

States  
of Jersey



JFSC

# **ANTI-MONEY LAUNDERING/ COUNTERING THE FINANCING OF TERRORISM STRATEGY GROUP**

## **FEEDBACK ON CONSULTATION PAPER NO. 3 2007**

### **PROPOSALS TO UPDATE JERSEY'S AML/CFT FRAMEWORK**

**Proposed amendments to primary legislation for the  
purposes of countering money laundering and the  
financing of terrorism**

# CONSULTATION FEEDBACK

This paper reports on the responses received by the Anti-Money Laundering/Countering the Financing of Terrorism Strategy Group (“**the AML/CFT Strategy Group**”) on Consultation Paper No. 3 2007: Proposals to update Jersey’s AML/CFT framework.

The AML/CFT Strategy Group would like to thank all respondents for the time they have taken to consider its proposals and for the feedback provided, and issues highlighted, in relation to these proposals. Due to time constraints, the AML/CFT Strategy Group does not propose to reply individually to all respondents, but invites any respondent or interested party to contact it should there be an area requiring further discussion.

A copy of the responses received can be obtained by contacting the AML/CFT Strategy Group.

Further enquiries concerning the consultation may be directed to:

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# CONSULTATION FEEDBACK

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# 1 - OVERVIEW

## BACKGROUND

1.1 The AML/CFT Strategy Group published Consultation Paper No. 3 2007: Proposals to update Jersey's AML/CFT framework (the "**consultation paper**") in July 2007. The purpose of the consultation paper was to consult on proposals to amend provisions of the Island's existing legislative framework to counter money laundering and the financing of terrorism, which would have an impact on financial services businesses and other businesses, trades and professions operating in Jersey. The amendments are necessary to meet the Recommendations of the Financial Action Task Force ("**FATF**") on Money Laundering and Terrorist Financing. The FATF is the inter-governmental body responsible for setting international standards for combating money laundering and the financing of terrorism.

1.2 In summary, the consultation paper proposed three main amendments:

- *Failing to submit a suspicious activity report*  
Introducing requirements into the Proceeds of Crime (Jersey) Law 1999 ("**POCL**") and the Drug Trafficking Offences (Jersey) Law 1988 ("**DTOL**") for a person working for a Schedule 2 business<sup>1</sup> to make a disclosure to the Joint Financial Crimes Unit (the "**JFCU**") where the person knows, suspects or has reasonable grounds to know or suspect that another person is engaged in money laundering or drug money laundering.
- *Extension of investigatory powers*  
Extending investigatory police powers under the POCL and DTOL, so that they are consistent with those of Schedules 6 and 7 of the Terrorism (Jersey) Law 2002 ("**TL**").
- *Registration of overseas civil confiscation orders and powers of assistance*  
Allowing for the registration of external civil asset recovery orders in Jersey and extending international co-operation powers to enable assistance to be provided in relation to external civil asset recovery investigations and proceedings.

## FEEDBACK ON THE CONSULTATION PAPER PROPOSALS

1.3 There were five responses<sup>2</sup> to the consultation paper. Respondents had comments on points of detail and a summary of those comments and how the AML/CFT Strategy Group has addressed them is set out in Section 2.

1.4 A list of the respondents is given in Appendix A.

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<sup>1</sup> A Schedule 2 business is a person carrying on by way of business an activity listed in Schedule 2 of the Proceeds of Crime (Jersey) Law 1999. The States of Jersey will shortly be considering an extension to the types of businesses included in Schedule 2. See <http://www.statesassembly.gov.je/documents/propositions/20237-31952-2492007.htm>

<sup>2</sup> Two of the respondents confirmed that they had no comments on the proposals.

