

Funds quarterly legal and regulatory update - 1 January 2017 to 31 March 2017

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1. Jersey Financial Services Commission (JFSC) updates

1.1 Jersey Private Funds

With the release of the Jersey Private Funds Guide (the **JPF Guide**), Jersey has introduced a welcome simplification of its funds regime, by providing for a single Jersey private fund product, to be called the "Jersey Private Fund" (**JPF**), as explained in our recent briefing.

The JPF will replace the three existing fund products that currently cater for private funds in Jersey, namely "COBO Only Funds", "Private Placement Funds" and "Very Private Funds". Existing COBO Only Funds, Private Placement Funds and Very Private Funds may elect to convert into a JPF (but are not required to convert, and if they do not convert, will continue to remain subject to their current regulatory regime).

The JPF, which can be offered to up to 50 investors, benefits from a streamlined authorisation process and will be available from 18 April 2017.

1.2 AML consultation

As we mentioned in our previous update, the JFSC issued a consultation paper in September seeking input on the proposed new Funds section to the AML/CFT Handbook for regulated financial services business. The consultation closed on 25 November and on 10 March the JFSC published both feedback on the consultation paper and the final form new Funds section.

The new section provides additional clarification and guidance on certain aspects of the AML/CFT regime. It does not amend any existing statutory or regulatory AML/CFT obligations for funds or fund operators nor does it contain any new codes of practice – rather it explains the application of the existing AML/CFT framework in a funds context, gives fund-specific examples and provides clarity in a number of specific areas of complexity.

1.3 Amended Outsourcing Policy

In March 2017, the JFSC issued a revised Outsourcing Policy. As explained in our recent briefing, the Policy achieves much by doing away with the distinction between delegation and outsourcing that has historically been a source of confusion for registered persons conducting financial services business in Jersey.

However, it requires consideration by registered persons and non-regulated entities alike, including as a result of expanding the scope of the Policy by broadening the definition of outsourced activity to capture activity which in itself is not regulated, but may materially impact the provision of services for which the registered person is licenced.

The Policy contains broad exemptions for funds and fund service providers, provided that certain conditions are met.

New outsourcing arrangements entered into from 1 June 2017 must comply with the Policy. Existing outsourcing arrangements must comply with the Policy by 1 June 2018, although registered persons can opt-in to the new regime earlier by making the relevant filings with the JFSC.

1.4 JFSC 2017 Business Plan

The JFSC has published its business plan for 2017, in which it has set out its objectives and priorities for the coming year. This year, its main stated objectives include the following:

- Focusing regulation on the greatest risks by increasing focus on risk-based supervision, progressing several high priority financial crime projects (including implementing an Island-wide MONEYVAL action plan and launching a National Risk Assessment in conjunction with Government) and continuing its public awareness campaign by providing financial education to the Jersey public on the potential dangers of high-risk investments and mis-selling.
- Interacting efficiently and effectively with industry through the improvement of its digital channels, including a new website, the launch of a new beneficial ownership interface between the JFSC and the Joint Financial Crimes Unit, the establishment of an enhanced beneficial ownership register and the creation of a new Registry portal.
- Facilitating market access, including the continuation of its Funds Regime Review (consisting of rationalising the private and unregulated fund regulatory requirements as evidenced by the introduction of the JPF Guide, reviewing Jersey's regulatory approach to public funds and considering certain exemptions and potential legislative enhancements), effecting local adoption of the Basel III set of international banking standards and continued consideration in respect of Jersey seeking equivalence with MiFID II.
- Safeguarding its sustainability, efficiency and independence through the organisational readiness of its staff and enhancing its cyber and information security.

1.5 Beneficial Ownership and COBO consents

As mentioned in our previous update, pursuant to an agreement made between the Jersey and UK governments, the Registry is requiring all Jersey corporate and legal entities (apart from foundations) to confirm their current beneficial ownership and control by 30 June 2017 and has also stipulated certain ongoing obligations, which differ for entities that are administered by a trust company service provider and for those that are not. The information provided will not be available on any public register, but will be stored on a private register held by the Registry and will only be exchanged on request with law enforcement and tax authorities.

We also mentioned that the Registry replaced the COBO consent for each corporate and legal entity with a new form of COBO consent issued on the JFSC website on 1 January 2017 containing the additional notification requirements. A replacement COBO consent in that form applicable to each corporate and legal entity will be sent out with the annual return receipts (except for certain more complex COBO consents which will be issued on review and on a case by case basis), but was effective from 1 January 2017. The new COBO consent automatically replaces any existing COBO consent, notwithstanding that a replacement copy

has not yet been received.

A link to the Commission's FAQs for TCB administered entities can be found [here](#) and those for non-TCB administered entities can be found [here](#).

