



RESPONSE TO COMMENTS MADE ON THE CONSULTATION PAPER FOR A CENTRAL REGISTRY OF BENEFICIAL OWNERSHIP OF LEGAL PERSONS

Introduction

1. This document provides an overview of the conclusions of the Committee *for* Economic Development and the Policy & Resources Committee (the Committees) in relation to the comments received to the technical consultation paper issued in June 2016. The consultation paper proposed the creation of a private central registry of beneficial ownership of legal persons (the Register), to be administered by a Registrar of Beneficial Ownership (the Registrar).
2. Twenty-seven responses to the consultation were received. They came from businesses, industry associations and individuals in their private capacity, as well as from the Registrar of Companies, the Guernsey Financial Services Commission (GFSC) and the Guernsey Border Agency.
3. Overall, the comments received demonstrated the benefits of consultation, with a number of valuable contributions leading to changes to the proposals in the consultation paper. The changes are summarised below and are also then set out in greater detail, using the same subject headings as those in the consultation paper for ease of reference.
4. In addition, some responses contained at least an element of misunderstanding. The Committees therefore take this opportunity of stating that the consultation paper is part of a process. It was a targeted request for input on the shape of a registry framework for beneficial ownership of legal persons; it was not seeking answers to every aspect of the transparency of beneficial ownership agenda, and it neither constituted legislation nor suggested specific legislative language. In broad terms, the paper took the existing framework in which resident agents hold beneficial ownership information and suggested some tightening of it, coupled with a requirement to provide beneficial ownership information (which should already be held) to the Registrar.
5. There also appeared to be a mistaken belief by some that the creation of the Register would change the position with regard to the provision of beneficial ownership

information to third parties. This is not the case. It is important to emphasise that the exchange of information with foreign counterparts in relation to beneficial owners is not a new concept or something where there is no experience of how the exchange of confidential information of this kind works in practice. In fact, the Guernsey AML/CFT authorities have been exchanging information on beneficial owners of legal persons for many years and there are secure processes on when exchange is exchanged and when it might not be. There are also well established restrictions in place on the use that can be made of that information once it has been provided, which cannot be overridden by legislation governing access to personal data or the freedom of information. To reiterate, the establishment of the Register will not affect the existing criteria that must be met before beneficial ownership information can be provided or the restrictions that are currently attached to its use, and should therefore make no difference to the number or types of requests for information on beneficial ownership that can be entertained or to the way in which the information is treated once provided.

6. There appeared to be further misunderstanding about the purpose of enhancing access to beneficial ownership information, as some responses demonstrated a belief this was driven by supervisory issues involving information exchange between regulators, when in fact the principal driver behind international initiatives in relation to beneficial ownership is to ensure that the necessary information is available to law enforcement agencies for the purposes of domestic or overseas criminal investigations into the source or location of illicit assets. Virtually all exchange of beneficial ownership information outside the context of tax information exchange agreements takes place between law enforcement authorities and the establishment of the Register will not change this. This is reflected in the undertaking given to the UK by the Chief Minister earlier this year that as well as introducing the Register Guernsey would put in place a designated team to be a point of contact for cooperation between Guernsey law enforcement agencies and international counterparts. The Register will however make information exchange more effective, as it will facilitate faster access to information for the domestic authorities, and therefore faster exchange with the authorities in other jurisdictions. It will also permit crosschecking of data to establish whether a person who is the subject of a criminal investigation is the beneficial owner of any legal persons that have not yet been identified in the course of the investigation. To be clear, this is an important investigatory tool that does not comprise a so-called “fishing expedition”. “Fishing expeditions” for information, that is, requests for information that are not justified by the requirements of an investigation, do not take place and will not take place in the future. In the same way as for the use of beneficial ownership information by domestic authorities, requests for information on beneficial ownership from overseas authorities are targeted and will continue to be targeted.

