

# FinReg

## MOURANT OZANNES

FINANCIAL SERVICES & REGULATORY

AUTUMN UPDATE 2017 - JERSEY

## WELCOME



Mathew Cook & Simon Gould

Welcome to our Autumn 2017 Update.

The key driver behind much of the content in this edition is, familiarly, the need for Jersey to remain on top of, and often ahead of, international standards.

In particular, our spotlight article covers the current consultation paper on Data for Risk Based Supervision and the interplay between that and the National Risk Assessment. It is clear that this move to greater scrutiny of and reporting by businesses appears inevitable, but the questions concerning practical implementation of these new provisions are significant.

We also cover a number of recent or upcoming topics which are no doubt keeping everyone busy, including the forthcoming new data protection law based on the General Data Protection Regulation and the UK Criminal Finances Act, which requires policies to avoid involvement in the facilitation of tax evasion to be in place.

Important consultations and feedback papers have also been issued to cover cyber-security, amendments to the Codes of Practice, civil confiscation of assets and due diligence requirements.

We also touch on a couple of recent cases, which highlight practical considerations for businesses in contentious situations.

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## QUICK FIRE UPDATES

### 1. CONSULTATION PAPER (NO. 7 2017) ON DATA FOR RISK BASED SUPERVISION

#### What's it about?

The JFSC has consulted on proposals to gather data from industry about the impact and likelihood of risks, in order to assist the JFSC in adopting a "risk based approach" to supervision. The proposals come in response to the shift in international standards towards demonstrating the effectiveness of supervision – not just the number of supervisory actions taken, but the reasons why those actions were taken in relation to particular types of business. Some of the data to be gathered will overlap with Jersey's "national risk assessment" being undertaken by government.

#### How does this affect you?

The proposals represent a significant increase in the reporting requirements for regulated businesses, particularly for banks, but affecting the whole industry to a lesser or greater extent. We expect many businesses will have responded to the consultation (the deadline was 8 November). The feedback paper will be published in early 2018 with some of the new reporting requirements coming into force shortly after that.



Mathew Du Val

**HAVE YOUR SAY:** Do you agree with the JFSC's proposals to gather more information about the industry and its clients?

Yes

No

### 2. SUZANNE SMITH V SWM LIMITED [2017]JRC167 (UNREPORTED JUDGMENT)

#### What's it about?

A civil claim was made against SWM for alleged failure to take reasonable care and skill in providing investment advice. Separately, the JFSC had required a report by Grant Thornton on SWM, to fact-find and assess compliance with regulatory standards. In this judgment the Court confirms that such report is admissible in evidence to support the civil claim being made by Suzanne Smith.

#### How does this affect you?

Although any similar case would need to be considered on its own facts, this judgment highlights a risk that regulatory reports may be used against a business in a civil action by clients, even when the conclusions in the report are in dispute.



Sarah Huelin

**OUR SAY:** "This case highlights the need to maintain privilege in dealing with contentious regulatory issues, particularly where a civil claim may arise."

### 3. UK CRIMINAL FINANCES ACT

#### What's it about?

The Criminal Finances Act 2017 came into force on 30 September 2017. It creates new offences designed to target corporates whose associates facilitate the evasion of UK or foreign tax.

#### How does this affect you?

Whilst this is UK legislation, it has extra-territorial effect. Evasion of UK tax is an offence worldwide, whilst the foreign tax offence applies to any facilitation with a UK nexus (which may be as little as a presence in the UK at a relevant time). All corporates should ensure they have procedures in place to ensure all their associates are aware of these offences and do not breach them. Existing policies on AML and Bribery will assist, but are not the complete picture.



Mathew Cook

**OUR SAY:** "This law is in force, but HMRC have made it clear that they will allow time for implementation, so all businesses should now be ensuring they have policies in place and train staff appropriately."

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#### 4. JFSC CYBER SECURITY SURVEY RESULTS

##### What's it about?

The JFSC reported the findings of its cyber security survey. The findings showed that while respondents showed a reasonable level of maturity in approaching cyber security, firms need to ensure that it is seen as a key business priority and that risk is assessed and monitored accordingly.

##### How does this affect you?

While the JFSC does not regulate cyber security, it does expect firms to apply a risk-based approach and it will monitor how firms respond to threats. The survey showed that unintentional/deliberate leaks of information, fraud, malicious code and social engineering attacks were considered by participants to be key threats. Firms should continue to develop their cyber security plans with these particular threats in mind, ensuring that third party risks (such as contractors and suppliers) are also included in risk assessments.



Laura Dauny

**OUR SAY:** "Have you reviewed your approach to cyber security since publication of the "Paradise Papers"?"

#### 5. CONSULTATION PAPER (NO. 6 2017) ON AMENDMENTS TO CODES OF PRACTICE

##### What's it about?

The JFSC is making amendments to the Codes of Practice, many of which are as a result of the GIFCS standards on the regulation of Trust and Corporate Service Providers.

