

FinReg

MOURANT OZANNES

FINANCIAL SERVICES & REGULATORY

SPRING UPDATE 2016 - JERSEY

WELCOME

Simon Gould
Partner

T +44 1534 676 367

E simon.gould@mourantozannes.com



As you can see, we have refreshed the format of this Update but it is still packed with our views on the latest regulatory developments in Jersey. We have also included some questions that you can respond to by ticking the boxes and clicking **'SUBMIT'** at the end of our quick fire updates (provided that you are reading it from your computer). Please do take a few seconds to answer the questions. We won't be attributing answers to anyone but if we notice any interesting trends, we will share those trends with you in later updates. I hope you will take the opportunity to do so.

In commenting on the last quarter's events, our attention is largely drawn to international affairs, with cyber security featuring prominently, following the 'Panama Papers' publication, hence our spotlight focus on this topic. We also still await the outcome of the MONEYVAL review and there is a long list of other international topics which are playing a significant part in dictating the future of Jersey's finance industry, including, to name a few, consultations on disclosure of beneficial ownership to a central register and bank resolution legislation, both of which we have commented on in this Update. By the time we write our next Update, we will also know the outcome of the Brexit referendum, which will no doubt either dominate the headlines or fall quickly silent.

I hope you enjoy this Update.

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QUICK FIRE UPDATES

1. BARCLAYS WEALTH DIRECTORS (JERSEY) LTD AND BARCLAYS WEALTH CORPORATE OFFICERS (JERSEY) LIMITED V AG

What's it about?

Money laundering offences were brought against Windward Trading Limited (WTL) under the Proceeds of Crime (Jersey) Law 1999. WTL's affairs were effectively frozen following the filing of a SAR in 2002, as it was suspected that WTL was holding the proceeds of criminal conduct carried out by its beneficial owner in Kenya.

Barclays assumed the administration of WTL in 2007 and provided two corporate directors. Proceedings were brought against WTL and Barclays applied to the court for assistance regarding the funding of the case. In February 2016 the court made confiscation orders equating to the monies held by the Viscount under the *saisie judiciaire*.

How does this affect you?

This case illustrates the importance of:

1. externalising a SAR when appropriate;
2. considering who will pay for legal fees if charges are brought against a company under the Proceeds of Crime Law; and
3. considering the extended timeframe which can be involved in these matters, as 14 years elapsed between the externalising of the SAR and the confiscation hearing in this case.



HAVE YOUR SAY: Does your firm provide corporate directors for administered companies? Yes No

2. JFSC FEEDBACK ON ELECTRONIC CUSTOMER DUE DILIGENCE (CDD)

What's it about?

This feedback confirms that the published E-ID section of the AML/CFT Handbook was not significantly changed from the consultation version. One helpful change clarifies that the risk assessment, in relation to the use of E-ID, can be completed as part of a wider AML/CFT business risk assessment and only needs to be completed when making a decision about incorporating E-ID into CDD procedures, rather than each time E-ID is used.

How will this affect you?

The E-ID section of the AML Handbook provides some certainty as to the parameters within which a business can use mobile apps as part of its CDD procedures.

OUR SAY: "E-ID is helpful for simplifying the collection of ID documents. Whilst Jersey must meet international standards, there are opportunities to further streamline CDD procedures."



HAVE YOUR SAY: Does your firm use mobile app technology to help with CDD?
Yes
No - we are concerned about the risks
No - it wouldn't be appropriate for our business
No - but we are considering it

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3. SWM LTD V JERSEY FINANCIAL SERVICES COMMISSION AND AG [2016] JRC 014


What's it about?

This case concerns a successful application by SWM Synergy to the Royal Court for a declaration that the commission of a one-off expert report into the suitability of advice that SWM gave to certain clients would be in the 'ordinary course of business' and so would not be in contravention of a direction issued by the JFSC, prohibiting SWM from making payments that are not in the 'ordinary course of business'.

How does this affect you?

The case serves as a useful reminder that regulated businesses should not be afraid to take independent advice and to challenge the JFSC's conclusions during their engagement with the regulator. The JFSC have now issued a press release setting out their response to the judgement.

OUR SAY: "It will be interesting to see whether this decision will have any impact on the way the JFSC phrases its directions in the future."



4. JERSEY GOVERNMENT CONSULTATION PAPER ON 'BENEFICIAL OWNERSHIP OF JERSEY COMPANIES AND A REGISTER OF DIRECTORS'

What's it about?

This topic has attracted much attention lately. The paper proposes the introduction of automatic reporting by trust companies of changes in beneficial owners and controllers of Jersey registered corporate entities to the JFSC, as well as a central register of directors of Jersey companies.

How will this affect you?

Whilst we now await Government conclusions, key concerns are that reporting should match UBO/controller information and timing of updates required for AML purposes and the extent of public access to director information.

If introduced, new procedures will be needed to identify and report details to the JFSC. Terms of business and client communications should also be reviewed to reflect this reporting obligation.



5. ALWITRY V THE STATES EMPLOYMENT BOARD AND ANOTHER [2016] JRC 050

What's it about?

