

# FinReg

## MOURANT OZANNES

FINANCIAL SERVICES & REGULATORY

WINTER/SPRING UPDATE 2017 - JERSEY

## WELCOME



Mathew Cook & Simon Gould

Welcome to the first FinReg update of 2017.

In this edition's Spotlight article, we take a look at the work that trust companies in Jersey need to carry out in the first half of the year to provide up to date information on beneficial owners and controllers of corporate and legal entities to the JFSC. This work is required in order to assist the JFSC in meeting the commitment, made by Jersey government, to provide overseas agencies with details of beneficial ownership within one hour of enquiry.

2017 is also likely to see significant work required by local data controllers to ensure that they are ready for the General Data Protection Regulation (GDPR) coming into force in early 2018. We are awaiting a draft of the replacement to the Data Protection (Jersey) Law 2005, but in the meantime, the GDPR serves as a guide in terms of its likely features. The new law will also have a direct impact on any business that operates in the EU or has EU clients.

In addition, this edition reviews draft laws that are relevant to banks; provides a snapshot on recent cases in Jersey's Royal Court; gives an update on consultations on MiFID II and outsourcing; and provides an update on the work on the Ombudsman.

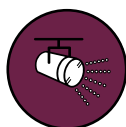
2017 certainly looks set to be another busy and eventful year!

Should you have any questions about the contents of our update please do not hesitate to get in touch.

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## QUICK FIRE UPDATES

### 1. MIFID 2 - FEEDBACK ON CONSULTATION PAPER NO. 3 2016

#### What's it about?

On 14 December 2016 the JFSC published a feedback paper on the consultation relating to the potential introduction of a MiFID2 equivalent regime in Jersey. The responses reflected a range of views across different parts of the investment industry in Jersey including those disagreeing, or expressing concerns, about the introduction of a MiFID2 regime in Jersey, versus a smaller number of respondents who were in favour of seeking MiFID 2 equivalence. The JFSC has indicated that it anticipates being in a position to make a strategic decision regarding MiFID2 equivalence in the first half of 2017. Mourant Ozannes has been closely involved in responding as well as assisting with industry responses, and will be continuing to liaise with the JFSC on this area.

#### How does this affect you?

Apart from some unspecified general changes to the Investment Business Code, MiFID2 equivalence for Jersey is in a holding pattern for the time being, so watch this space for further updates.



**OUR SAY:** *"The prospect of a post-Brexit UK regime on EU equivalence regimes has clearly had an impact on this proposal, as illustrated by ongoing difficulties in achieving AIFMD equivalence in Jersey."*

### 2. DRAFT BANK DEPOSITORS COMPENSATION (JERSEY) LAW 201

#### What's it about?

This Law is intended to improve upon and replace the current Depositors Compensation Scheme Regulations (DCS). The DCS is designed to pay compensation to individuals if a bank in Jersey is wound-up. A number of changes are made to improve the position for depositors, including to the order and means of payment of compensation and to change the maximum compensation from £50,000 per banking group to £50,000 per bank.

#### How does this affect you?

Banks should note the proposed change to the order of repayments out of the recovered funds (repayment of bank levies will rank behind depositors compensation payments). Banks will also need to consider whether any customer materials referring to the DCS need to be amended.



**OUR SAY:** *"This Law will help to bring the Jersey DCS in line with international standards."*

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

#### What's it about?

This new legislation, now to be debated by the States on 14 February 2017, is intended to implement international standards, establishing a resolution authority and fund, as well as granting certain powers in the form of 'resolution tools' for stabilization or winding up of a bank. The definition of 'deposit' will also be amended to address the risk of bail-in and to clarify that negative interest may be applied. The scope for banking business transfers is also being extended to introduce new flexibility.

#### How does this affect you?

Banks will be required to maintain recovery plans for submission to JFSC, but otherwise this legislation will largely only have an effect in the event of a bank failure. No doubt the prospect of non-covered deposits being bailed-in will also attract attention, although the resolution process should give better outcomes overall for depositors than a bankruptcy would have done.



