

# FinReg

MOURANT OZANNES

FINANCIAL SERVICES & REGULATORY

SUMMER UPDATE 2016 - JERSEY

## WELCOME

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In this quarter's Update we report on the usual mixture of consultations, new legislation, cases and regulatory publications but it is impossible to escape a special mention for Brexit.

On 24 May 2016, MONEYVAL published its report on Jersey, which could have been the primary focus for Jersey's finance industry for several months. Government and the Commission have already started to respond to the report's recommendations, including making changes to proceeds of crime legislation and outlining a revised risk-based approach to supervision.

Just a month later, however, on what can only be described as an historic day, the UK electorate voted to leave the EU. In the short term, Jersey's finance industry must now ride the waves of economic disruption in the UK. In the medium term, with equal rigour and attention, Jersey will respond to MONEYVAL's report and the possible consequences of Brexit in relation to AIFMD, MiFID II and public beneficial ownership registers, as well as adjusting to the UK's new constitutional and political position.

In addition to responding to these international influences to make the most of the opportunities arising, it remains important to keep up with business as usual developments, like the new dormant accounts law and the ombudsman case studies referred to in this Update.

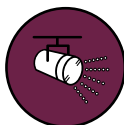
Also in this update, we look at a couple of recent cases which seem to us, to flow partially from increased pressure from MONEYVAL to ensure effective and enforced regulations. There appears to be an increased frequency of successful challenges to the exercise of regulatory and enforcement powers, which, although not of earth-shattering significance on their own, taken together do show that the Court is fulfilling its role as guardian of the rule of law, to ensure justice and curb the exercise of such powers, where appropriate. We see this as a healthy development for the industry, although no doubt always a difficult and challenging experience for the businesses and individuals concerned.

Finally, in this Update, we have also included some feedback to the 'Have Your Say' questions from the Spring Update. Thank you for your responses and we hope you will take a minute to submit your answers to the questions raised in this Update too.

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## QUICK FIRE UPDATES

### 1. JFSC PUBLIC STATEMENT: MISS JULIE ELIZABETH MCCLAFFERTY

#### What's it about?

Miss McClafferty applied for a variation of the directions which the Commission had issued in relation to her in 2014 pursuant to Article 23(1) of the FS(J)L. After considering Miss McClafferty's submission in May 2016, the Commission decided to vary the directions it had issued previously. The public statement specifically refers to the length of time since the directions were issued and to the fact that Miss McClafferty has obtained a diploma in compliance.

#### How does this affect you?

This public statement shows that the Commission is willing to vary directions of this kind in cases where there is sufficient evidence to suggest that the relevant person has acquired the requisite skill and competence to hold a position in the business of a registered person.

**OUR SAY:** "This public statement is a helpful indication of what the Commission is likely consider in deciding whether similar directions should be varied."



### 2. DORMANT BANK ACCOUNTS (JERSEY) LAW 201- (THE LAW)

#### What's it about?

The Law was approved by the States on 28 June 2016 on a second reading and will enable dormant account balances (being balances on accounts where contact has been lost with the customer for more than 15 years) to be transferred to a reclaim fund and used to support local good causes.

#### How does this affect you?

Registered deposit-takers should now be taking steps such as: identifying dormant accounts; putting in place procedures to fulfil reporting and notice requirements under the Law; and considering what changes might need to be made to terms and conditions.

**OUR SAY:** "The Law still needs to be approved by the Privy Council and registered in the Royal Court before it takes effect, and does include transitional provisions."



### 3. MONEYVAL REPORT ON JERSEY'S LEADING AML/CFT REGIME

#### What's it about?

MONEYVAL has published its report on Jersey's AML/CFT measures and it recognises Jersey's mature and sophisticated regime. Recommendations in the report are expected to cause: a small number of technical changes to legislation; a review of statutory exemptions; an increased focus on effectiveness, to include more resources for pursuing prosecutions and confiscation orders; publication of more typology reports to show trends and patterns in financial crime; and an increased focus on enhanced CDD during supervisory visits.

