

UPDATE

Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018

The *Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018* (the **Law**) came into force this summer, and our understanding it that financial institutions are already receiving notices issued under the Law.

The Law was developed in response to one of MONEYVAL's recommendations, namely that Jersey should consider the introduction of a non-conviction based confiscation regime. Jersey already has existing measures to allow for forfeiture of assets in cases of criminal proceedings. The Law does not require criminal proceedings to have taken place, and so will cover a wider remit of cases, potentially including those where the criminal standard (beyond reasonable doubt) cannot be met for any reason.

In this update, we will set out the main features introduced by the Law and then set out some practical considerations for businesses.

Forfeiture after a suspicious activity report (a SAR)

This is likely to be the most common use of the Law. The Law establishes a mechanism for the Attorney General to serve a notice on the holder of an account held at a bank in Jersey (and the bank itself) where:

- (a) he has reasonable grounds to believe the property held in the bank account is tainted property;
- (b) in relation to the bank account, a consent request has been made to an authorized officer;
- (c) an authorized officer has refused the consent request; and
- (d) notification of the refusal was given at least 12 months prior to the notice being issued.

The notice served must cover certain matters, including providing a date for attendance before the Royal Court. The Law then sets out a summary procedure whereby:

- (a) if the account holder does not attend the hearing, the Court may make a forfeiture order without further notice to the recipient;
- (b) if the respondent appears, the respondent may either:
 - (i) satisfy the Court at that hearing that the property is not tainted property; or
 - (ii) request that the question of whether or not the property is tainted be determined at such time as the Court may order. In this scenario, the account holder must provide an affidavit within 21 days setting out why the property is not tainted property.

Forfeiture based on suspicion

The Law also sets out a procedure whereby the Attorney General himself has reasonable grounds for suspicion that tainted funds are held in Jersey. The filing of a SAR by an entity in Jersey is not a pre-requisite. It is understood that this procedure may be used in cases where a foreign authority has made a request to Jersey.

The Law establishes a procedure whereby the Attorney General may first apply ex parte to the Bailiff prohibiting withdrawal, transfer or payment from a bank account. The Bailiff may make the appropriate order (a property restraint order) where satisfied that such an order is justified for a reasonable period whilst the origin of the property is investigated or proceedings in Jersey in respect of the property are either considered or concluded.

Upon making the order, the Bailiff may give such directions as are considered reasonable, including in relation to the provision of notice to affected persons. Once a property restraint order has been made, the Attorney General may then apply for a forfeiture order. In that application, the onus is, as above, on the person against whom the order is proposed to be made to convince the Court that the property is not tainted property.

Investigations

The Law also sets out a number of investigatory powers for the Attorney General where a civil forfeiture investigation is being conducted in Jersey, or elsewhere, with a view to proceedings being brought under the Law or under equivalent law of a foreign jurisdiction in relation to property in Jersey. This includes powers for the production of a wide range of information and powers of search and seizure.

Considerations for recipient

In this update we focus on the considerations for a bank in receipt of any notice under the Law:

- (a) the procedure established by the Law envisages the proceedings being between the Attorney General and the account holder. The bank will typically be a neutral party and is unlikely to wish to directly participate in the proceedings. However, there is of course the risk that the customer will turn on the bank in due course. In particular if the customer establishes that the assets are not tainted, the filing of any SAR may come under scrutiny. In this regard, please see our briefing from our Guernsey colleagues which sets out guidance for institutions dealing in potentially tainted assets, as similar issues will arise. To see the briefing please click [here](#);
- (b) a related point is that it should be noted that the test in cases under the Law will be balance of probabilities i.e. more likely than not. This is lower than the criminal standard of beyond reasonable doubt, but higher than the standard usually applied in deciding whether or not to file a SAR, where mere suspicion suffices. A bank should review any previous SAR and associated documents to ensure it is satisfied it can properly demonstrate why it filed the SAR and that sufficient evidence of that is held;
- (c) ongoing compliance with the Proceeds of Crime (Jersey) Law 1999 must be considered. In particular, there may be a need to consider whether a SAR, or additional SAR, is required in light of information disclosed under any notice. Further, tipping off issues will need to be managed. Whilst the fact of a notice being served on the recipient by the Attorney General may suggest tipping off provisions do not arise, the Law itself establishes its own tipping off offence which will need to be managed;
- (d) whilst an institution holding frozen funds is unlikely to be criticised for refusing to follow customer instructions, it must be noted that duties towards that customer still need to be considered. It is likely that some dialogue will be needed to ensure the customer is aware of the issues and taking action, as well as clarify over how the account should be managed pending resolution;
- (e) whilst the Law establishes a pretty straight forward process, there are certain necessary criteria which must be satisfied and a bank should consider, and record, whether it is satisfied that any notice is validly served;
- (f) As set out in the note from our Guernsey colleagues, action could be taken now to look at terms and conditions to ensure they provide protections for institutions which may receive these notices.

Comment

The introduction of the Law is a further step to demonstrate that Jersey strives to keep pace with the global fight against financial crime. A number of jurisdictions have similar provisions or are adopting comparable measures to confiscate potentially tainted assets, for example the advent of Unexplained Wealth Orders in the UK. However, as ever, these measures present challenges for financial institutions holding these assets and the need to balance legal and regulatory obligations, whilst at the same time managing client relationships.

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