In this case, the Royal Court provided guidance on dealing with data subject access requests. We've prepared a briefing summarising the main points of the case [here](#), setting out the key issues.

How does it affect you?

The guidance in this case will be relevant for all data controllers when they deal with data subject access requests. Often these requests are used to assist in litigation rather than for the legitimate purpose of verifying what personal information is held. The Courts in England have adopted a fairly robust approach in refusing to enforce such requests. The Royal Court did however enforce such a request in *Alwitary*, albeit in circumstances in which the facts can perhaps be distinguished. Data controllers should continue to be careful to ensure that they continue to consider data subject access requests carefully and cognisant of the risks of over-disclosure.



HAVE YOUR SAY: How many subject access requests do you receive in, say, a year? None A handful Dozens

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6. DRAFT BANK (RECOVERY AND RESOLUTION) (JERSEY) LAW 201-


What's it about?

The draft law shows Jersey's intention to implement a recovery and resolution regime that will be broadly consistent with the equivalent EU and UK regimes. It is proposed that the law should apply to all Jersey banks (branches and subsidiaries), establish a 'Jersey Resolution Authority', set out the general principles for resolution and the resolution tools and also implement a new winding up procedure for Jersey banks.

How will this affect you?

Once implemented, the law will require all Jersey banks to have a recovery plan. It will also require banks to include a 'bail-in clause' in foreign law contracts creating eligible liabilities. Due to a similar English law requirement, which is already in force, Jersey borrowers are already being asked to agree to 'bail-in clauses' when entering into Jersey law contracts with UK banks.

OUR SAY: "This law will have a wider scope than originally anticipated but this will give Jersey more options in the event of international banking failures."



7. HER MAJESTY'S ATTORNEY GENERAL V ARNE ROSENLUND AND ANOTHER [2016] JRC062

What's it about?

The AG was seeking a *saisie judiciaire* over assets in a trust on the basis of a request from Denmark (where there had been a criminal conviction and confiscation order granted). Mr Rosenlund and the trustee applied to strike out the application on the basis, inter alia, it contradicted fundamental and long-standing principles of Jersey Trust Law.

How will this affect you?

The application was successful and the *saisie judiciaire* was struck-out. In an earlier case the AG had failed in his argument that an entire trust could be confiscated on the basis of one beneficiary having a confiscation order made against him. This was an attempt to effectively achieve the same by arguing that a change in trustee amounted to a "gift" by the beneficiary that was caught by the law. However, there was no transfer of legal and beneficial title (necessary for a gift) and it was not done by the beneficiary, and so the application failed. For more detail, see our briefing [here](#).



8. TRUST COMPANY BUSINESS (TCB) EXAMINATION FEEDBACK (2014 AND 2015)

What's it about?

The JFSC has recently published feedback on its TCB on-site examination programmes from 2014 and 2015. The findings are consistent with the JFSC's continued focus on the effectiveness of systems and controls.

How does this affect you?

The majority of findings relate to AML/CFT shortcomings, meaning that these feedback papers are relevant for all registered persons (not just TCBs). Key points include ensuring that your business risk assessment and policies and procedures are consistent, sufficiently tailored (to manage specific, rather than generic risks), reviewed regularly, and are appropriately monitored.

We recommend that these feedback papers should trigger a cross-check of your existing systems and controls, to mitigate the risk that your business fails to satisfy the JFSC's stated expectations in future.



HAVE YOUR SAY: Do your existing policies and procedures treat JFSC feedback papers as a trigger event for reviewing operations manuals? Yes No

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SPOTLIGHT ON: INFORMATION SECURITY

It cannot have escaped most people's attention that Information Security continues to be in the news.

Recent events go to demonstrate what those in the security industry have known for a long time that all organisations face a real and present threat to their security, no matter their location or nature of business.

In order to best combat the threats you need to understand what risks your business faces. These issues can come from anywhere, either external to your organisation or indeed from within.

Hackers are a real threat to all Channel Island organisations; indeed I am aware of many companies who have experienced an intrusion. The challenges come in detecting these problems in a reasonable time frame; I have seen statistics stating that the average time to detect a data breach is close to 200 days. Can you imagine the damage that could be done in that time frame?

Some hackers do aim for specific organisations because of the data they might hold, some might attack your organisation based on a specific vulnerability they have found in your defences, regardless of their motivations to attack you. Be under no illusion, all stolen data has value and can be sold on to those wishing to use it for illegal purposes. Understanding your exposure to those elements is a crucial layer of security.

Some incidents are more opportunistic, for example Ransomware attacks. Your employees are emailed an attachment, which if opened has the potential to encrypt all of your corporate data and the gang behind it will hold you to ransom, usually demanding a payment in bitcoin. Educating your staff on the risks and implementing technical controls can help to prevent these issues. How are your IT department responding to these threats?

Finally we cannot overlook your staff. There have been numerous examples where a disgruntled employee has deliberately leaked or sold data. Ensuring you know what flows out of the company and what vectors can be used to take data from your company should be on your risk register.

