

## AML Update: Review of 2014 amendments to the substantive offences under the Proceeds of Crime...

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Reform of AML practices and laws has been high on the legislative agenda in Jersey, particularly following Jersey becoming a member of MONEYVAL in 2012. MONEYVAL is the body within the Council of Europe tasked with ensuring that members have effective systems and controls in place to combat money laundering and terrorist financing as well as ensuring compliance with international standards in the AML arena. The recent MONEYVAL progress report on developments in Jersey's AML framework has initiated a raft of activity by the JFSC.

In December 2013 MONEYVAL issued a report which picks up from the IMF report of 2008 and sets out the progress that Jersey has made following the IMF's recommendations. In response to the both the IMF report and the MONEYVAL progress report the JFSC has implemented the following:

- Money Laundering (Amendment No. 7) (Jersey) Order 2014 which came into force in October 2014
- Proceeds of Crime and Terrorism (Miscellaneous Provisions) (Jersey) Law 2014 (the **2014 Law**) which came into force on 4 August 2014
- Proceeds of Crime and Terrorism (Tipping Off-Exceptions) (Jersey) Regulations 2014 (the **2014 Regulation**) which came into force on 4 August 2014

### Amendments to substantive offences

#### Reporting

One of the substantive changes brought in by the 2014 Law is in respect of reporting suspicious activity. In addition to amending and replacing certain reporting requirements under the Terrorism (Jersey) Law 2002, the 2014 Law makes a key amendment to Articles 34A and 34D of

the Proceeds of Crime (Jersey) Law 1999 (the **1999 Law**). Articles 34A and 34D under the 1999 Law have been amended so as to implement a MONEYVAL recommendation to change the previous reporting offence of "*failing to disclose suspicious transactions*" into one that creates a positive obligation to report suspicious activity. Under the revised position a person "must" report where a person knows, suspects or has reasonable grounds for suspecting money laundering.

## Tipping Off

The 2014 Law and the 2014 Regulations brought in substantive changes to the tipping off offence. Whereas the tipping off offence was previously limited to circumstances where tipping off was "likely to prejudice" an investigation or proposed investigation, this qualification has now been removed so that where a person knows or suspects an investigation is contemplated or underway, the tipping off offence now applies to any information relating to the investigation, including the fact that a disclosure has been made. The changes implement the IMF recommendation to expand the tipping off offence so as to include all disclosures, rather than just those instances of tipping off that are "*likely to prejudice*" any investigation. This brings the Jersey tipping off offence in line with the majority of other major financial jurisdictions. In practice it largely restricts compliant disclosures to those made within a firm/group "*in good faith for the purpose of preventing or detecting money laundering*". Outside of this narrow exception, there is now a clearer risk that any disclosure will be an indictable offence.

The 2014 Regulation sets out a number of protected disclosures which do not contravene the tipping off offence. These include:

- Certain disclosures between relevant persons (**relevant persons** having the meaning given to it in Article 1 of the Money Laundering (Jersey) Order 2008, namely: (a) a person carrying on a financial services business in Jersey; or (b) either (i) a Jersey body corporate or (ii) other legal person registered in Jersey, carrying on a financial services business in any part of the world.)
- Certain disclosures within a financial group
- Certain internal disclosures between employees
- Certain disclosures between relevant persons
- Disclosures to certain supervisory bodies
- Disclosures to MLRO's
- Certain disclosures to professional advisers, with the qualification that such disclosure is not made with a view to furthering a criminal purpose

Certain disclosures may also be made where the JFCU has given written permission to the person making the disclosure to do so. The wording of the revised Article 35 contemplates exceptions being introduced or amended by further regulations from time to time.

In addition to the substantive changes to the offences set out in the 2014 Law and the 2014 Regulation, the JFSC has initiated numerous amendments to the AML/CFT Handbook. Whilst it is outside the scope of this update to detail all the changes set out within the AML/CFT Handbook, the below section has sought to touch upon those imminent changes that may be of immediate interest to your business.

## AML Handbook

In light of the amendments to the substantive AML offences, the JFSC commenced a consultation process to amend the AML Handbook (the **Handbook**). The process is at an advanced stage and the JFSC has issued a draft Handbook detailing the changes to be introduced. The amendments will have a significant impact on the manner in which a relevant person completes and/or undertakes the following:

- Corporate Governance
- Reporting
- Identification Measures regarding ownership and control
- Enhanced Customer Due Diligence and Simplified Identification Measures
- Reliance on obliged persons and group persons (formerly referred to as “introducers and intermediaries”)
- Record Keeping
- On-going Monitoring
- Screening and training of employees

Some of these are considered in brief below:

### Reporting

The rules relating to reporting are set out in a new Section 8 of the Handbook. It remains the case that a subjective and objective test must be applied when determining whether to make a report: that is whether there is knowledge or suspicion (subjective) or whether there are reasonable grounds for having knowledge or suspicion (objective). Section 8 includes a revised definition of the “*objective test*” for determining what constitutes reasonable grounds for knowledge or suspicion for the purposes of making a report. The Handbook sets out that what may constitute reasonable grounds for knowledge or suspicion “*will be determined from facts*

*or circumstances from which an honest and reasonable person working in a relevant person would have inferred knowledge or formed suspicion".*

The revised Handbook also reiterates the new positive duty to report suspicious activity, outlining that *"employees of a relevant person **must** raise an internal SAR as soon as practicable where they have knowledge or suspicion, or where there are reasonable grounds for having knowledge or suspicion"*. The proposed amendments to Section 8 of the Handbook also track the revisions to the tipping off offence as set out in the 2014 Law, by removing the qualification that disclosures should be made where there is *"likely prejudice"* to an investigation.

