

STEP Guernsey Conference

Managing Risk in the Fiduciary Industry

Presented by

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Managing Risk

Recent Challenges



British Virgin Islands



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Different Approaches



Managing Risk

Overview of Presentation

- Insolvency Risk
- Transactional Risk
- Sanctions Risk
- Who is responsible for risk management

Managing Insolvency Risk

Administered Companies



Managing Insolvency Risk

Mitigation Strategies



Managing Insolvency Risk

Mitigation Strategies – Pressure Points

- Company's balance sheet and cash flow position
- New Contracts
- Keep up to date
- Supply chain
- Review existing contracts
- Litigation strategies

Managing Insolvency Risk

Zone of Insolvency

- Common law fiduciary duties
- Statutory duties
- Interests of the creditors – v – interests of the company
- Record keeping

Managing Transactional Risk



Managing Transactional Risk

Capacity and Due Execution

- Certificate of Incorporation
- Memorandum and Articles
- Register of Directors
- Authorised Signatories
- Written resolutions / Board Minutes
- Trust Instruments
- Corporate Directors



Unbroken Chain of Authority

and

Delegation of Powers

Managing Transactional Risk

Due Execution during COVID-19 Lockdown

- Wet ink -v- electronic execution
- Electronic Transactions Law 2000
- Electronic Transactions (Exemptions) Order 2001
- Trusts (Guernsey) Law 2007
- Pragmatic Approach



Managing Transaction Risk

Opinion Certificates

- Confirmation by Director of certain matters of fact
- Dated on day Opinion is issued
- Relied on by law firm when issuing Opinion
- Contents remains complete and accurate on completion

Managing Sanctions Risk

Russia's Invasion of Ukraine

- Commercial Risk
- Regulatory Risk
- EU Regulation 2022/576 dated 8 April 2022
- Article 5m

Managing Sanctions Risk

EU Regulation 2022 / 576 – Article 5m

Article 5m applies to a **trust** or similar legal arrangement where the trustor (i.e. **settlor**) or **beneficiary** is:

- a) a **Russian national** or **natural person resident** in Russia;
- b) a legal person, body or **entity established** in Russia;
- c) a legal person, entity or body whose proprietary rights are directly or indirectly owned for more than 50% by a person referred to in (a) or (b) above;
- d) a legal person, entity or body controlled by a natural or legal person, entity or body referred to at (a), (b) or (c) above; or
- e) a natural or legal person, entity or body acting on behalf or at the direction of a natural person, entity or body referred to at (a), (b), (c) or (d) above.

The prohibition does **not apply** where the trustor or beneficiary is a **national** of an **EU Member State**, or a natural person having a temporary or permanent **residence permit** in an **EU Member State**.

Managing Sanctions Risk

Developments following Article 5m

- STEP Position Paper
- US Sanction 4 May 2022
- UK Sanction 8 May 2022
- EU Regulation 2022/879 dated 3 June 2022

Managing Sanctions Risk – STEP Position Paper

Article 5m of EU Regulation 2022/576

*"an EU trustee must **reach out to the settlor** and the **beneficiaries** of a trust with a Russian connection **pointing out the different solutions available** to comply with these provisions. This contact should be **properly documented**, as it may be relevant for the purposes of the **personal liability** of the **trustee** if **no solution** is achieved by the due date".*

Managing Sanctions Risk

GFSC Sanctions Thematic Review – Areas for Improvement (specific recommendations)

Screening of Underlying Assets

Action: consider whether **underlying assets** (including subsidiaries) could be **subject** to **sanctions** and document what **mitigation** is possible

Understanding and Mitigating Sanctions Risks

Action: **assess** sanctions **risk** of **customers**, **products** and **services** and determine appropriate **mitigation**

Managing Sanctions Risk

GFSC Sanctions Thematic Review – Areas for Improvement (general observation)

Board ↔ Compliance ↔ IT

*“All firms should be alive to the **risk** of placing **over reliance** on these **systems**.”*

*“It is **crucial** staff from the **different functions interact** with one another in order to **minimise the risk of screening failures**.”*

Managing Sanctions Risk

Documenting concerns and how they are managed

- What is the issue?
- What is the context?
- What are stakeholders concerns?
- What are the potential sensitivities for business?
- Are there time pressures?
- Any similar cases?

Managing Sanctions Risk

Client Take On

- GAT and GFSC message 22 April 2022
 - Trust related business connected to a **sanctioned** individual is **not welcome** in Guernsey
- “**Other Russian wealth structures** which can be clearly **shown not** to be **related** to **sanctioned** (EU/US/UK) **individuals** or **Russian war industries etc**”:
 - Is there a **positive case** for take on based on its **merits**?
 - Can you demonstrate **own** very **thorough** due diligence?
 - Can you **demonstrate** compliance in full with **AML/KYC, beneficial ownership** and **source of funds** requirements?
- Check **nationality** or other **links** of **staff** working on structure

Managing Sanctions Risk

Onboarding Checks

- Financial statements and audit trail
- CRS due diligence and reporting
- Reasonable to rely?
- Governing law
- Manage expectations as well as risks

Managing Risks – Who is Responsible?

Fiduciary Rules and Guidance

Board and Senior Management

Take all **reasonable steps** to ensure all **employees** act so as to **avoid** material **damage** to:

- reputation
- financial position
- Bailiwick as IFC

Employees

- Understand **duties** to client/client companies, and
- Understand extent to which they must **exercise independent judgement**

Managing Risks

Who is Responsible?

*“...we are all **collectively responsible** for maintaining the Bailiwick’s good name.”*

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