### 4. OUTSOURCING UPDATE

#### What's it about?

Following a recent consultation, we're awaiting a feedback paper from the JFSC on changes to its Outsourcing Policy. This feedback paper is expected during Q1 2017.

#### How does this affect you?

At the moment, it's not clear what the amended Outsourcing Policy will require, but we expect that it should include a transitional period before commencement.

Separately, the FCA (in respect of two Aviva entities) and the Central Bank of Ireland (CBI) (in respect of Ulster Bank) have both recently issued large fines in relation to outsourcing failures and the lessons learned could apply equally in Jersey. The FCA findings refer to failures to retain sufficient technical expertise to supervise an outsourcing arrangement, resulting in an over-reliance on the supplier. The CBI found deficiencies with intra-group outsourcing arrangements. Each of these areas would also constitute failings under the current JFSC Outsourcing Policy, if conducted by a Jersey registered person.



**OUR SAY:** "Publication of the amended Outsourcing Policy will provide a good opportunity to 'health check' your existing outsourcing arrangements, including to make sure that you don't fall foul of the sorts of issues seen in these recent FCA and CBI findings."

### 5. CIFO THIRD AND FOURTH QUARTER COMPLAINTS STATISTICS 2016

#### What's it about?

Of the matters mediated by CIFO, 50% (Q3) and 36% (Q4) were decided in favour of the financial service provider, and of the cases determined by the Ombudsman, 62% (Q3) and 86% (Q4) were decided in favour of the provider. However, compensation of an amount more than that offered by the provider was only awarded in 19% (Q3) and 14% (Q4) of cases determined. Perhaps not surprisingly, given the collapse of the Providence fund in Guernsey, the Ombudsman's statistics also show a switch from most common complaints about current accounts and poor administration (Q3) to financial advice and mis-selling (Q4).

#### How does this affect you?

The vast majority of cases do not reach determination by the Ombudsman, and of those that do, the majority have been decided in favour of the provider. As such, the focus should be on continuing to maintain suitable complaints procedures, ensuring they are followed, and keeping adequate records to ensure claims can be defended effectively.



**OUR SAY:** "The Ombudsman is clearly willing to listen to financial service providers as much as consumers, and his findings seem to demonstrate that good procedures are being applied by local financial services businesses."

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## 6. GENERAL DATA PROTECTION REGULATION (GDPR)

### What's it about?

The General Data Protection Regulation is the new EU data protection regulation which will take effect from May 2018, and replaces all existing data protection legislation throughout Europe. It includes a number of new measures designed to strengthen rights of data subjects.

### How does this affect you?

Jersey will require new data protection legislation in order to maintain its status as an adequate territory for data processing. This law is expected to be consulted on during the course of 2017. Even without a Jersey law, GDPR has extra-territorial effect in a number of ways. It will be important for all data controllers to review all existing policies and documentation to ensure that they are equipped to meet the new standards. The new law is likely to introduce a power of fining, heightening the adverse consequences of failure to comply.



**OUR SAY:** "GDPR will be a significant change for Jersey businesses. Mourant Ozannes has a dedicated data protection team closely following the development of GDPR in Jersey. If you require assistance in preparing for the new measures, or wish to attend our future seminars on the topic, please let us know."

## 7. W V JFSC

### What's it about?

The Royal Court held that the JFSC should provide reasons for its decision to issue a public statement in respect of W as well as further and better particulars of certain paragraphs of the proposed public statement. In particular, any breaches of duty or codes of practice relied upon should be identified expressly.

### How does this affect you?

The judgment reinforces the principle that a person affected by a proposed public statement or other regulatory action should know why the decision has been made and what material has been relied upon in making that decision.



**OUR SAY:** "This is another example of a successful challenge to the regulator's actions. In this case, the failure to provide reasons for the decision to issue a public statement was not only deemed unreasonable, but also a breach of the law."

