

UPDATE

# Mourant Ozannes & QEB Hollis Whiteman Financial Services & Regulatory Forum 2017

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A round-up of the Mourant Ozannes & QEB Hollis Whiteman Financial Services & Regulatory Forum, noting regulatory developments and upcoming changes.

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## Introduction

Thank you to those who were able to come along to our inaugural Financial Services & Regulatory Forum, hosted in conjunction with QEB Hollis Whiteman. Over 200 guests heard speakers from Mourant Ozannes and QEB Hollis Whiteman, as well as our guest speakers from the Jersey Financial Services Commission and Jersey Government, cover a range of topics which have been of key importance to regulated businesses over the last six months, and will continue to keep people busy over the next six months and beyond.

We hope that this conference provided valuable assistance to attendees to help keep ahead of regulatory challenges and risks. To help ensure that you get as much out of the event as possible, and for those who missed it, we've prepared a short summary of the key points which were discussed.

We hope that you found the Forum to be useful. If you have a couple of minutes, please do complete our feedback survey.

## Important developments in the law of tax evasion: Nicholas Griffin QC & Tom Broomfield | QEB Hollis Whiteman

The Criminal Finances Act 2017 (CFA) and the Finance Act 2016 (FA) enacted important changes in UK tax evasion legislation. The CFA contains strict liability offences, applicable to 'relevant bodies' or corporates only, of failing to prevent UK tax evasion and foreign tax evasion. If the offence is made out, it is for the defence to prove to the civil standard that it has put in place reasonable preventative procedures. The FA contains new civil penalties for enablers of offshore tax evasion, which include a power to publish the details of those found liable, and strict liability criminal offences for engaging in offshore tax evasion.

## International sanctions, relevance to Jersey and management of sanction risk: Mathew Cook | Mourant Ozannes

### Sanctions

Sanctions compliance is a key area for Jersey regulated businesses, with UN and EU sanctions having direct effect in Jersey, and other sanctions (in particular, the OFAC sanctions from the US) having potential effect and significant consequences in case of breach. Staff training and awareness of sanctioned jurisdictions and activities, robust policies and procedures, regular screening of customer databases, and ensuring sufficient information on customers and intermediaries to be able to identify sanction breaches are key tools in addressing sanctions compliance. Sanctions may also require trigger reporting obligations, including where a business has only been approached by a sanctioned entity. The recent introduction in the UK of an ability to directly fine for sanction breaches without the need for criminal proceedings highlights the escalation in focus on sanctions compliance.

## Privilege

A recent case (*SFO v ENRC*) in England highlights potential limitations on privilege in regulatory investigations. In that decision, the Court held that a majority of documents over which privilege had been claimed needed to be disclosed. Particular issues included the range of people who had given instructions to the lawyers, the question of whether certain documents constituted advice or fact-finding, the purpose for which documents had been prepared and the fact there had been a promise of co-operation which was then effectively reversed by seeking to withhold documents. The judgment highlights the need for a carefully controlled process and regular review if privilege is to be maintained.

## Personal accountability in regulatory proceedings: Jason Mansell | QEB Hollis Whiteman

In pursuing its enforcement agenda of credible deference the UK FCA continues to focus on the role of individuals when investigating regulatory failings. Not only does this extend to those individuals directly implicated, but increasingly to senior managers responsible for the business area where the alleged misconduct occurred.

In the UK the implementation of the Senior Managers and Certification Regime (**SM&CR**) should make it easier to hold individuals personally accountable. With clear lines of responsibility it should be obvious where responsibility for regulatory failings should properly lie. It is however likely that the increased appetite to discipline individuals may lead to a rise in the number of contested cases. UK senior managers will need to demonstrate awareness of the risks in the business areas for which they are responsible and to take steps to control that risk through appropriate delegation, efficient corporate governance systems and effective remedial actions where issues are identified.

## Session 1 Panel: Justin Harvey-Hills | Mourant Ozannes

In this session the Panel further considered the implications of the recent developments for Jersey regulated businesses. It was noted that the CFA legislation was largely designed to bring about a change in behaviour by potential facilitators of tax evasion and that it was not anticipated that there would be large numbers of prosecutions. However, if a business's procedures are found to be lacking (and it was noted that a criminal prosecution of the client was not necessary, a voluntary admission would do), prosecutions could flow to ensure examples are made of businesses. It was clear therefore that reviews of procedures will be required, and that these should involve more than a simple extension of existing policies to include reference to tax evasion.