##### How does this affect you?

The final form Codes are due to be published shortly, with a two month lead-in time. The majority of the proposed changes relate to the Code of Practice for Trust Company Business (including the rationale for incorporation to be documented, the reconciliation of customer assets (in addition to customer money), and disclosure requirements in relation to terms of business). However, there are also changes to the other Codes of Practice and policies and procedures will need to be considered by all regulated businesses as a result.



Fiona Magee

**OUR SAY:** "We're aware that many of you have commented to the JFSC on the introduction of a formal definition of "complaint". This definition is modelled on the UK FCA equivalent (albeit without the associated requirement that the complainant alleges financial loss, material distress or material inconvenience). If introduced in its current form, this definition is likely to increase your complaints numbers and will require training of front-line staff in the identification of such complaints. "

#### 6. THEMED EXAMINATION PROGRAMME 2016/17: ENHANCED & SIMPLIFIED DUE DILIGENCE

##### What's it about?

This document provides an insight into JFSC expectations relating to enhanced and simplified due diligence. The client risk assessment is critical for correctly applying enhanced and simplified due diligence and these findings suggest that there remains some room for improvement. The findings also include reminders about managing conflicts, governance for changes to policies and procedures and the importance of having effective policies and procedures.

##### How does this affect you?

We can all learn from the findings to identify staff training topics and possible weaknesses in our policies and procedures. Consider, for example: If applying group policies, are gaps filled to meet Jersey requirements (e.g. in relation to high risk jurisdictions, PEPs and sanctions)? Are high risk indicators routinely spotted? Are risk rating decisions being properly recorded, scrutinised and approved by the right people? Is there an over-reliance on an automated risk assessment? Do staff understand the difference between 'source of wealth' and 'source of funds'?



Sarah Huelin

**HAVE YOUR SAY:** Has your business reviewed the JFSC's summary findings on enhanced and simplified due diligence to identify areas to focus on in staff training and updates to your due diligence policies and procedures?

Yes

No

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**7. CONSULTATION ON CIVIL ASSETS - EXPANDING JERSEY'S NON-CONVICTION BASED CONFISCATION REGIME**

**What's it about?**

This consultation (which closed on 1 November 2017) covers a new civil asset recovery regime to allow for confiscation of assets where there has been no criminal conviction.

**How does this affect you?**

The two main instances in which this new law will be used are (1) where there has been a SAR that has been subject to a "no consent" for 12 months or more; and (2) where assets are suspected to be proceeds of unlawful conduct or used/intended to be used in unlawful conduct (which may be as a result of a request from a foreign jurisdiction). The process envisages HM Attorney General summoning both the account holder and relevant bank to Court, for the account holder to justify that the funds are legitimate.



Mathew Cook

**HAVE YOUR SAY:** What do you consider to be (a) the main potential benefit; and (b) the main risk arising as a result of the draft law?

a. .... b. ....

**8. GDPR UPDATE**

**What's it about?**

The General Data Protection Regulation (GDPR) will come into effect on 25 May 2018. Jersey and Guernsey will implement their own legislation which will largely reflect the key principles of the GDPR but with some differences. The Jersey legislation was lodged with the States on 5 December 2017 with a view to it being debated on 16 January 2018.

**How does this affect you?**

Your business will need to review and update its privacy notices, policies and practices in preparation for the new legislation. If you are complying with the current legislation, you have a strong starting point to build from. However, changes will inevitably still be necessary.



Carla Benest

**OUR SAY:** "A good place to start is with an 'information audit'. What data do you hold? Why do you hold it? Where did it come from? Who do you share it with? What is your lawful basis for processing?"



**MOURANT OZANNES COMMUNITY NEWS**

**Jersey's first Learning & Innovation Centre for IT skills opens its doors to the public**

Thursday 12 October marked the launch of Jersey's first ever Learning & Innovation Centre for IT skills at Beaulieu Convent School which will bring the latest technology skills training to local communities free of charge.

A large number of Jersey students, parents, teachers and members of the community attended the launch and heard from Mourant Ozannes managing partner, Daniel Birtwistle, and assistant head for curriculum and technology at Beaulieu, Rory Steel. The innovative project has been co-funded by Mourant Ozannes and Beaulieu Convent School.



Rory Steel & Daniel Birtwistle at the opening of the Learning & Innovation Centre at Beaulieu Convent School





## SPOTLIGHT ON: JFSC CONSULTATION ON COLLECTION OF DATA AND THE NRA

The Jersey Financial Crime Strategy Group (JFCSG), which is a multi-department group that reports to the Chief Minister, announced in October that it would conduct a national risk assessment (NRA) of the threats posed to Jersey by money laundering (ML) and terrorist financing (TF), in order to comply with requirements set by the Financial Action Task Force. The NRA is intended to identify ML and TF risks, so that action and resources can be aimed at ensuring risks are mitigated effectively. The NRA is due to be completed by May/June 2019.

