STATES OF JERSEY

DRAFT FINANCIAL REGULATION (DISCLOSURE OF INFORMATION) (AMENDMENTS) (JERSEY) REGULATIONS 201- (P.7/2013): COMMENTS

Presented to the States on 1st March 2013
by the Economic Affairs Scrutiny Panel

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2013 Price code: B P.7 Com.

COMMENTS

Introduction

1. On 29th January 2013, the Economic Affairs Scrutiny Panel was briefed on Draft Financial Regulation (Disclosure of Information) (Amendments) (Jersey) Regulations 201- (P.7/2013).

2. The Panel decided not to pursue this topic further as the draft Regulations appear uncontroversial. Nevertheless, the briefing provided an opportunity to put questions and to elicit information on the draft Regulations which we believe would be of use to Members during the debate.

3. The draft Regulations seek to amend the provisions of 4 Laws with regard to the disclosure of restricted information to third parties, namely supervisors of securities markets (e.g. stock exchanges); European supranational regulators; and Jersey authorities with licensing or registration of consent functions.

4. In the report accompanying P.7/2013, the Minister for Economic Development has highlighted the consultation undertaken by the Jersey Financial Services Commission (JFSC) on the draft Regulations. The results of that consultation are available on the JFSC website (www.jerseyfsc.org) and were indeed generally positive.

5. In terms of the third parties to which the Regulations refer, we understand that it is standard practice internationally for regulators to be able to disclose information to supervisors of securities markets such as stock exchanges. Indeed, the JFSC already receives requests from stock exchanges and the draft Regulations, if adopted, would potentially lead to a few dozen requests per annum.

6. In respect of disclosure to European supranational regulators, a precedent for this has already been set with the adoption of the *Draft Alternative Investment Funds (Jersey) Regulations 201-*. Those Regulations were approved by the Assembly on 6th December 2012. Whilst the 27 Member States of the European Union have membership of such bodies, any disclosure would not mean releasing the information to each of the 27 States individually; rather it would mean disclosure to the supranational regulators. It is uncertain how many requests for disclosure may be made by European regulators and they may amount to very few. However, we understand that it is important to allow for the possibility of disclosure to European regulators in order that Jersey may fully access European markets.

7. With regard to Jersey authorities with licensing or registering functions, we understand that there is already provision for disclosure to such authorities within the Laws currently. However, there are limits as disclosure can only be undertaken in respect of an individual for whom both the JFSC and the other authority exercise a statutory function. The draft Regulations seek to enhance the provisions for such disclosure. We asked which Jersey authorities this might involve and were advised that it would probably involve the Gambling Commission and authorities in respect of Housing and the Regulation of Undertakings. The latter bodies effectively mean the Population Office, given

the structure that will exist once the *Control of Housing and Work (Jersey) Law 2012* has been implemented.

8. Safeguards have been built into the draft Regulations: other authorities will need to respect the confidentiality of disclosed information; they will need to show the relevance of the information requested; and they will need to adhere to any conditions applied by the JFSC to the information. The JFSC has to be satisfied that it was a valid request. We questioned how the JFSC could be certain that its conditions and requirements for confidentiality would be met. This was a question which the JFSC also fielded during the public consultation. We understand that one would rely upon the track record of the authority making a request for disclosure and on the fact that other regulators must adhere to the legislation applicable in their own jurisdictions governing the receipt, usage and disclosure of information. We would draw Members' attention to the response to this question provided by the JFSC during its consultation which gives a fuller explanation of the JFSC's position (**Appendix**).

9. We asked whether disclosure of information to a third party would attract a fee. We were advised that a charge could be levied but that this was generally rare as the JFSC had to maintain a reciprocal relationship with other authorities and it might therefore need to request disclosure of information itself from other authorities in due course.

10. The principles of disclosure to the third parties listed in the draft Regulations are therefore not new and are already established, either in the Regulations themselves or in other decisions recently taken by the Assembly. The draft Regulations, if adopted, would enhance and extend those provisions and do not therefore appear to be controversial.

APPENDIX

Extract from responses received by the Jersey Financial Services Commission on Consultation Paper No. 3 2012: Information Gateways. January 2013.

2.12 Question 4.6.6
Do you have any comments on the text of the draft legislation itself?

2.12.1 No respondent had any comments on the text of the draft legislation that would enable the Commission to make public a former registration and any conditions that were attached thereto.