Good governance includes assessing and understanding your Information Security risks and there are clear expectations from regulators on what they expect as we have seen recently with the Dear CEO letter sent by the Jersey Financial Services Commission setting out their view.

The JFSC has also recently issued a request for information from registered persons in the form of five specific questions relating to connections with Mossack Fonseca.

MATTHEW PARKER

Head of Information Security
Business Management

T +44 1481 731 450

E matthew.parker@mourantozannes.com



UPCOMING EVENTS & SEMINARS

NEWFINANCE FINTECH OPEN MIC NIGHT - VIRTUAL CURRENCIES

5:30pm - Thursday 30 June 2016

JERSEY FINANCE AGM & MEMBER UPDATE

Wednesday 24 June 2016

MOURANT OZANNES FINANCIAL SERVICES FORUM

12 July 2016

MOURANT OZANNES COMMUNITY NEWS



JERSEY TOUCH TEAM

This year we are proud to support Touch Team Jersey during the European Touch Rugby Championships being held in Jersey on 7-10 July 2016. Touch Team Jersey consists of three teams, competing in the Mixed Open, Senior Mixed Open and Men's 40s.

They will face the best Touch players from 16 other nations including the rugby Six Nations countries England, Ireland, Wales, Scotland, France and Italy.

We are delighted to sponsor Jersey's Touch Rugby stars and we wish not only them, but all of the players from every competing nation, a successful tournament.





CONSULTATION SNAPSHOTS

CONSULTATION ON PROPOSED AMENDMENTS TO THE TRUSTS (JERSEY) LAW 1984

Closing 4 July 2016

Under this consultation, which will be of particular interest to trust companies, there are 12 proposed areas for consultation, including in connection with the rights of beneficiaries to information, trustees self-contracting and the power of the court to vary a trust.

It is intended that legislation incorporating the amendments will be adopted during the course of 2016.

JFSC CONSULTATION PAPER NO.2 OF 2016 – FEES FOR THE FUNDS SECTOR

Closing 20 May 2016

This consultation will be relevant to all registered persons conducting fund services business and AIF services business, as well as collective investment fund permit holders. The proposals relate to fee increases.

JFSC CONSULTATION PAPER NO. 3 2016 – MIFID II – CONSULTATION ON WHETHER TO INTRODUCE AN EU EQUIVALENT REGIME IN JERSEY

Closing 22 July 2016

This consultation invites comments on whether Jersey should seek MiFID II equivalence. Although this paper is most likely to be of interest to investment businesses, if equivalence is sought, it could have wider implications, including changes to Jersey's financial penalties regime.



INDUSTRY UPDATE TRACKER

We've chosen a few topics which are likely to have a significant impact on the current legal and regulatory landscape in Jersey – we'll update this tracker every quarter with information on key developments which have taken place.

ANTI-MONEY LAUNDERING DEVELOPMENTS	
Various developments following the MONEYVAL visit in early 2015.	
Q2 2016	The report on MONEYVAL's findings in relation to Jersey's AML regime is expected imminently.
During 2016	Changes to the AML Handbook to reflect the intended interpretation of the 'beneficial owner or controller' three-tier test.
During 2016	Consultation or further guidance expected in relation to AML requirements for Funds and Fund Services Businesses.

BANK RECOVERY AND RESOLUTION	
The EU's Bank Recovery and Resolution Directive 2014 (BRRD) is intended to avoid systemic disruption in the event that any bank should fail. Jersey is proposing to introduce equivalent legislation.	
1 January 2016	EU Member States must have transposed Article 55 BRRD, to implement 'contractual bail-in'. EU Financial institutions will, where relevant, now require Jersey law governed agreements to indicate that relevant liabilities may be subject to bail-in.
17 March to 13 April 2016	Consultation on the draft Bank (Recovery and Resolution) (Jersey) Law 201- relating to the proposed Jersey bank recovery and resolution regime and bank winding-up procedure.
Mid 2016	Amendments to be made to the draft Jersey law, following consultation.

BENEFICIAL OWNERSHIP REPORTING AND REGISTER OF DIRECTORS	
Already ahead of other jurisdictions in relation to collecting beneficial ownership information, Jersey continues to review its position.	
Historically	Jersey has maintained a central register of beneficial ownership for over 20 years. Beneficial ownership information is disclosed to the Jersey Companies Registry upon incorporation of Jersey companies and partnerships.
10 March to 7 April 2016	Consultation on: (1) requiring automatic updates to be sent to the Jersey Companies Registry upon changes to beneficial ownership or control; and (2) establishing a public register of directors.
11 April 2016	Jersey and UK enter an agreement to reinforce existing arrangements for providing beneficial ownership information to UK law enforcement and tax authorities, including using technology to speed up responses to information requests.
Mid 2016	Feedback and proposals for change expected, following the April consultation.

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please contact one of your usual Mourant Ozannes contacts.

When you respond to the questions in this update, we collect and store the responses that you submit. By clicking 'SUBMIT', you are consenting to our collecting and using that data in accordance with our Privacy Policy, which is available online at mourantozannes.com. The information which you submit to us is not anonymous, but we will not publicly attribute any answers to you.