7. There was also some misconception that all information held by the Guernsey Registry is publicly accessible, perhaps because it makes a substantial amount of information available on line. In fact, some information held by the registry is confidential, is subject to existing strict confidentiality processes within the registry and by definition is not accessible to the public.
8. Some responses suggested that more far reaching measures, for example, extending the definition of beneficial owner to a wider class of individuals or including legal arrangements such as trusts, should be considered. While the Committees are grateful for these suggestions, they do not come within the scope of the project at hand so are not considered further for present purposes.
9. Turning to who should be the Registrar, having given the matter detailed consideration, the Committees believe that government must be responsible for such an important project and for delivering the international commitment that has been made. They have therefore decided to appoint the Registrar of Companies as the Registrar. This decision informs a number of the issues that are addressed below.
10. Finally, there are two points on which the Committees believe further consideration is necessary. The first point concerns the definition of beneficial owner. Many responses considered that the proposed definition in the consultation paper was too wide, particularly with regard to the third limb of the proposed definition and the reference to protectors and beneficiaries of trusts. It is accepted that the definition should be narrowed to reflect these points. A large number of respondents also expressed the wish for a single definition applicable under both commercial legislation and the AML/CFT framework. The importance of this is also recognised. It is therefore proposed that the legislation which establishes the register should permit the definition of beneficial owner to be made by regulations. This will permit the definition for the purposes of commercial legislation to be considered at the same time as that for the AML/CFT framework and the language relating to beneficial ownership revised as necessary to ensure that the two regimes are as closely aligned as possible given their different characteristics. Subject to the precise wording of the definition being finalised, the intention is that it will be based on the approach in the FATF standards with regard to ownership and control. Therefore it will apply in the case of companies to individuals who hold, either directly or indirectly through a chain of ownership, more than a specified threshold of the shares or voting rights in a company or the right to appoint or remove the majority of its directors, as well as to individuals who otherwise control the company. This definition will be modified as necessary in relation to other forms of legal person to reflect their particular characteristics. Provision will also be made for joint interests so that where two or

more persons hold a share or similar right jointly both are treated as holding it. Similarly, where shares are held by a number of associated persons, for example members of the same family or persons who have entered into an arrangement to exercise their rights jointly, each person is treated as holding the combined shares or rights of them all.

11. The second point is the proposal to extend the power to apply for incorporation to a wider group of supervised entities than at present. Responses on this issue were mixed, and as it is not germane to the issues relating to the Register, it will be examined further as a separate work stream which will permit the points raised in the consultation to be fully considered.

Summary of changes following consultation

12. The following changes are intended to be made to the proposals in the consultation paper:
 - a. The proposal to permit beneficial ownership information with foreign authorities with registration functions will be removed.
 - b. Information on trusts in ownership structures will be limited to the trustee.
 - c. The period within which resident agents should report any changes in beneficial ownership to the Registrar will run from the date on which the resident agent is aware of the change or could reasonably be expected to be aware of it, rather than from the date on which the change occurs.
 - d. The Registrar's monitoring, verification and enforcement powers will not be applicable to legal persons administered by persons licensed by the GFSC.
 - e. The proposed obligation of resident agents to provide board members or equivalent officers with the same information as that provided to the Registrar will be replaced with an obligation to provide this information to these parties upon request.
 - f. Additional provisions permitting resident agents to give notice of intention to resign will be included.
 - g. Provision will be made for the issuing of standard beneficial ownership declaration forms and statutory guidance.

- h. The definition of beneficial ownership will be narrower than that proposed in the consultation paper and will be set out in regulations to be enacted after further consideration, to permit alignment with the definition in the AML/CFT framework.
- i. The proposed obligation on resident agents to state the basis on which identification and verification of beneficial ownership has been carried out and to give details of the information relied on will be replaced by an obligation to state that identification and verification measures have been taken.