The Jersey Government NRA working group will rely heavily on the collection and analysis of data. As mentioned above, the JFSC will collect quantitative data from supervised businesses between January and April 2018 as part of more general data collection to support supervision of those businesses, and will then be shared with the NRA working group and its various teams using statutory gateways for sharing information.

Other data will be collected directly by the Government in 2018 from domestic agencies, neighbouring countries, NGOs, as well as supervised persons through surveys, workshops and interviews. Supervised persons will not be compelled to take part in these surveys, but will be strongly encouraged to do so.

The NRA tool for assessing ML and TF has different modules focused on particular industry sectors, namely banking, securities, other financial institutions such as lenders and bureaux de change, trust company service providers, DNFBPs (eg lawyers, accountants and estate agents).

Having collected data by April/May 2018, the NRA working group will move to the assessment process with a view to publishing the NRA Report and Action Plan by May/June 2019. The AML/CFT regime will then be re-considered to take account of areas of high and low risk identified in the Report. The NRA Report will be a key focus of Jersey's next MONEYVAL assessment in 2021/2022.

In the short term, the primary impact of the NRA for supervised businesses will, of course, be the obligation to report on required data. This will require careful consideration of the systems required and the risk of errors arising in reporting. A failure to supply data can result in administrative penalties or other supervisory action and, in the most serious cases, criminal prosecution (for example if misleading information is provided). In the long term, businesses should see changes to the AML regime focussed on achieving and demonstrating greater effectiveness.

A considerable amount of feedback has already been provided by industry, raising various questions and concerns as to the criteria for reporting data. Industry now awaits further information from the JFSC as to the detail that will be required in late Q1/early Q2 of 2018.

### SIMON GOULD

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## CONSULTATION SNAPSHOTS

### CONSULTATION PAPER NO.9 OF 2017: FINANCIAL SERVICES (JERSEY) LAW 1998 FEES

Closed 1 December 2017

Consultation on proposals to enact a law enabling the creation of limited liability companies.

### CONSULTATION PAPER NO.10 OF 2017: SCHEDULE 2 FEES

Closed 1 December 2017

Consultation on fee increases for persons who are registered under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008

### LIMITED LIABILITY COMPANIES (JERSEY) LAW 201-

Closing 12 January 2018

Consultation on proposals to enact a law enabling the creation of limited liability companies.

### CONSULTATION PAPER NO.11 OF 2017: MISCELLANEOUS AMENDMENTS TO REGULATORY LEGISLATION

Closing 16 February 2018

Consultation on amendments to various regulatory legislation, including the Financial Services (Jersey) Law 1998 and the Banking Business (Jersey) Law 1991.

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## UPCOMING EVENTS & SEMINARS

### MOURANT OZANNES FINREG FORUM

Wednesday 10 January 2018

### JFSC PRESENTATION: BUSINESS PLAN 2018

Wednesday 17 January 2018



## 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 that have taken place.

### 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.

<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>12 May 2017</b>	Bank (Recovery and Resolution) (Jersey) Law 2017 registered by the Royal Court, but not yet in force
<b>2018</b>	Bank (Recovery and Resolution) (Jersey) Law 2017 registered by the Royal Court

### BENEFICIAL OWNERSHIP REPORTING AND REGISTER OF DIRECTORS

Jersey continues to meet international transparency standards by updating and maintaining its register of beneficial owners or controllers.

<b>Historically</b>	Jersey has had a central register of beneficial ownership for over 20 years.
<b>13 April 2016</b>	Jersey and UK enter into 'Exchange of Notes' to reinforce existing arrangements for providing beneficial ownership information to UK law enforcement and tax authorities
<b>2 November 2016</b>	Chief Minister's Department Policy Document published, confirming intent to update central register of beneficial owners and controllers by 30 June 2017.
<b>30 June 2017</b>	Jersey's central register of beneficial owners or controllers has been updated
<b>1 July 2017 to mid-2019</b>	UK Government review of effectiveness of information sharing arrangements between UK and crown dependencies (amongst others)
<b>End 2017 to Early 2018</b>	Anticipated changes to legislation applicable to companies, limited partnerships, limited liability partnerships and foundations, all in relation to disclosure of beneficial owner or controller information
<b>Q2 2018</b>	Proposed reporting of director information to Jersey Companies Registry
<b>Mid-2018</b>	Proposed establishment of central register of directors

### BREXIT

A key risk for Jersey's financial services industry, Brexit negotiations will be closely monitored and industry should feed into Government's work on Brexit where possible.

<b>27 June 2016</b>	Ministry of External Relations Report on what Brexit means for Jersey
<b>21 March 2017</b>	Justice Committee Report on the impact of Brexit for Crown Dependencies
<b>29 March 2017</b>	Government announces funding for a review of Jersey's financial services industry, commissioned by Jersey Finance Limited, to take account of opportunities and challenges arising from Brexit
<b>Mid-June 2017</b>	Government engagement to continue with a survey aimed at Jersey businesses
<b>End 2017</b>	Expected publication date for the Jersey Finance Limited commissioned report on Brexit opportunities and challenges

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.

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