2.12.2 One respondent noted that the legislation would require that the Commission may not disclose restricted information to an ESA, the ESRB or a supervisor of a securities market, unless it is satisfied that three conditions would be met:

a) the purpose of the disclosure is in order to assist the ESA, the ESRB or the supervisor of the securities market, as relevant, in the exercise of any of their functions;

b) the ESA, the ESRB or the supervisor of the securities market, as relevant, will treat the information disclosed with appropriate confidentiality; and

c) the ESA, the ESRB or the supervisor of the securities market will comply with any conditions which the Commission may, in its discretion, subject such disclosure.

2.12.3 In relation to these three conditions the respondent asked:

- How would the Commission assess that condition (a) had been met?
- How would the Commission enforce condition (b)?
- How would the Commission enforce condition (c)?

2.12.4 The respondent also asked whether the disclosure of restricted information to an ESA, the ESRB or a supervisor of the securities market would be subject to an independent audit to ensure that the Commission had met the required standards.

Commission Response

2.12.5 The Commission already has extensive experience in applying the conditions referred to in 2.12.2 above as they already apply in relation to the disclosure of restricted information to a 'relevant supervisory authority' (i.e. an overseas financial services regulator). In this regard the Commission would draw attention to the standard template request letter for relevant supervisory authorities that it has published in Appendix A of its Handbook on International Co-operation and Information Exchange (see http://www.jerseyfsc.org/the_commission/international_co-operation/assisting-overseas.asp). In particular, that template request letter expects the other authority to confirm, amongst other things, that:

- it will only use any information disclosed to it in the discharge of its supervisory functions;
- it will treat any information disclosed as confidential;
- it will comply with any conditions attached by the Commission to the disclosure of the information.

2.12.6 In relation to condition (a) referred to by the respondent, in most cases it is likely to be self-evident how the disclosure of restricted information would assist the ESA, the ESRB or the supervisor of the securities market to exercise their functions. However, were it not to be obvious, the Commission would require the relevant authority to explain how the disclosure would so assist it.

2.12.7 In relation to condition (b), the Commission would only disclose restricted information on the basis that the recipient authority would have to treat it as confidential. The Commission's internal procedures on disclosing restricted information are designed to make sure that this is the case.

2.12.8 Accordingly, restricted information would not be disclosed by the Commission unless it was certain that the relevant authority would treat the information as confidential. In the highly unlikely event that the Commission subsequently had reason to suspect that an authority was about to breach the confidentiality requirement in relation to restricted information previously disclosed, it would raise the matter directly with the relevant authority and also consider taking action to enforce such confidentiality to be observed (for example, by seeking a court injunction in the relevant jurisdiction).

2.12.9 Similarly, in relation to condition (c), the Commission would only disclose restricted information on the basis that the recipient authority would comply with any conditions set by the Commission in relation to the disclosure. Ordinarily, the Commission would condition a disclosure of restricted information so that the other authority would be required to obtain the Commission's prior consent before passing on any disclosed information to another party. (Notwithstanding this, it has to be recognised that, in certain circumstances, the other authority may be required by law to onward disclose the information, e.g., to a law enforcement agency where the disclosed information revealed a case of suspected money laundering. In such instances, the Commission would expect the other authority to notify it of such onward disclosure either before it occurs or as soon as practicable thereafter.)

2.12.10 Accordingly, the Commission would not disclose the restricted information requested if it had any doubt that the relevant authority would comply with the conditions applied by the Commission. In the highly unlikely event that the Commission subsequently had reason to suspect that an authority would not comply with a condition applied in relation to restricted information previously disclosed, it would raise the matter directly with the relevant authority and also consider taking action to enforce the condition (for example, by seeking a court injunction in the relevant jurisdiction).

2.12.11 Turning now to the respondent's point concerning an independent audit of the Commission's use of the information gateway. The Commission would make three observations in relation to this.

2.12.12 Firstly, if the Commission were to disclose restricted information in breach of any one of the three conditions, the Commission and the relevant officer(s) would be disclosing information out with the provisions of the information gateway and could be exposed to criminal liability. Accordingly, the Commission has in place a robust internal procedure that is designed to make sure that any potential disclosure of restricted information by the Commission is considered very carefully and subject to approval at seniority levels within the Commission commensurate with the sensitivity of the restricted information to be disclosed.

2.12.13 Secondly, the Commission's internal audit function provides periodic, risk-based, independent reviews of decisions to disclose restricted information to third parties.

2.12.14 Thirdly, as with the disclosure of restricted information under any of the existing gateways in the regulatory laws, any person that is aggrieved by a disclosure may petition the Royal Court to undertake a judicial review of the decision of the Commission to disclose the information.