2. Other Jersey Developments

2.1 Changes to the Data Protection Law

In February 2017, the Assistant Chief Minister approved instructions to law draftsmen to repeal the Data Protection (Jersey) Law 2005 and to prepare new legislation to replace it, which will set out the new powers, functions and funding arrangements for the regulator. The proposal comes as a result of a desire to refine Jersey's data protection legislation, while ensuring that it meets the 'adequacy' requirements of the upcoming EU General Data Protection Regulation and the new EU Data Protection Directive on the protection of personal information processed for the purposes of policing and public protection, which introduce a number of new measures designed to strengthen the rights of data subjects.

The draft law is expected to be consulted on during the course of this year. We expect it will require data controllers to review their existing policies and documentation to ensure that they are equipped to meet the new standards. Although it is too early to know exactly what those standards will be, we are closely following developments and they will be reported on in our next update.

2.2 Jersey Digital Policy Framework

In February 2017, the government of Jersey announced the launch of a new Digital Policy Framework, which has as its objectives achieving a thriving digital sector, digital skills for all, advanced digital infrastructure, government digital transformation, robust cyber security and secure data protection. The Framework explains the government's new strategies for telecommunications and cyber security and announces work that is underway to enable Jersey to remain compliant with the EU's General Data Protection Regulation so that the Island can maintain market access to the European Economic Area.

2.3 Consultation on Online Register of Désastres

In January 2017, the Viscount's Department published a consultation on a proposal to change its policy on the Online Register of Désastres (bankruptcies) (the **Online Register**), such that details of désastres that have been discharged or settled shall be removed from the Online Register three months after the conclusion of each désastre.

The reason for the proposed change in approach is that it is considered that the current policy is not in accordance with current principles regarding data privacy or with the "right to be forgotten". It is also not in keeping with the principle of bankruptcy proceedings that aim to offer the debtor the ability to make a fresh start and be discharged from debts that they are unable to repay.

Currently there is a hard copy register and the Online Register. It is proposed that the hard copy register, which can be inspected at the Viscount's Offices, will continue to be maintained and will show all relevant information and as such the "désastre check" service will continue to be offered and carried out by reference to such register.

2.4 S&P's maintains Jersey's credit rating

In January 2017, Standard & Poor's re-assessed and maintained Jersey's credit rating as AA-. The report has recognised the Island's strong and flexible institutions, wealthy economy and considerable flexible buffers, and expects that over the next two years the risks to Jersey's financial sector and its fiscal performance, particularly following Brexit, will be balanced by its still-significant economic resilience.

2.5 Jersey Brexit Report

In January 2017, the Minister for External Relations lodged a report on the steps that have been taken by the Jersey government since the UK's 23 June 2016 referendum, which have included the following:

- Issued a report on 27th June 2016 setting out the objective of preserving the substance of Jersey's relationship with the UK and, as far as possible, the substance of the benefits of its relationship with the EU as set out under Protocol 3 of the UK's 1972 Accession Treaty (albeit recognising that this will be subject to intense negotiations following the triggering by the UK of Article 50 of the Lisbon Treaty).
- Submitted evidence to (i) the Foreign Affairs Committee on the interests of the Crown Dependencies (CDs) in the UK's approach towards its withdrawal from the EU; (ii) the Justice Select Committee on the performance of the UK in building its relationship with the CDs in light of Brexit; and (iii) the House of Lords EU Committee.
- Established oversight groups to ensure political direction and strategy for Brexit-related activity.
- In July 2016, the UK Prime Minister and the Lord Chancellor stated their intention to involve the CDs and, in October 2016, the UK Minister of Justice with responsibility for the CDs visited Jersey.
- In August 2016, 4 priority work-streams were identified and agreed between the UK and the CDs (being financial services, immigration and the Common Travel Area, the Customs Union and tax and agriculture and fisheries) and the government of Jersey has established its own working groups of officials in these 4 areas.
- Co-ordinated with Guernsey and the Isle of Man in relation to discussions with the UK and participated in CD 'roundtable' meetings in Whitehall.

The report also sets out the first steps that Jersey will take in respect of the withdrawal process, including the repeal of the European Union (Jersey) Law 1973.

A link to our recent briefing on the options for fund managers following the triggering of article 50 can be found [here](#).

3. Global Developments

3.1 City UK Report on EU's third country regime and alternatives to passporting

In January 2017, The International Regulatory Strategy Group (co-sponsored by TheCityUK)

published a report on the EU's third country regimes and alternatives to passporting in anticipation of the UK exiting the EU and becoming a 'third country' for the purposes of EU financial services legislation, including the AIFMD.

