and systems in order to comply with their regulatory obligations. Communication of the changes and training will also need to be factored into any transitional provisions.

The proposals that would most require transitional provisions are those at paragraphs:

- 7 – 10: Basic governing powers;
- 24 and 25: Enforcement measures - Consistency in sanctions and Publication of Sanctions;
- 27: Consistency in enforcement process
- 30 to 35: Information gathering and sharing powers
- 36: Tipping off (if the proposal is retained)
- 37 – 39: Cooperation with Bailiwick authorities by resident agents and nominated general partners

as these provisions will require the most (a) upfront work to be in compliance (e.g. to update information already held at the Registry or at the entity's registered office) and/or (b) changes to policies, procedures and systems for CSPs.

We hope the above feedback is helpful. Please do not hesitate to contact us should you have any questions or wish to discuss any aspect of our feedback further.

Submitted on 20th February 2023 on behalf of the Guernsey Association of Trustees and its members.

cc. Guernsey Financial Services Commission  
Commercial Bar Association