## 8. JERSEY COURT SETS OUT THE POWER OF SHAREHOLDERS TO MANAGE A COMPANY IN CERTAIN CIRCUMSTANCES – REPRESENTATION OF GALASYS [2016] JRC 188

### What's it about?

Ordinarily a company is managed by its directors subject to the shareholders' residual power to give certain directions by special resolution. In the Galasys case, the Royal Court has held that in certain circumstances (in particular where the directors are prohibited from voting on an issue as a result of conflicts of interest), the shareholders may make management decisions by ordinary resolution.

### How does this affect you?

The outcome of this case is of interest to anyone who sits on a board of a company, or administers a company where the directors have or may have conflicts of interest. In addition, compliance officers should consider whether or not shareholders are giving any directions or taking any management decisions when they apply the "three-tier test" to a client's verification. Banks should also be careful when their clients are in dispute – ask yourself, who is really authorised to operate the bank account?



**OUR SAY:** "Check that articles of association for joint venture vehicles address conflict and deadlock situations."





## SPOTLIGHT ON: REGISTER OF BENEFICIAL OWNERS AND CONTROLLERS

In 2016 Jersey Government entered an agreement with the UK to enhance the existing arrangements for the exchange of information on beneficial owners and controllers of corporate and legal entities. With effect from 30 June 2017, in appropriate circumstances, Jersey will provide details of the beneficial owner or controller of a Jersey entity to the UK within one hour of receiving a request. To ensure that this will be possible, the JFSC needs to hold up-to-date information on beneficial owners and controllers, rather than continuing with the current system whereby the information is held by regulated trust company service providers and available to the JFSC upon request.

It is intended that the companies, limited partnerships, limited liability partnerships and foundations laws should all be amended during the first half of 2017, to require such entities to notify the JFSC of changes to their beneficial owners and controllers within 21 days of the entity becoming aware of the change.

In the meantime, changes made to Jersey companies' COBO Consents to issue shares, with effect from 1 January 2017, enable the JFSC and trust companies to start doing the necessary work, to update the beneficial owner and controller information held by the JFSC.

Most companies incorporated prior to 1 January 2017 (with a few exceptions to be considered on a case by case basis) are being granted a replacement COBO Consent with effect from 1 January 2017. Companies incorporated from 1 January 2017 onwards will be granted a COBO Consent in the new form upon incorporation.

The new form of COBO Consent includes new conditions to: (1) require a one-off notification by the company to the JFSC of information on its beneficial owners or controllers, at any time on or before 30 June 2017; and (2) impose an ongoing obligation on the company, after the company has given the notification required by 1, to notify the JFSC within 21 days of becoming aware of any change to its beneficial owner or controller information.

A trust company should, therefore:

- confirm from its records, who is the beneficial owner or controller of each corporate and legal entity under its administration, according to the definition in the Money Laundering (Jersey) Order 2008 (as applied by the three tier test in the JFSC's AML/CFT Handbook);
- consider whether or not the new notification obligation is a trigger event for some of those entities, such that it may be necessary to contact clients to update identification information;
- assist administered companies to comply with their obligations under the new COBO Consent conditions; and
- implement revised policies and procedures to ensure that all administered companies (and, subject to changes in the relevant laws, limited partnerships, limited liability partnerships and foundations) comply with the ongoing requirement to notify the JFSC of changes to beneficial owner or controller information.



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## UPCOMING EVENTS & SEMINARS

**JFSC TRAINING EVENT  
(INTERNATIONAL TERRORIST  
FINANCING – RISK AWARENESS AND  
MIGRATION)**

Thursday 16 February 2017

**MOURANT OZANNES  
FINANCIAL SERVICES FORUM**

Thursday 20 April 2017

Pomme D'Or Hotel

Please contact the below for details:  
melissa.crowther@mourantozannes.com



## CONSULTATION SNAPSHOTS

**CIFO CONSULTATION PAPER 10 –  
2017 LEVY SCHEMES**

Closing 20 March 2017

Consultation regarding funding of the Ombudsman's office through industry levies. Responses sought by 20 March 2017.

**CONSULTATION NO.10 OF  
2016 – PROCEEDS OF CRIME  
(SUPERVISORY BODIES) (JERSEY)  
LAW 2008 FEES**

Consultation on proposals to increase fees for persons registered under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008.