#### How does this affect you?

Financial services businesses will need to monitor and respond to these outcomes by updating policies and procedures, where necessary. In preparation for MONEYVAL's next visit, businesses should also engage with Government in relation to the National Risk Assessment.

**OUR SAY:** "This is a positive report and a helpful endorsement of Jersey's stable and robust regulatory environment."



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#### 4. PROCEEDS OF CRIME (MISCELLANEOUS AMENDMENTS) (JERSEY) REGULATIONS 2016

##### What's it about?

These changes, prompted by the MONEYVAL report and virtual currency consultation, increase the scope of activities to be subject to AML compliance and JFSC registration. High value dealers paid in virtual currency as well as cash and virtual currency exchangers will have to register. The MLO will also apply to express trustees who act *otherwise than by way of business*, although they will not have to register with the JFSC. The commencement date is yet to be appointed by the States and transitional provisions will apply to virtual currency exchangers. To the extent that this applies to individuals, they would be treated as 'sole traders' for whom there are some obvious limitations on the impact of the MLO, but key provisions still apply.

##### How does this affect you?

Businesses that do not deal with virtual currency will be largely unaffected themselves by these changes, but you may have customers who are affected.

**OUR SAY:** "The regulation of high value dealers in and exchangers of virtual currency seems welcome, but there are some significant challenges in the application of the MLO to private individuals who take on 'not by way of business' trusteeships, which seem likely to make such family arrangements unattractive in future."



#### 5. JFCU'S POWERS TO REFUSE CONSENT PURSUANT TO A SAR: WTHK LIMITED AND VALENTIN NZ LIMITED V UBS TRUSTEES (JERSEY) LIMITED, ROYAL COURT 27 MAY 2016

##### What's it about?

The existing trustee of certain trusts had made a SAR, in response to which JFCU refused consent to any act which would facilitate the movement or transfer of control of the trust assets. Two additional trustees were validly appointed and the existing trustee was unable, on account of JFCU's refusal of consent, to meet its obligations to provide the new trustees with the trust instrument or to complete an endorsement on the trust instrument as to the appointment of the new trustees. The Court appeared to be satisfied that neither of these actions would result in a money laundering offence and accordingly ordered the existing trustee to carry out both actions, indicating "that the JFCU exceeded its powers" in refusing consent in that respect.

##### How does this affect you?

Remedies in this context have previously been limited to judicial review of the JFCU's decision or civil action against the institution to which the refusal applies. This case indicates that the Court is prepared to restrict the JFCU's exercise of its powers in other wider contexts.



**HAVE YOUR SAY:** Have you experienced instances where the JFCU appears to have unnecessarily refused to give consent following submission of a SAR?

Yes No

#### 6. SWM LTD V JFSC, 11 MAY 2016

##### What's it about?

SWM, a regulated investment adviser, sought a stay of a direction issued by the JFSC that it write to eight clients reviewed by Grant Thornton, notifying them of the finding that the advice provided by SWM was deemed by Grant Thornton to be unsuitable. The Court granted the stay. The JFSC appeared to be proceeding on the basis that SWM has "missold" investments to clients even though the findings of Grant Thornton were hotly contested by SWM who wished to procure a further report to put in the balance against the Grant Thornton report.

##### How does this affect you?

This decision shows that the Court will intervene where it considers that the interests of investors are not being balanced with fairness to the investment professional.

**OUR SAY:** "The tension between the regulator and the Court evidenced by this case demonstrates the importance of having a robust and independent judiciary."



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**7. DUTY OF CARE OF A LENDER: FINCH AND ANOTHER V LLOYDS TSB BANK PLC AND OTHERS**

**What's it about?**

The UK High Court has held that a lender did not owe a duty to its customers to advise them of the existence or effect of an onerous term contained in a lending contract. The Court held that to do so would be exceptional and markedly different from the conventional relationship of banker and customer.

**How does this affect you?**

This case is helpful in continuing to resist any suggestion that a lender should be under a legal obligation to provide advice to its customers. But lenders should remember that, if they do provide advice, they must do so using reasonable care and skill. If in doubt, do not provide advice and ensure that customers take their own independent legal advice.



