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Financial crime suspicions in Guernsey: A real battle of wits

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Collas Crill assisted its clients in securing the release of over GBP 100 million, informally held at financial institutions as a result of Guernsey's anti-money laundering regime, in 2024 alone.

The regime is placing a significant burden upon those customers captured by it, the island's financial services businesses and the Courts, as frustrated individuals and companies take their financial service providers and the Authorities to Court in an attempt to resolve the stalemate. In this article we will look at what those affected by the regime can do to mitigate the impact it has on them, their customers and the Courts.

Financial service providers

Settle your suspicion

There is a real temptation when faced with an internal suspicious activity report or information that suggests criminal conduct to fire off a Suspicious Activity Report (**SAR**) as quickly as possible. The Disclosure (Bailiwick of Guernsey) Law, 2007 (**Disclosure Law**) does, after all, require such a report to be made *'as soon as possible'* "and the bar for suspicion in relation to an account, asset or individual is, as we all know, a low one - *'[The institution] must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.'*

However, the low bar for suspicion does not free the maker of the SAR from the requirement to clearly and coherently identify the factual basis of their suspicion. The Bailiwick of Guernsey Financial Intelligence Unit's (**FIU**) "Guidance on the Submission of Suspicious Activity Reports" (**the SAR Guidance**), clearly identifies the requirement for a SAR to *"set out a clear factual account of the circumstances so that the FIU can readily understand what has prompted suspicion and can easily ascertain all of the other details relevant to its intelligence analysis."*

The same guidance identifies that every SAR should, as a minimum:

- clearly define the suspected criminality;
- clearly demonstrate the reason for suspicion;
- describe in sufficient detail the purpose and intended nature of the business relationship or occasional transaction;

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- describe in sufficient detail the assets under management, including their value and location clearly outline any suspected proceeds of crime;
- clearly indicate how the Reporting Entity will proceed with the relationship.

This is not an insignificant amount of information and it may well take time for the MLRO to identify, consider and most importantly draft a reasoned report. The FIU highlighted in their guidance, "WHY CARE ABOUT SARS?" (or why you should help the Financial Intelligence Unit to help you) that '*All that the MLRO can do is provide as full information as is available to him or her which explains the grounds for suspicion.*'

However, an MLRO should not only be mindful of the need to assist the FIU. If a private law action is brought, the quality of the SAR and the basis of the suspicion will likely face much scrutiny. It must be remembered that in any private law action, it is first of all the financial institution that *'bears the burden, on the balance of probabilities, of satisfying [the Court] that there are still relevant facts on which to base the suspicion about the source of the funds..., where there is more than a fanciful possibility that those funds are the proceeds of criminal conduct.'* Therefore, it is imperative that the institution making the SAR has clearly met the minimum criteria, as set down the by FIU. Failure to properly evidence the reasonableness of the SAR, could result in a claim for damages from those impacted by it.

Keep your suspicion under review

Institutions should also be careful to ensure that the basis of the suspicion is properly considered in light of new or further information. An already disgruntled customer is unlikely to be sympathetic towards an institution that has failed to properly consider new material which could have resulted in the negation of a suspicion or an institution that has failed to properly document why this information has not addressed its concerns.

Furthermore, institutions should re-visit their historic SARs to ensure that they too, wherever possible reflect the minimum criteria set down by the FIU. As the cases show, it is not uncommon for private law actions to be commenced years or even decades after the initial SAR was filed. No institution wants to be presenting a SAR to the Court that may have passed muster in the early noughties but has not been revisited since that date.

Engage with your customer

Financial institutions find themselves in an invidious position once a SAR has been submitted. At best, a once careful and competent service provider appears to be disinterested and sluggish and at worst, on the face of it, negligent. The tipping off provisions in both the Disclosure Law and Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (**Proceeds of Crime Law**) mean that institutions must be extremely careful when dealing with a customer impacted by a SAR.

However, it is important to remember that the FIU Guidance states, '*Whilst the tipping-off offence prevents you from disclosing information relating to the submission of a SAR, it does not prohibit the making of appropriate enquiries with a view to negating suspicion.*'

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The managing of customer relationships, in such circumstances, can be extremely difficult. Institutions should have clear policies and procedures in place to mitigate the risk of tipping off, whilst making any interaction with the customer as productive as possible.

Ultimately, it is in everybody's best interests to try and negate a suspicion at the earliest opportunity. A positive outcome is more likely to be achieved when the customer and institution have been able to work together, despite the difficult circumstances customer and institution find themselves in.

Customers Impacted by a disclosure

Get help

People who entrust their money or assets to a Guernsey financial services provider will probably not have a comprehensive understanding of the Island's anti-money laundering regime. It seems highly unlikely that most people are aware that their property is at risk of being informally frozen for an indefinite period as a result of a "mere suspicion" by the financial institution.

This goes for foreign lawyers too. We have seen letters from lawyers in foreign jurisdictions that, as a result of not understanding the Guernsey legal and regulatory framework, have only made the situation worse. The instruction of a local legal adviser at the earliest opportunity will hopefully improve the level of engagement from the institution and will ensure that the customer is aware of their own legal and regulatory rights and entitlements and the options available to them in resolving the situation.

Be realistic

If your previously competent and capable financial services provider is no longer providing you with the level of service you have come to expect, be mindful that there may be a legal and regulatory reason for its sudden dip in form.

We would all like to think that the shadow of suspicion would never fall on us but it is entirely possible, as a customer, to become tainted by the unlawful conduct of others. It is no good ignoring adverse media or unhelpful open source information, in the hope that your financial institution will do the same. They won't.

Work collaboratively

The filing of a SAR does not mean that a financial services institution's interests are no longer aligned with their customers. What appears to be an entirely unreasonable list of demands for further information or client due diligence may in fact be an attempt to address the red flags and negate a suspicion.

Be mindful that an uncooperative approach taken by a customer or their representative, although understandable in the circumstances, can cause the institution to become even more suspicious. Furthermore,

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should the matter proceed to Court, the actions of the customer will inevitably be scrutinised as carefully as those of the financial institution. Allegations by the customer that an institution's suspicion is unreasonable may ring hollow if repeated and legitimate requests for documents or information have been met with hostility and inaction.

Ultimately, it is in everybody's best interests to try and negate a suspicion at the earliest opportunity. This outcome is going to be most likely when the customer and institution have been able to work together.

If you are a reporting institution or customer impacted by Guernsey's consent regime, please get in touch with our specialist team who would be happy to advise you.

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COLLAS CRILL

For more information please contact:



Amy Davies

Of Counsel (Advocate) | Guernsey

t: +44 (0) 1481 734234 | **e:** amy.davies@collascrill.com



Michael Adkins

Partner (Advocate) | Guernsey

t: +44 (0) 1481 734 231 | **e:** michael.adkins@collascrill.com



Wayne Atkinson

Partner (Advocate) | Guernsey

t: +44 (0) 1481 734225 | **e:** wayne.atkinson@collascrill.com



Ben Newton

Associate (Advocate) | Guernsey

t: +44 (0) 1481 734849 | **e:** ben.newton@collascrill.com

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