**CONSULTATION NO.11 OF 2016 –  
GENERAL INSURANCE MEDIATION  
BUSINESS FEES**

Consultation on proposals to increase general insurance mediation business fees.

**CONSULTATION NO.12 OF 2016 –  
MONEY SERVICE BUSINESS FEES**

Consultation on proposals to increase money service business fees.





## AUTUMN UPDATE SURVEY RESULTS

In our Autumn edition of the FinReg bulletin we asked you to give us your views on various questions, many thanks to all of you who responded. Below are the results of the Autumn survey.

### Do you see opportunities for the use of LLPs in Jersey, alongside the existing LPs, ILPs and SLPs?



Generally respondents could see opportunities for the use of LLPs in Jersey, alongside existing structures. Hopefully the new Limited Liability Partnerships (Jersey) Law 201- will help to capitalise on these opportunities, by making LLPs more user-friendly.

### Do you have any clients acting in their capacity as a tuteur?

0%

None of this quarter's respondents have clients acting in their capacity as *tuteur*. Perhaps the clarifications in the new Children's Property and Tuteurs (Jersey) Law 2016 could change this position in future.

### Do you already or do you plan to accept payment in or provide exchange of virtual currencies?



The results suggest that most respondents do not currently intend to accept payment or provide exchange of virtual currencies. Depending on the way in which virtual currency develops in future though, AML changes to create new regulatory regimes for accepting payment in and exchanging virtual currency may become more relevant for those businesses.

### Have you reviewed your lending terms to ensure they are fair and reasonable?



None of our respondents provide lending services. However, it's worth regularly reviewing your terms and conditions generally, to ensure continued compliance with your obligations under the JFSC Codes of Practice (including in relation to communicating with clients in a way that is adequate, fair and not misleading).

### Do you keep a Regulatory Record (eg using the MO standard form) to note the exemptions relied on by each entity under your administration?



This question wasn't applicable to the business of our respondents. However, we do think that keeping a regulatory record noting the exemptions which are relied upon by entities under your administration and the explaining the rationale behind reliance on those exemptions will save time in the long run. These regulatory records help to ensure that the thought process conducted on the client's regulatory status at take-on is documented and remains easily to hand. Let us know if you'd like more information on the Mourant Ozannes standard form regulatory record.

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## INDUSTRY UPDATE TRACKER

We've chosen a few topics that 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 that have taken place.

ANTI-MONEY LAUNDERING DEVELOPMENTS	
Ongoing work relating to Jersey's mature and sophisticated AML/CFT regime.	
24 May 2016	MONEYVAL publishes a positive report on Jersey's AML/CFT regime
2016 to 2018	Changes to legislation and regulation in response to the recommendations in the MONEYVAL report.
21 February 2017	End of the transitional period for SB Law registration of non-corporate persons with a registered office in Jersey, carrying on regulated business anywhere in the world, but the SB Law will otherwise apply in the meantime.
25 March 2017	End of the transitional period for trustees of express trusts acting otherwise than by way of business to comply with relevant measures under the Money Laundering (Jersey) Order 2008.
2017	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.
2021	Jersey's next round MONEYVAL assessment visit, against the new 2012 FATF recommendations.
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.
14 February 2017	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.
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.
April 2016	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.
13 April 2016	Jersey and UK enter into 'Exchange of Notes' 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.
5 July 2016	European Commission adopts a proposal to increase transparency relating to ownership of companies and trusts.
2 November 2016	Chief Minister's Department Policy Document published, confirming intent to update central register of beneficial owners and controllers by 30 June 2017 and to legislate to create centrally held register of directors by mid-2018.
1 January 2017	Revised COBO consents issued for most Jersey companies
Before 30 June 2017	Notification to JFSC of current beneficial owners and controllers of all Jersey companies, limited partnerships and limited liability partnerships
Q2 2018	Proposed reporting of director information to Jersey Companies Registry
Mid-2018	Proposed establishment of central register of directors

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.