**HAVE YOUR SAY:** Would you favour the introduction of regulation of lending business in Jersey for (a) retail customers or (b) professional/corporate customers?

(a) (b) Both Neither

**8. CHANNEL ISLANDS FINANCIAL OMBUDSMAN CASE STUDIES**

**What's it about?**

Four case studies and the quarterly complaint numbers have now been released by CIFO, which are indicative of the approach it will take. It is relevant to note that all eight cases mediated were resolved in favour of the complainant, with more compensation being given than offered by the financial services provider.

**How will this affect you?**

It was noted that the most common issue across all product areas was with advice or information (or the lack of) given during the sales process, which highlights the importance of providing customers with clear and relevant information. Further examples will be published as they are decided, so it is worth checking <https://www.ci-fo.org/case-studies-new/> for future updates.



**HAVE YOUR SAY:** Have you updated your complaints handling procedures to match CIFO's model?

Yes No N/A for my business



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](http://mourantozannes.com). The information which you submit to us is not anonymous, but we will not publicly attribute any answers to you.



**UPCOMING EVENTS & SEMINARS**

**CIFO ANNUAL REPORT AND COMPLIANT STATISTICS – PUBLIC MEETING**

3:45pm - Thursday 21 July 2016

**MOURANT OZANNES FINANCIAL SERVICES FORUM**

13 October 2016



**FINREG SPRING UPDATE SURVEY RESULTS**

Many thanks to those of you who responded to the questions we posed in our Spring Update. We have summarised the results below.



**Does your firm provide corporate directors for administered companies?**

The results suggest an approximately even split between the use of corporate and individual directors.



**Does your firm use mobile app technology to help with CDD?**

Electronic CDD apps are still very new and there is uncertainty about the risks involved in using them so businesses are still assessing the possibility of using them, where appropriate.



**How many subject access requests do you receive in, say, a year?**

Regulated businesses do not receive subject access requests all that frequently. When received, it is, therefore, important to familiarise yourself with procedures for handling them and remind yourself of the risks of over-disclosure.



**Do your existing policies and procedures treat JFSC feedback papers as a trigger event for reviewing operations manuals?**

JFSC feedback papers are not consistently used as a trigger event for reviewing operations manuals even though they offer a helpful indication of what issues the JFSC is most focussed on.





## SPOTLIGHT ON: BREXIT - A JERSEY PERSPECTIVE

Following the UK referendum on Brexit, we have all been inundated with opinions on how the UK should seek to shape its future relationship with the EU and the rest of the world.

While the UK's future relationship with the EU may be unclear, Jersey is already a "third country" outside of the EU and Jersey government has been quick to declare that Jersey's interests will be best served by maintaining the status quo. Jersey government will therefore be seeking to:

- continue free trade in goods and services with the UK and the EU (accepting the need to meet the EU's third country "equivalence standards" for financial services access);
- continue the current de facto monetary union with the UK, enabling free movement of capital with the UK and with EU Member States via the UK (although Jersey is reliant on the UK for negotiation of this aspect);
- remain part of Common Travel Area and free movement of people between Jersey and the British Isles and Ireland (again, Jersey is reliant on the UK for negotiation of this aspect);
- retain current Jersey provisions for employment and housing of immigrant labour; and
- retain present fiscal and other elements of constitutional autonomy.

This is what Jersey government refers to as the "Jersey objective" and it is too early to tell whether the outcome which is sought will be achievable; as Jersey government's Brexit Information Report observes, much will be determined by the UK's future relationship with the EU, as the UK's future agreement with the EU is likely to comment on the Crown Dependencies' relationship with the EU.

The short-term impact of the leave vote for Jersey could be seen in the recent downgrade by Standard & Poor's of Jersey's long-term credit rating by one notch from AA to AA-, which followed a similar downgrade of the UK by two notches from AAA to AA. However, in revising the rating, Standard & Poor's recognised Jersey's "still significant economic resilience", and the revision should be viewed as a consequence of wider economic disruption rather than a reflection on Jersey or a long-term concern.