The report analyses the alternative options available to the UK relating to the cross-border provision of financial services if the passporting rights for the UK do not continue post-Brexit. The report concludes that negotiations for Brexit should focus on creating a bespoke UK-EU deal allowing wider, mutual rights of market access to reflect the unique position of the UK in relation to the EU and their integrated and interdependent markets. It provides insights into some of the mechanisms which could be used to structure such a relationship. The report also considers what the position would be if the UK, after Brexit, does not secure a bespoke agreement and is not able, or willing, to comply with the conditions of the third country regimes.

The report highlights that transitional arrangements should be agreed as soon as possible to provide reassurance to the financial services industry on both sides of the future UK/EU border.

3.2 IOSCO publishes report on loan funds

In February 2017, the International Organization of Securities Commissions (**IOSCO**) published a report called "Findings of the Survey on Loan Funds", which describes how the market for loan funds has evolved in different jurisdictions and explains how regulators are addressing the risks associated with such funds.

The report recognizes two types of loan funds, being loan originating funds (whose strategy allows it to grant, restructure and acquire loans) and loan participating funds (which acquire and restructure partially or entirely existing loans originated by banks and other institutions) and identifies certain risks associated with such funds. It is said that the risks include: (i) that loans are hard to value and, since they are also hard to trade, they are very illiquid assets; (ii) borrowers could default on their loans; (iii) there are systemic risks from excessive credit growth; and (iv) regulatory arbitrage.

Despite these risks, the report concludes that no further work on loan funds is currently warranted by IOSCO as many jurisdictions consider their general rules to be sufficient to address the associated risks, however, IOSCO will continue to monitor this area of the fund industry with a view to potentially revisiting it, depending on market developments.

3.3 Illiquid assets and open-ended funds

In February 2017, the UK Financial Conduct Authority (the **FCA**) published a discussion paper on the practice of investing in illiquid assets (for example, land and buildings, infrastructure and financial assets such as unlisted securities) through open-ended funds and the challenges that it can pose to managers and investors.

The paper highlights that if conditions change in the market, the value of underlying assets could fall in a way that may not be fully reflected in fund valuations, allowing investors to sell their holding for more than it is worth and disadvantaging the remaining investors. It was well publicised that, following the 23 June 2016 Brexit referendum, liquidity management issues arose in some UK open-ended property funds.

Rather than advocating broad structural changes (such as banning open-ended funds from holding illiquid assets or preventing retail investors from investing in open-ended property funds), the FCA intends to gather more evidence to decide whether changes to its regulatory approach are needed to enhance market stability and promote competition in this area, while

protecting consumers. The FCA is seeking feedback by 8 May 2017.

3.4 Criminal offence for facilitating tax evasion

As considered in our February 2016 briefing, HM Revenue & Customs published a number of Consultation Papers, including a proposal to introduce a new corporate criminal offence of failing to prevent the facilitation of tax evasion. As a result, the UK government has published draft legislation in the Criminal Finances Bill.

This strict liability offence will seek to extend criminality to corporations where they fail reasonably to prevent their representatives (for example, employees) from facilitating criminal tax evasion during the course of a business (the **Proposed Offence**). It aims to make it easier for corporations to be found liable for the acts of their representatives, removing some of the previous hurdles that have historically made such liability difficult to prove (for example, showing the requisite level of intent).

In much the same vein as the defence of 'adequate procedures' under the Bribery Act, there will be a defence to the Proposed Offence where a relevant body had in place reasonable prevention procedures or where it is unreasonable to expect such procedures. The introduction of the Proposed Offence will require companies and partnerships caught within its scope to revisit and amend policies and procedures to ensure that they have reasonable prevention processes in place. The offence will have extra-territorial effect along the same lines as the Bribery Act 2010, meaning that it is potentially of great importance to offshore financial services businesses.

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Meet the Author



Niamh Lalor
Partner
Jersey
niamh.lalor@ogier.com
T+44 1534 514210
M+44 7797 728454

Key Contacts



Emily Haithwaite
Group Partner, Ogier Group L.P.
Jersey
emily.haithwaite@ogier.com
T+44 1534 514072
M+44 7797 825183



Simon Schilder
Partner, Ogier Group L.P.
British Virgin Islands, Jersey
simon.schilder@ogier.com
T+44 1534 514298
M+44 7797 862907



Dilmun Leach
Senior Associate
Jersey
dilmun.leach@ogier.com
T+44 1534 514119



Joanna Christensen
Senior Associate
Jersey
joanna.christensen@ogier.com
T+44 1534 514127
M+44 7797 758973



Alexandra O'Grady
Senior Associate
Jersey
alexandra.o'grady@ogier.com
T+44 1534 514081

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