## 2 – SUMMARY OF RESPONSES RECEIVED

### RESPONSES TO THE PROPOSALS IN THE CONSULTATION PAPER

- 2.1 The summarised responses received by the AML/CFT Strategy Group have been presented below following each topic (references are to paragraphs in the consultation paper). How the AML/CFT Strategy Group has addressed the matters raised in the responses is set out in italicised text.
- 2.2 Readers of this feedback paper should note that draft legislation to implement the proposals set out in the consultation paper has recently been lodged *au Greffe* and is expected to be debated by the States Assembly on 6 November 2007. The relevant *projet* numbers are P128/2007 “Draft Drug Trafficking Offences (Amendment) (Jersey) Law 200-“, P129/2007 “Draft Proceeds of Crime (Amendment) (Jersey) Law 200-“ and P135/2007 “Draft Civil Asset Recovery (International Co-operation) (Jersey) Law 200-“. The text of those draft laws can be obtained from the website of the States Assembly (see [www.statesassembly.gov.je/propositions.asp](http://www.statesassembly.gov.je/propositions.asp)).

#### PAPER REF.

#### SUMMARY OF RESPONSES

4.1 to 4.2

#### **Failing to submit a suspicious activity report.**

One respondent noted that any employee of a financial services business could, as a defence for failing to report a suspicion or knowledge of money laundering/drug money laundering, argue that their employer had not provided him or her with the relevant training required by law. The respondent appeared to be of the view that, to avoid abuse of it, the defence should not be available to money laundering reporting officers (“MLROs”).

*The AML/CFT Strategy Group is of the view that it is not unreasonable for the defence to be available to MLROs since the board of a financial services business has the responsibility to provide relevant training, assisted by the money laundering compliance officer. Although their training needs are likely to be more than for other employees the board will have a duty to ensure that an MLRO (particularly so when new to the role or the employer) is provided with adequate anti-money laundering/countering the financing of terrorism training. Where this is not the case, then the business may commit an offence under the Money Laundering (Jersey) Order 1999. However, it is considered unlikely that an MLRO would be successful in proving the defence of inadequate training in any event: given that an MLRO will fall within the (proposed) ‘key persons’ approval regime and they will therefore need to demonstrate adequate knowledge and experience (amongst other things) before being approved by the Commission.*

PAPER REF.	SUMMARY OF RESPONSES
4.3 to 4.7	<p data-bbox="300 360 759 394"><b>Extension of investigatory powers</b></p> <p data-bbox="300 465 1402 568">One respondent felt that the proposed thresholds for obtaining a customer information order and an account monitoring order under the DTOL and the POCL should be the same as those in equivalent legislation in the United Kingdom.</p> <p data-bbox="300 607 1402 674"><i>The AML/CFT Strategy Group has included in the draft amending legislation thresholds that are materially the same as those in the equivalent United Kingdom legislation.</i></p> <p data-bbox="300 712 1402 887">One respondent asked what cost and expense provision would be made where “an independent innocent third party” was required to comply with a customer information order or account monitoring order when that person may, or may not, have made a suspicious activity report or was otherwise co-operative but adversely affected.</p> <p data-bbox="300 925 1402 1211"><i>The AML/CFT Strategy Group recognises that these orders will have some impact on financial services businesses in terms of expense and resources. However, before such an order could be obtained the Bailiff would need to be satisfied that a number of criteria were met. Furthermore an account monitoring order will not be ordered for a period longer than 90 days beginning with the day on which the order is made. With this in mind, the AML/CFT Strategy Group considers that it is not unreasonable for a financial services business to bear the expense and resourcing impact of complying with an order as part of its duty to assist in the fight against crime.</i></p> <p data-bbox="300 1249 1402 1352">One respondent suggested that guidance should be given to financial services businesses in three areas in respect of an account that was subject to a monitoring order. The three areas were:</p> <ul data-bbox="347 1391 1402 1715" style="list-style-type: none"> <li>• Whether suspicious activity reports (“SARs”) would still need to be filed whilst an account monitoring order was in place;</li> <li>• Whether the termination of the customer relationship would be permitted under guidance from the Joint Financial Crimes Unit (“JFCU”) whilst the account monitoring order was in place;</li> <li>• Where a financial services business believes that there may be constructive trusteeship issues involving an account subject to a monitoring order whether their concerns could be referred to the JFCU/Law Officers to determine an appropriate course of action.</li> </ul> <p data-bbox="300 1753 1402 1998"><i>On the first point, a financial services business would, where it suspected or knew that the account was being or had been used in connection with money laundering or terrorist financing (or had reasonable grounds for such knowledge or suspicion), need to meet its legal obligation by filing a SAR. If, whilst the account monitoring order was in place, the financial services business considered other transactions were suspicious, there would be no need to file further SARs because the monitoring order would result in the transactions being disclosed to the JFCU anyway.</i></p>