Central Register

- 13. Most consultation responses acknowledged the importance of addressing developments in international standards and expectations with regard to the transparency of legal persons and, therefore, supported the introduction of the Register. Responses were also supportive of the information on the Register being made accessible to the authorities for the purposes set out in the consultation paper, subject to two points.
- 14. The first point related to the need to identify precisely which authorities would have access to the information on the register. A specific concern was expressed by some about the provision of information to foreign authorities with registration functions, primarily with regard to the difficulty in governing the way in which this information might subsequently be used. In response to this specific concern, it is no longer the intention that the provision of information to such persons will be permitted. On the issue of access more generally, the intention is that, apart from the Registrar, only the Guernsey Border Agency and the GFSC will have direct access to the information on the Register insofar as is necessary for the purposes of their functions. The Registrar may provide other authorities with information only insofar as that is necessary for purposes which will be specifically identified in the legislation or which come within existing legal gateways (for example section 10A of the Disclosure (Bailiwick of Guernsey) Law, 2007). It is, however, intended that there will be the power to amend this aspect of the legislation by regulations to ensure that any future international developments in this area can be swiftly addressed.
- 15. The second point related to what was envisaged by civil forfeiture investigations, with some responses querying whether this was intended to go beyond the scope of the type of cases covered by the Forfeiture of Money, etc. in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 (the Civil Forfeiture Law). For the avoidance of doubt, there was never an intention to do this and it was always envisaged that when matters came to the formal drafting stage, the scope of civil forfeiture investigations would be defined in the legislation by reference to the Civil Forfeiture Law.

16. Responses also addressed the specific factors identified at paragraph 14 of the consultation paper. Security of data was the most important issue for virtually all respondents. The importance and sensitivity of this issue is recognised by the Committees. While the majority supported the idea that the Register should be electronic provided that adequate security systems could be put in place, a small number of respondents suggested that the Register should be purely paper based. Although this might have some advantages from a security perspective, it would not enable the rapid access to information or the swift crosschecking of data that are two of the primary reasons behind the international drive towards establishing beneficial ownership registers, for both international cooperation purposes and also for the purposes of domestic investigations. This would handicap the Guernsey authorities in the discharge of their functions and would inevitably lead to Guernsey being unfavourably compared with similar jurisdictions such as Jersey that have electronic registers. In addition, a paper register would not enable the Bailiwick to meet a key aspect of the undertaking given to the UK by the Chief Minister referred to above. This was that Guernsey would introduce a consolidated register so as to permit the very rapid provision of information. For these reasons, a non-electronic Register is not a feasible option, but the security concerns that have been raised are fully recognised and, in order to address them, an expert working party to look into the best way to guarantee the security of the information on the Register is being established. The Registrar of Companies will chair the group and its membership, which includes the States of Guernsey Chief Information Officer, is drawn from both the public and private sector. The contribution from the private sector will be particularly valuable in ensuring that the IT system that is put in place fully addresses industry concerns about security.

17. Responses on the other specific factors at paragraph 14 were mixed, but the majority believed that the costs of the Register should be borne by the States of Guernsey. It is intended that the capital costs of establishing the Register will be funded by means of a States Loan, repayable by the Guernsey Registry over 5 years from the annual validation income already received from legal entities. This is consistent with the approach taken on the establishment of the Guernsey Registry in 2008. There was also support for measures to reduce duplication, in particular a single process for incorporation and provision of beneficial ownership information and for the appointment of a single Registrar for administered and non-administered legal persons. These aims will be achieved in the appointment of the Registrar of Companies as the Registrar.

18. Another point raised concerned the potential overlap of the proposed monitoring and verification powers for the Registrar with the existing oversight functions of the GFSC. The force of this point is recognised and it is proposed that the Registrar's monitoring, verification and enforcement powers will be restricted to legal persons that are not administered by a person licensed by the GFSC. In order to ensure that there is no gap in the legal framework as a result, the GFSC's oversight functions will be expanded to include the adequacy of beneficial ownership information provided to the Registrar. The Registrar's powers will be exercised on the basis of risk, taking into account matters such as the objects or areas of activities of a legal person. The powers will cover steps such as issuing notices to obtain information from the legal person, the registered agent or third parties (such as financial services businesses with which the beneficial owner or another legal person owned or controlled by the beneficial owner has an established business relationship), and the right to immediate and direct access to the record of beneficial ownership maintained at a legal person's registered office, whether by attendance at the premises or otherwise. These measures are intended to address the point made by MoneyVal about the need for an oversight process in relation to beneficial ownership information obligations for companies whose directors are not licensed by the GFSC.
19. Possible confidentiality and data integrity issues around monitoring and verification of information by the Registrar were also raised. In recognition of this, the exercise of the power to undertake this will be subject to strict safeguards including confidentiality obligations and data protection measures, and the Registrar will only be entitled to take copies of documents at the registered office where this is necessary for the purposes of enforcement action.
20. The consultation paper also sought views on exemptions from the obligation to provide information on beneficial ownership. There was a suggestion that there should be an additional exemption for charities, along the lines of the exemption in the new UK legislation about persons with significant control. The Committees have considered this but do not propose to introduce such an exemption, as the regimes governing charities in the UK and Guernsey are not comparable. Charities in the UK are subject to a comprehensive oversight framework that is far more extensive than the Guernsey registration regime for charities. Apart from this point, the consensus was that the current exemptions should be maintained and the intention is to do this. There will also be a power to amend the exemptions by regulation in line with the existing power under the legislation governing companies and limited liability partnerships, to permit changes to be made as necessary to reflect any future developments in this area.