While it is tempting to focus on the risks to Jersey's financial services industry, it is equally true that there may also be opportunities for Jersey given the relative constitutional and regulatory stability Jersey offers in the current climate. Jersey is and will remain a "third country" as far as the EU is concerned, so it already operates within the constraints of that status and seeks to establish equivalent status, where appropriate. Therefore, the majority of Jersey financial services business need not be directly affected by restrictions on UK market access to the EU and, where Jersey is seeking market access to the EU, the UK may become an important new ally for negotiations with the EU if the UK finds itself in the position to which Jersey is well accustomed. Moreover, if the UK turns its attention to developing relationships with the rest of the world, that too could represent an opportunity for Jersey to gain increased exposure to those markets.

Most importantly, however, the fundamentals behind Jersey's success as a global finance centre are unchanged and Jersey businesses can seek to take advantage of that fact in the coming months and years.

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## MOURANT OZANNES COMMUNITY NEWS



### KITE FLYING FESTIVAL

Mourant Ozannes is delighted to be a sponsor of the National Trust for Jersey, Kite Flying Festival in celebration of the formal opening of the newly restored Plémont headland.

Why not take a picnic and enjoy what promises to be a wonderful fun filled afternoon for all the family?

Learn how to make and fly a kite, enjoy vintage swing boats, a carousel and go on a bug safari around the site.

Parking will be available in the fields next to the site. Free entry to the event and kite making workshops.





**CONSULTATION  
SNAPSHOTS**

**CONSULTATION NO. 3 OF 2016**

**Closing 22 July 2016**

The key changes which are anticipated if Jersey opts to seek MiFID II equivalence will be changes to legislation (such as requiring authorisation for previously exempt activities) and changes to JFSC Codes of Practice (in particular, the Investment Business Code).

This consultation will be of interest to most regulated businesses. Unusually, it will also be of interest to unregulated businesses which are currently relying on certain regulatory exemptions.

**CONSULTATION NO.5 OF 2016  
– DEPOSIT-TAKING ANNUAL  
REGISTRATION FEES**

**Closing 12 August 2016**

This consultation will be relevant to all registered persons conducting deposit-taking business. The proposals relate to fee increases.

**DRAFT DIGITAL POLICY  
FRAMEWORK CONSULTATION**

**Closing 5 August 2016**

This consultation, on how Jersey can capitalise on digital technology, will be of interests to all financial services businesses as it includes questions on cyber security and what barriers local businesses face in making better use of technology (amongst other things).



**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 dates.

<b>ANTI-MONEY LAUNDERING DEVELOPMENTS</b>	
Ongoing work relating to Jersey's mature and sophisticated AML/CFT regime.	
<b>24 May 2016</b>	MONEYVAL publishes a positive report on Jersey's AML/CFT regime
<b>2016 to 2018</b>	Changes to legislation and regulation in response to the recommendations in the MONEYVAL report
<b>2017</b>	Industry participation in preparing the National Risk Assessment of Money Laundering and Terrorist Financing, to inform Jersey's future risk based policies relating to AML/CFT
<b>2021</b>	Jersey's next round MONEYVAL assessment visit, against the new 2012 FATF recommendations
<b>BANK RECOVERY AND RESOLUTION</b>	
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.	
<b>1 January 2016</b>	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
<b>April 2016</b>	Consultation closed in relation to the draft Jersey legislation for a Jersey bank recovery and resolution regime and bank winding-up procedure
<b>Late 2016</b>	Draft law likely to be debated by the States of Jersey
<b>BENEFICIAL OWNERSHIP REPORTING AND REGISTER OF DIRECTORS</b>	
Already ahead of other jurisdictions in relation to collecting beneficial ownership information, Jersey continues to review its position.	
<b>Historically</b>	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
<b>April 2016</b>	Consultation closed in relation to: requiring automatic updates to be sent to the Jersey Companies Registry upon changes to beneficial ownership or control; and establishing a public register of directors
<b>11 April 2016</b>	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
<b>5 July 2016</b>	European Commission adopts a proposal to increase transparency relating to ownership of companies and trusts
<b>Awaited</b>	Feedback to the April consultation paper is likely to be delayed, to allow additional consideration of Jersey's position following the UK Referendum



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.