



Bailiwick of Guernsey
Financial Intelligence Unit

Bailiwick of Guernsey Consent Regime

Financial Intelligence Unit

Published April 2023

Contents

1. Introduction.....	3
2. Purpose of the Guidance Document	3
3. The Consent Regime.....	4
4. Application for Consent.....	5
5. What is the Defence Under POCL and TAFL?.....	6
6. When Should I Seek Consent from the FIU?	6
7. What are the consequences if insufficient information is submitted?.....	7
8. 'No Consent'	7
9. 'Consent granted letter'	8
10. Ongoing Obligations	8
11. Tipping Off Offences.....	9
12. Can I Discuss this Consent Issue or SAR with the Regulator or Revenue Service?	9
13. Contact.....	9
14. Appendix: Consent Regime Flow Chart	10

This guidance is issued to assist the Bailiwick's financial sector in discharging their legal duties in respect of consent matters and does not constitute legal advice. Anyone who has concerns about any of the matters covered in this guidance should obtain independent legal advice. This guidance may be revoked or amended at any time.

1. Introduction

The Bailiwick of Guernsey Financial Intelligence Unit (“FIU”), acts as the competent authority with the sole responsibility for the receipt, analysis and timely dissemination of Suspicious Activity Reports (“SARs”) filed by Financial Services Businesses and Non-Financial Services Businesses (“Reporting Entities”) to fulfil obligations set out in Part I of The Disclosure (Bailiwick of Guernsey) Law, 2007, or Sections 12, 15 or 15A of The Terrorism and Crime (Bailiwick of Guernsey) Law, 2002.

The FIU also has responsibility for addressing any ‘consent’ requests as a result of a SAR being submitted.

2. Purpose of the Guidance Document

This document is intended to provide information as to the approach that the FIU will adopt when an appointed Money Laundering Reporting Officer (“MLRO”) or Nominated Officer (‘NO’) of a Reporting Entity seeks consent from the FIU in respect of an act that may constitute a money laundering and/or terrorist financing offence according to relevant legislation.

This document outlines the consent regime, including expected responses, and addresses some common misapprehensions concerning the regime.

All MLROs must be familiar with the following, in addition to this document when submitting a disclosure to the FIU:

- Part I of The Disclosure (Bailiwick of Guernsey) Law, 2007 (“Disclosure Law”), ‘Disclosure of Information by Financial Services Businesses and by Non-Financial Services Businesses’;
- Part II of the Criminal Justice (Proceeds of Crime)(Bailiwick of Guernsey) Law, 1999 (“POCL”), ‘Offences in Connection with the Proceeds of Criminal Conduct’;
- Part III of the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 (“TACL”), ‘Terrorist Property’;
- Part IV of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000 (“DTL”), ‘Offences in Connection with the Proceeds of Drug Trafficking’;
- Schedule 3 of the Criminal Justice (Proceeds of Crime)(Bailiwick of Guernsey) Law, 1999 (“POCL”) ‘Specified Businesses’
- Chapter 13 of Guernsey Financial Services Commission (“GFSC”) Handbook on Countering Financial Crime and Terrorist Financing, ‘Reporting Suspicion’;
- FIU Guidance on the submission of Suspicious Activity Reports;
- FIU Guidance on Requests for Additional Information

3. The Consent Regime

As was made clear by the Guernsey Court of Appeal in *Chief Officer of Customs & Excise v Garnet Investments Ltd*¹ **the purpose of the Consent Regime is to provide an opportunity for law enforcement to give an exemption from criminal liability by consent where it is in the interests of law enforcement to do so.** The original rationale for the introduction of consent regimes was to protect informants and undercover operations from discovery. It also enables funds to be traced as part of an investigation. These are examples of “the interests of law enforcement”. Consent is also likely to be given in cases where it is necessary to preserve the value of assets, or for the payment of demonstrably legitimate fees.