PAPER  
REF.

## SUMMARY OF RESPONSES

*On the second point, the stance that the JFCU takes concerning the proposed termination of a relationship will depend on the circumstances of the case and, in particular, whether the termination of the relationship might prejudice an ongoing investigation. A financial services business should therefore liaise closely with the JFCU when it is considering terminating a relationship. Further guidance on terminating a relationship can be found in section 6.4.3 of Part 1 of the Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism issued by the Jersey Financial Services Commission (“JFSC”).*

*Turning now to the third point. The issue of constructive trusteeship would not, per se, be affected by an account monitoring order and where a financial services business came to the conclusion that it might be a constructive trustee it should consider taking advice from its own legal counsel. Further information on issues of constructive trusteeship can be found in paragraph 2.7.3 in Part 2 of the Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism issued by the JFSC.*

*The JFSC considers that it would be helpful for the guidance given in the first two points above to be incorporated into its Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism. It will do so at the earliest practicable opportunity.*

## 4.8

**Registration of overseas civil confiscation orders and powers of investigatory assistance**

One respondent queried whether the abandonment of the list of designated countries could result in the registration of civil confiscation orders and the use of powers of investigatory assistance being extended to jurisdictions controlled by repressive regimes or dictators, or where a decision was politically motivated.

*The AML/CFT Strategy Group considers that the draft Civil Asset Recovery (International Co-operation) (Jersey) Law 200- has been drafted in such a way to prevent such a situation arising. Article 9 of the draft Law provides, subject to the provisions of that Article, that the Royal Court may register an “external civil asset recovery order”. “External civil asset recovery order” is defined in Article 1 of the draft Law as meaning an order or other judicial authority that –*

*(a) is made, other than in the course of criminal proceedings, by an external decision-making body in a country or territory outside Jersey; and*

*(b) specifies that property specified in the order is tainted property, or specified an amount of money to be money to be forfeited or recovered in lieu of tainted property.*

*“Tainted property” means property that has been found by an external decision-making body to have been –*

*(a) used in, or intended to be used in, unlawful conduct; or*

*(b) obtained in the course of, from the proceeds of, or in connection with, unlawful conduct;*

*“unlawful conduct” means the commission of an offence against a law of a country or territory, including Jersey.*

**PAPER  
REF.****SUMMARY OF RESPONSES**

*In addition, before registering an external civil asset recovery order the Royal Court would (amongst other things) need to be of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice (Article 9(c) of the draft Law).*

*Before the Attorney General gives assistance to the responsible authority of another jurisdiction requesting assistance in obtaining evidence in Jersey, he must be satisfied of a number of criteria. The Attorney General must be satisfied that the request is for evidence in Jersey connected with either external civil asset recovery proceedings that have been instituted in a country or territory or an investigation for the purpose of external civil asset recovery proceedings that are being, or may be, instituted in a country or territory. The Attorney General must also be satisfied that there are reasonable grounds to suspect that the evidence is, or relates to, property that has been used in, or is intended to be used in, unlawful conduct or has been, was intended to be, obtained in the course of, from the proceeds of, or in connection with, unlawful conduct.*

One respondent wanted reassurance that the provision for the registration of external civil confiscation orders would not extend to such matters as marital or commercial disputes.