Provision of information to the Registrar

21. Many respondents indicated that the proposed obligation on resident agents to report changes to beneficial ownership within a certain time required modification, as resident agents may often not be aware of changes at the time at which they take place. In recognition of this, the proposal will be changed so that the notification obligations only arise once a resident agent is aware of a change in beneficial ownership or could reasonably be expected to be aware of it.
22. Some respondents also questioned the need for the proposed obligation on resident agents to provide board members (or equivalent officers) with the same information as that given to the Registrar. The point was made that as this intended to address comments made in the MoneyVal report about unsupervised officers (primarily persons with not more than six directorships) this was not necessary in the case of administered legal persons and could lead to duplication of work by resident agents of these entities. While the Committees recognise that this may apply in many cases, there is still a need to include unlicensed directors of administered companies within the measures that are put in place. In order to do this in a way that reduces the risk of duplication of work by resident agents, the obligation will now be confined to providing this information to board members or equivalent officers on request.
23. The need to protect resident agents from adverse consequences in the event of resignation, particularly in situations where they found it difficult to obtain instructions from their clients, was also raised. This will be addressed by the inclusion of measures enabling resident agents to serve notices of intention to resign on the legal person and on the Registrar.
24. A question was raised about the effectiveness of giving information gathering powers to resident agents on the grounds that it was difficult to see how these powers could be used to obtain information outside the jurisdiction. To clarify, it is expected that the powers will principally be used to obtain information that is held within the jurisdiction, for example from a bank at which the beneficial owner has an account. This will be subject to confidentiality requirements.
25. More generally, it was clear from many responses that resident agents would welcome assistance in the discharge of the various obligations envisaged for them as outlined in the consultation paper. Therefore, it is intended that statutory provision will be made for the Registrar to issue standard beneficial ownership declaration forms to be completed when submitting information to the Registrar. The Registrar will also have the power to issue statutory guidance.

Information that must be recorded

26. Some responses identified practical difficulties in complying with the proposed obligation to state the basis on which an individual has been identified and verified as the beneficial owner and to provide the information relied on to do so. In view of this, the proposal will be modified to require resident agents only to provide a statement to the Registrar confirming that the identity of relevant individuals has been established and verified.

Application to all legal persons

27. The majority of responses were in favour of the same obligations applying to all legal persons, and no changes from the position on this in the consultation paper are envisaged.

Nominees

28. Some responses queried the purpose of requiring the disclosure of the existence and purposes of a nominee relationship, primarily on the grounds that it would be unlikely to lead to the provision of useful information. While it is recognised that this may be true in some cases these obligations will nevertheless be retained, as they will assist the Registrar in taking a risk based approach to monitoring and enforcement in relation to non-administered legal persons, as well as helping the Bailiwick to meet the revised FATF standards in respect of all legal persons on this point.

Bearer instruments

29. The proposal to introduce explicit provisions prohibiting the use of bearer instruments was widely supported and no changes from the position on this in the consultation paper are envisaged.

Liquidations and striking off

30. Few responses addressed the issue of who should be responsible for record retention in the case of liquidation or strike off of non-administered legal persons. It is proposed that in cases where a liquidator has been appointed, the liquidator should be obliged to maintain records of beneficial ownership for 5 years. In all other cases this obligation should be borne by the resident agent, even where the legal person has been struck off following the resignation of the resident agent.