It is not the purpose of the regime to provide for the temporary freezing of funds through the refusal of consent. Whilst such informal freezing of funds may be the practical effect, that is an effect of the criminal law itself and the fact that, in the absence of consent, Reporting Entities will be unwilling to risk the commission of a criminal offence. Refusal of consent is not confined to cases where there is a likelihood of restraint proceedings being brought. The regime thus differs from that in the UK where consent is deemed to be given if no restraint proceedings are brought within a certain period.

It is thus a misconception to refer, for example, to a bank account as being “subject to a no consent”. Where consent was sought to transfer funds from that account and consent was refused, that simply means that it was not regarded as being in the interests of law enforcement to grant consent. **The grant or refusal of consent is not an indication of the likelihood of funds being the proceeds of criminal conduct.**

It remains the case that, if you know or suspect that funds are the proceeds of criminal conduct, then by dealing with them in the ways described in sections 38 and 39 of the Proceeds of Crime Law and, in the case of knowledge, section 40 of that Law (and analogous provisions of the Drug Trafficking Law and the Terrorism and Crime Law), you will commit a criminal offence if your suspicion proves correct, unless you have first obtained consent to act from the FIU.

The only legal effect of consent is that it provides a statutory defence to money laundering or terrorist financing offences. The money laundering offences apply when a person has knowledge or suspicion that any property, in whole or in part directly or indirectly represents the proceeds of criminal conduct, and that person undertakes a particular ‘act’, ‘transaction’, ‘transfer’, ‘activity’ or ‘conversion’ in relation to those proceeds. The terrorist financing offences apply when a person knows or has reasonable cause to suspect that property may be terrorist property or intended for use for the purposes of terrorism and that person solicits, uses, possesses, enters into a money laundering arrangement or makes an insurance payment in relation to that property.

¹ <https://www.guernseylegalresources.gg/CHttpHandler.ashx?documentid=62574>

The Consent Regime is not a substitute for Reporting Entities to discharge their obligations under the legal and regulatory framework.

Reporting Entities should take a risk-based approach when considering business relationships, to prevent their products and services being used for the purpose of money laundering or terrorist financing.

The FIU will only grant or withhold consent, when a Reporting Entity is seeking a statutory defence to an ‘act’ defined under;

- Sections 38 to 40 of the POCL;
- Sections 57 to 59 of the DTL;
- Sections 8 to 11A of the TACL.

4. Application for Consent

When applying for consent you should indicate the type of act which you are proposing to undertake and identify the section of the relevant Law within which that act falls so that undertaking it without consent would constitute a criminal offence.

You must provide full details of the act for which you seek consent. You should **give full details** of:

- **any proposed transaction**
- **the nature of the transaction**
- **the parties involved**
- **the date or estimated date of the transaction**
- **the actual or estimated value of property involved in the transaction**
- **the rationale for the transaction**

Failure to provide such details will result in the FIU issuing a **“Consent Not Applicable”** response, indicating that no specific act has been identified with sufficient clarity, in respect of which consent to proceed is sought.

Examples of failure to specify an act include cases where consent is sought to “Maintain the relationship”, to “Continue and maintain the account”, or to “Exit the relationship”. Such proposed conduct may involve individual acts which could form the subject of consent, such as a transfer of assets to a new trustee, or the payment out of funds. However, a request for consent must specify each individual act in order to constitute a proper request for consent. A request for consent to commence or maintain a business relationship (sometimes referred to as ‘Business as Usual (BAU)’ consent) is too wide. It may encompass a number of unspecified prohibited acts. Consent of this nature therefore cannot be given by the FIU.

It is possible to submit one SAR with a request for consent for a number of, or a category of, transactions. A request of this nature must be sufficiently detailed with regard to matters such as the nature, number, regularity, duration and estimated value of the transactions, perhaps set out in a table or spreadsheet. Consent can then be considered in relation to each act.