## Reliance on obliged persons and simplified identification measures

Relevant persons should be mindful of the recent changes in respect of reliance on introducers. Article 16 of the Money Laundering (Jersey) Order 2008 (the **MLO**), as amended by the Money Laundering (Amendment No 6) (Jersey) Order 2013, provides that a relevant person may still rely on another relevant person, or a person carrying on an equivalent business (each referred to in the amended MLO as an "obliged person"), to apply the identification procedures specified in the MLO in respect of its customers (or the beneficial owners or controllers of such customers, or any third parties for whom that customer is acting) or, if that obliged person is not in Jersey, apply similar identification procedures that satisfy recommendation 5 of the Financial Action Task Force (on money laundering) recommendations (as defined in the MLO). The obliged person does not necessarily need to have introduced the customer to the relevant person and does not need to act as an intermediary.

However, there are additional administrative steps that must be completed in order to rely on article 16 of the MLO. Section 5 of the draft Handbook details these procedures and, in particular, the 6 conditions that need to be followed. These are:

1. The obliged person consents to being relied upon
2. identification measures adopted by the obliged person have been applied in the course of an established business relationship or one off transaction
3. the obliged person provides adequate assurance in writing that full and specified identification measures have been applied and that evidence of identify has been retained
4. information identified about a customer by an obliged person is immediately obtained by the relevant person
5. the obliged person provides assurance in writing that the evidence of identity will be retained until provided to the relevant person or until it is notified that evidence is no longer required and that it is provided on request without delay
6. The obliged person assesses risk and records in writing the reason why it is appropriate to place reliance having regard to the money laundering and financing of terrorism risk and the

risk that evidence of identity is not provided.

Section 7 of the draft Handbook details revised procedures in relation to the application of simplified identification measures and reflects changes now in force pursuant to the Money Laundering (Amendment No 6) (Jersey) Order 2013. Provided a customer (formerly referred to as an intermediary) meets certain criteria, a relevant person will no longer be required to obtain evidence of identity of, a third party (or parties) that the customer acts for, so long as: (i) certain conditions are complied with (and, in some cases, assurances provided are tested by the relevant person); and (ii) the relevant person collects basic identity information concerning any significant third party (or parties).

The changes are particularly geared towards pooled relationships and designated relationships and the revised Handbook sets out the following examples of pooled relationships for which simplified identification measures may be applicable:

- Stock-brokers and investment management firms acting as nominees for underlying investors
- Overseas banks that place deposits on a fiduciary basis with a Jersey bank
- Trustees of unit trusts and general partners of limited partnerships that wish to establish banking facilities for a collective investment fund
- Client accounts operated by trust companies, investment managers, lawyers and accountants

The appropriateness of applying simplified identification measures largely depends on the facts of the business relationship and nature of the customer/third parties. It is recommended that relevant persons obtain advice on the matter to avoid incorrect application of the measures. Ogier has significant experience of advising on the revised identification procedures and would be delighted to assist.

## Ownership/structures

Section 3 of the revised Handbook sets out that firms will be required to follow three steps to understand clients' ultimate beneficial ownership and control structures, which broadly requires: 1) Obtaining necessary information from a customer; 2) validating the information obtained; and 3) checking that the information makes sense.

## Enhanced CDD

The revised Handbook implements changes to the rules regarding enhanced due diligence pursuant to Article 5 of the Money Laundering (Amendment No. 7) (Jersey) Order 2014 which came into effect in October 2014 and requires relevant persons to undertake enhanced due

diligence for a wider category of customers than under the current framework. In particular, whereas the current position is to adopt a risk based approach when determining whether enhanced due diligence is required (by focussing on “net risk” taking into consideration factors such as the location and nature of the customer or connection to higher risk states or persons), the proposed changes to the Handbook now require enhanced due diligence where the:

- Customer is non-resident
- Customer is provided with a private banking service
- Customer is a personal asset holding vehicle or
- Customer is a company with nominee shareholders or issues bearer shares

It remains down to the relevant person to decide what type of enhanced measures to apply, with such measures to be determined by applying a risk based approach. The new requirements regarding enhanced due diligence are not retrospective and no remediation is stipulated for existing clients.

## Comment

The recent amendments to the AML offences together with the proposed revisions to the Handbook are indicative of the continued focus and commitment that the JFSC has to strengthening the AML framework in line with MONEYVAL recommendations. The sea change being ushered in is further evidence of the need to ensure that robust and up-to-date AML procedures are in place within your business and that continuous review and assessment of compliance protocols should remain a fundamental part of your business. MONEYVAL are scheduled to conduct a visit of the Island in 2015 and it is likely that this will lead to further adjustment to the AML regime in Jersey in addition to closer scrutiny of obligations and requirements already in place.

This update is not intended to provide an exhaustive overview of the imminent changes. Should you require further information on the proposed changes to the AML Handbook and how that may impact your business, further information on the substantive offences contained under the Proceeds of Crime (Jersey) Law 1999 as amended or general advice on compliance with JFSC regulatory requirements, please contact us.

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