The growing trend of regulatory enforcement was also noted, and it was considered that the restrictions on the use of privilege were largely intended to avoid businesses being able to avail themselves of long-established measures of self-preservation and instead to co-operate at all costs. The need for caution and a careful plan for dealing with regulatory investigations was therefore ever greater.

## Supervision update, key findings and focus for 2017: Jill Britton | Jersey Financial Services Commission

Over the past year the JFSC has made significant progress towards the strategic goal of risk-based supervision. The changes necessary in systems and operating practices in order to achieve this goal are well on course for delivery, with further industry engagement on data capture requirements to be undertaken in the latter part of 2017. On-site examinations continue to be a key supervision tool with themed reviews being the focus for 2017. Policy development continues at pace to ensure Jersey remains a well-regulated and growing financial services industry and continues to earn the right to market access through the adoption of international standards.

The focus for the remainder of 2017 includes further embedding our supervisory approach through increased industry engagement, data collection to support the risk model and international assessments, and ensuring delivery of enhancements to our system capabilities, to realise efficiencies and make it easier to interact with industry. The industry and JFSC continues to face multiple regulatory changes and needs to continue to work together in safeguarding the best interests of Jersey.

## **An update on international standards on transparency and fighting financial crime: George Pearmain | Government of Jersey**

While the international market remains challenging, maintaining Jersey's reputation as a well-regulated jurisdiction will allow local businesses to continue to pursue foreign opportunities. There are a number of new obligations which are expected in the near future, including the exchange of notes with the UK (coming into force 1 July 2017) and developments in financial crime regulation, which are currently being considered by the Financial Crime Strategy Group. These developments are likely to necessitate changes in law during 2018, to enable the effectiveness of those requirements to be assessed at the next MONEYVAL visit in 2020. Jersey is also well-placed to adopt a market-leading position in relation to future FinTech developments.

## **International Transparency Standards, Risks and Opportunities: Sarah Huelin | Mourant Ozannes**

Jersey is committed to updating its central register of beneficial owners or controllers by 30 June 2017. The JFSC and trust companies have undertaken a significant amount of work to meet that commitment in a short space of time. This fast and flexible response, as well as the quality of the information on the register, showcases some of Jersey's strengths which can be used to competitive advantage as Jersey continues to respond to international transparency demands.

New obligations to notify personal information to the JFSC do give rise to information security concerns but the JFSC is focussed on cyber security risk and encouraging trust companies to do the same. The new obligations also give rise to the risk of criminal and civil liability. These risks can be mitigated by understanding the new obligations, communicating with clients and making amendments to terms of business.

For trust companies, there are also opportunities to charge more fees and stand out from competitors by providing pragmatic and efficient assistance to client entities, including by using technology to streamline all reporting obligations and minimise the risk of human error.

## **Changes to the JFSC outsourcing policy, what you need to know: Fiona Magee | Mourant Ozannes**

The JFSC Outsourcing Policy has been amended (the **2017 Policy**). Since 1 June 2017, new outsourcing arrangements need to comply with the 2017 Policy. Existing outsourcing arrangements will need to comply no later than 1 June 2018.

It's important to be aware that the definition of 'outsourcing' has changed in the 2017 Policy. This means that you may have existing arrangements which were not subject to the 2011 Outsourcing Policy, but that will be in scope for the 2017 Policy.

For further information, the Spotlight article in our recent [FinReg Bulletin](#) is a good place to start.

## **Session 2 Panel: Simon Gould | Mourant Ozannes**

Jill Britton indicated that the JFSC did not currently intend to copy the UK's Senior Managers Regime, but will be proposing to extend the civil penalties regime to individuals. She also explained that, although no civil penalties have yet been imposed, this is primarily because the regime does not have retrospective effect. However, a number of 'yellow card' warnings have been given.

George Pearmain gave reassurance that the highest level of importance is given to prevention of hacking of the central beneficial ownership/controller register. He also commented that although the eVID project is being approached with caution, Government does see it as a potential game-changer for Jersey.

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