Where consent is granted, a letter will be sent indicating that you have a statutory criminal defence in relation to specified acts.

Where consent is refused, a letter will be sent indicating that you do not have such a statutory criminal defence.

There is no statutory time limit in which the FIU must respond to a consent request. However, the FIU will aim to respond to the request within 14 working days of the submission.

5. What is the Defence Under POCL and TACL?

When a SAR is submitted where there is knowledge, suspicion or reasonable grounds for knowing or suspecting that another person is engaged in money laundering, or that certain property is, or is derived from the proceeds of criminal conduct, you can seek a statutory defence from the FIU to an offence under POCL (or under the DTL in drugs related cases). There is also a corresponding defence in relation to terrorist financing and terrorist property under the TACL.

The wording of the statutory defence makes it clear that it only applies to a specific act.

This statutory defence is only available where consent is obtained prior to a person undertaking the relevant act which they anticipate could result in them committing a money laundering offence.

A person who has submitted a SAR and has received consent (i.e. a 'defence to a money laundering offence' response) from the FIU in respect of a particular act, based on the information disclosed at that time, will have acquired a defence to a money laundering offence (or terrorist financing offence as the case may be) when carrying out that act.

6. When Should I Seek Consent from the FIU?

The purpose of seeking consent is to seek a defence to an 'act' that could constitute an offence under the law.

If a Reporting Entity which has the relevant suspicion or knowledge is being asked to carry out an act that may comprise an offence, such as concealment, conversion or transfer of property, or its removal from the Bailiwick, then it should seek consent from the FIU before undertaking that act.

Be careful to analyse whether there is a risk of the commission of an offence before seeking a defence. **The Consent Regime is not a "safety blanket". Consent requests which do not follow the guidance in this document, and/or are related to SARs which do not follow the Guidance on the Submission of SARs, are unlikely to be granted. Consent may still be refused where all guidance is followed, unless it is in the interests of law enforcement to grant consent.**

7. What are the consequences if insufficient information is submitted?

If the SAR and/or consent request does not contain sufficient information to demonstrate why suspicion has been raised or to enable the FIU to fully understand the purpose and intended nature of the business relationship or occasional transaction, the FIU may not have sufficient information to consider providing you with a defence. In such a case you will receive a letter indicating that **insufficient information** has been provided to enable the FIU to consider the request for consent.

In addition to identifying in adequate detail the specific act for which consent is sought, you should have regard to the FIU's Guidance on the Submission of SARs so as to ensure that you provide sufficient information within a SAR for any associated consent request to be considered. If there is some reason why you are unable to provide detailed information (for example, you are filing a SAR based only upon suspicion raised by having received a request for information from the FIU under Regulation 2A) then you should explain the position.

8. 'No Consent'

The only legal effect of a consent request being refused is that if a Reporting Entity proceeds with the relevant act, it will not have a statutory defence to a charge of money laundering or terrorist financing in relation to that act.

A SAR is a living document and therefore if a Reporting Entity becomes aware of new information that it believes negates the original suspicion, it should provide that information and the rationale behind it to the FIU as soon as practicable. This will enable the FIU to reconsider whether the original 'No Consent' should be rescinded.

The refusal of consent for a specific act simply means that you will have no defence to a money laundering offence if you commit that act and if your suspicion is correct. The commercial effect of the substantive money laundering offences is that funds can effectively be "frozen" by the Reporting Entity's unwillingness to risk the commission of an offence. In such a situation it is highly likely that, without the client being informed by the Reporting Entity that a SAR has been filed and consent sought (which would constitute tipping off), the client (if necessary with the benefit of legal advice) will in time deduce that this is the case. The client is the party best placed to know and to demonstrate the provenance of the funds. It is open to the client to bring a civil action against the Reporting Entity in order to demonstrate that the funds are not the proceeds of crime, thus enabling the Reporting Entity to proceed with a transaction without fear of prosecution (see the Royal Court case of *BD Limited v Investec Bank*² for an example of this).