*The draft Civil Asset Recovery (International Co-operation) (Jersey) Law 200- covers only "tainted property". "Tainted property" is property that has been found to have been used in, or intended for use in, unlawful conduct or obtained in the course of, from the proceeds of, or in connection with unlawful conduct.*

**4.9****Other proposed changes**

One respondent queried what was meant by "designated authorities" and why they could not be named at this time. In addition, the respondent expressed the view that they should be Jersey governmental authorities and not external ones.

*The designated authorities would be those designated under the proposed AML/CFT Oversight Law – see the AML/CFT Strategy Group's May 2007 consultation paper: "Overseeing compliance with legislation to detect and prevent money laundering and the financing of terrorism"<sup>3</sup>. Because the proposed AML/CFT Oversight Law is not yet in place, it is not possible to name the "designated authorities" at this time (nor has a definitive list of such authorities yet been drawn up, but when it is, the identity of proposed designated authorities will be consulted upon).*

**RESPONDENTS' OTHER COMMENTS**

2.3 One respondent raised a number of general concerns, as set out below.

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<sup>3</sup> See

<http://www.gov.je/ChiefMinister/International+Finance/Consultationonmoneylaunderingandcounteringterrorism.htm>

A concern was raised that the shorter than usual consultation timescales might lead to inappropriate or misunderstood provisions that could give rise to future adverse consequences.

*The AML/CFT Strategy Group considers that inappropriate or misunderstood provisions are unlikely given that the changes that are being made to the POCL and the DTOL are based on existing provisions in the TL. Also, the key provisions in the draft Civil Asset Recovery (International Co-operation) (Jersey) Law 200- for registering overseas civil confiscation orders and for providing investigatory assistance to overseas authorities in relation to civil asset forfeiture are broadly based on those in the Criminal Justice (International Co-operation) (Jersey) Law 2001.*

The respondent commented that the Jersey provisions should be reflective of the provisions in the United Kingdom (“UK”) and not applied ahead of the UK.

*The provisions described in the consultation paper, and now set out in the draft legislation, are based on reporting and investigatory powers that are already established principles in the UK regime.*

The respondent remarked that the Jersey provisions should be similar to those in Guernsey and the Isle of Man but elsewhere too, including the United States.

*In seeking to implement FATF Recommendations regard has been had to developments in other jurisdictions including in the other Crown Dependencies. It has been noted that in the case of the United States it was recently assessed as ‘compliant’ or ‘largely compliant’ with 43 of the 49 FATF Recommendations.*

*The AML/CFT Strategy Group does accept, however, that some of the proposed legislative changes are being made ahead of competitor jurisdictions. It is therefore possible that some short-term arbitrage might take place. However, the AML/CFT Strategy Group considers that it is important that the changes are made at this time so that they are in place in advance of the planned assessment by the International Monetary Fund next year.*

Finally, the respondent commented that there should be adequate time for creating new systems and procedures to comply with the proposed changes.

*Given that the proposed legislation, if approved by the States, is unlikely to be in force until the second quarter of 2008 (given the need for Privy Council approval), the AML/CFT Strategy Group considers that this lead time should be adequate for financial services businesses to put in place the necessary systems and procedures.*

### 3 NEXT STEPS

- 3.1 As indicated in 2.2 the draft legislation to implement the proposals set out in the consultation paper has recently been lodged *au Greffe* and is expected to be debated by the States Assembly on 6 November 2007.
- 3.2 If the States pass the legislation on 6 November 2007 it will be submitted to the Privy Council for approval. That process is expected to take approximately four or five months. It is therefore anticipated that the three laws will come into force in the second quarter of 2008.

# APPENDIX A

## LIST OF RESPONDENTS TO THE CONSULTATION

- Barclays Private Bank
- Bedell Cristin
- HSBC
- Institute of Directors (Jersey branch)
- Jersey Finance Limited