Where a client cannot demonstrate that the funds are "clean", there is now a statutory procedure by which summary civil forfeiture proceedings can be brought by HM Procurer

² [CHttpHandler.ashx\(guernseylegalresources.gg\)](http://CHttpHandler.ashx(guernseylegalresources.gg))

once 12 months have elapsed from the FIU's refusal of consent to do an act in relation to funds in a bank account in the Bailiwick (see s.12A of the Civil Forfeiture Law³).

9. 'Consent granted letter'

Upon receiving a 'granted' response, the corresponding letter issued by the FIU via THEMIS will refer to the terms 'defence to a money laundering/terrorist financing offence' as applicable under the relevant legislation.

A granted response (and the subsequent defence):

- **Does not** imply FIU approval of the proposed act(s), persons, corporate entities or circumstances contained within the disclosure.
- **Should not** be taken as a statement that the property in question does or does not represent the proceeds of criminal conduct/terrorist property.
- **Does not** provide you with a defence against other criminal offences or any regulatory breaches relating to the proposed act(s).
- **Does not** oblige or mandate you to undertake the proposed act(s).
- **Does not** override the private law rights of any person who may be entitled to the property specified in the disclosure.

A granted response only provides a criminal defence to the money laundering or terrorist financing offences, in relation to the act specified in the request and the information disclosed at the time. Any changes in circumstance thereafter may impact on the validity of the defence.

It should also be noted that such a consent does not release the firm, group or person from their obligation in respect of all future transactions and activity on the account or arising from the relationship, or other regulatory requirements.

The granting of consent does not mean that other regulatory and legal obligations, such as the prevention of corruption and fraud, common reporting standards reporting, and regulatory legislation, are discharged and you should therefore consider how you proceed with the client/customer accordingly.

10. Ongoing Obligations

Once you have submitted a SAR to the FIU, it does not release you from your ongoing obligations in respect of all future transactions. You will need to consider what you are going to do next including taking any further steps to negate the original suspicion. This may require you to seek further information from the client surrounding the suspicion identified, having due regard to the Guernsey Financial Services Commission Handbook. The suspicion may be such that a Reporting Entity may wish to consider terminating the business relationship, which is a commercial decision for the business. Termination of the relationship may involve

³ [Forfeiture of Money, etc in Civil Proceedings \(Bailiwick of Guernsey\) Law, 2007 \(guernseylegalresources.gg\)](https://www.guernseylegalresources.gg/)

acts which could constitute money laundering offences, such as the transfer of assets. Consent should be sought in respect of such acts. On occasions the Reporting Entity may agree a joint strategy with the FIU in respect of exiting a relationship. However, the FIU will not seek to influence a decision to exit by the business.

11. Tipping Off Offences

Under no circumstances should you inform your client or customer that you have submitted a SAR to the FIU, or that you intend to submit a SAR. If you do so inform your client, you could be committing an offence under the relevant legislation:

- Section 4 of the Disclosure Law;
- Section 41 of the POCL;
- Section 40 of the TACL;
- Section 61 of the DTL.

Refer to the FIU's Guidance on the Submission of SARs for more information about tipping-off.

12. Can I Discuss this Consent Issue or SAR with the Regulator or Revenue Service?

There is no need for you to seek permission from the FIU to discuss a SAR with the Guernsey Financial Services Commission (GFSC), the Alderney Gambling Control Commission (AGCC) or the Guernsey Revenue Service, as the FIU provides such AML authorities with SAR information under the provisions (gateway) of the Disclosure Law.

13. Contact

The Financial Intelligence Unit can be contacted by telephone 01481 225824 or email FIU@gba.gov.gg. Guidance issued by the FIU can be found on the website www.guernseyfiu.gg.

[Report End]

14.Appendix: Consent Regime Flow Chart

