

## Jersey securities issuing vehicles

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Jersey has recently updated its laws in relation to the making of offers to the public by Jersey issuers, as a result of which what constitutes a "prospectus" for Jersey law purposes has also changed.

This briefing has been produced to assist structured finance advisers and arrangers considering using Jersey incorporated companies (a **Jersey Issuer**) to issue securities other than shares.

This briefing considers:

- the revised definition of a 'prospectus' for Jersey law purposes
- whether the Jersey Issuer will require a consent under COBO (a **COBO Consent**) and the consequences of this
- the Jersey requirements in relation to the preparation of audited accounts for vehicles issuing debt securities

### | Is a 'prospectus' being issued?

In order to make an offer of securities to the public, a Jersey company is required to issue a prospectus and comply with enhanced disclosure requirements as well as obtaining additional consents. The company would also be required to be a public company. Prior to the recent amendments to the Companies (Jersey) Law 1991, as amended (the **Companies Law**) an offer to more than 50 investors would be considered to be an offer to the public.

The Companies (Amendment of Law) (No.2) (Jersey Order 2021 (the **2021 Order**) has substantially amended the definition of prospectus, providing a modernised and more issuer and arranger friendly framework which is more closely aligned with market expectations.

A 'prospectus' is now defined as an invitation to the public to become a member of a company or to acquire or apply for any securities, however, an invitation will not be considered to be

made to the public where:

(a) the invitation is addressed to either or both:

- qualified investors as defined in Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market OJ L 168, 30.6.2017, p.12, as amended from time to time, or
- professional investors as defined in the Financial Services (Investment Business (Special Purpose Investment Business – Exemption)) (Jersey) Order 2001, or both

(b) the number of persons (other than qualified investors and professional investors) to whom the invitation is addressed does not exceed 50 in Jersey or 150 elsewhere

(c) the minimum consideration which may be paid or given by a person for securities to be acquired by that person is at least EUR 100,000 (or an equivalent amount in another currency)

(d) the securities to be acquired or applied for are denominated in amounts of at least EUR 100,000 (or an equivalent amount in another currency)

(e) the invitation relates to the issue of shares or other securities by a company to its members satisfaction, in whole or in part, of a distribution to be made by that company

(f) the invitation relates to a scheme specified in Article 3(2) (c) of the Companies (General Provisions) (Jersey) Order 2002, or

(g) any combination of exemptions detailed in sub-paragraphs (a) to (f) apply

If the Jersey Issuer is not issuing a prospectus under the Companies Law as amended by the 2021 Order, it will not be required to be incorporated as a public company and can instead be established as a private company. As set out below, one of the benefits of being established as a private company is a potential exemption to the requirement for a public company to produce audited accounts.

## **Is a COBO Consent required (pursuant to Article 4 of COBO)?**

If the securities to be issued by the Jersey Issuer are to be offered to more than 10 investors, then a consent under the Control of Borrowing (Jersey) Order 1958 (COBO) will need to be obtained.

Obtaining a COBO consent requires an application to be made to the Jersey Financial Services

Commission by the Jersey legal advisers to the issuer. It is possible to obtain in principle consent to the establishment of the Jersey Issuer and the issue of securities.

The published timescale for obtaining in principle consent is 5 business days with a further 5 business days required for document review (usually the offer document and principal programme documents).

A COBO consent will contain conditions, but these are not typically onerous.

## **Relaxation of audit requirements for private companies issuing debt securities under COBO**

In August 2006, the Jersey Financial Services Commission (the Jersey regulatory body) announced a change in its approach with regard to whether or not a company issuing debt securities must maintain audited accounts.

The current position is as follows:

- public companies will continue to require an audit of their accounts
- a private company is required to prepare audited accounts if its articles of association or shareholders required it to do so
- a private company issuing debt securities and requiring a COBO consent to do so is not required to prepare audited accounts if:
  - the offer document or other documentation pursuant to which the securities are issued makes it clear to investors that no audited accounts will be produced, and
  - the transaction documents allow note holders holding 10 percent by value to obtain an audit of such company's latest annual accounts

Where such a request is made the requesting parties will be responsible for the costs of carrying out the audit.

A private company issuing debt securities does, however and as with all Jersey incorporated companies, have a statutory obligation under Articles 102 and 103 of the Companies Law to keep accounting records which are sufficient to identify the transactions of the company and to disclose with reasonable accuracy its financial position. The Companies Law also prescribes that accounts must be prepared in accordance with generally accepted accounting principles and show a true and fair view of the profit and loss of the company and the state of its balance

sheet. There is no limit on which GAAP may be chosen.

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## Meet the Author



[Katrina Edge](#)

Partner

[Jersey](#)

E: [katrina.edge@ogier.com](mailto:katrina.edge@ogier.com)

T: [+44 1534 514192](tel:+441534514192)

## Key Contacts



Bruce MacNeil

Partner

Jersey

E: [bruce.macneil@ogier.com](mailto:bruce.macneil@ogier.com)

T: [+44 1534 514394](tel:+441534514394)



Kate McCaffrey

Partner

Jersey

E: [kate.mccaffrey@ogier.com](mailto:kate.mccaffrey@ogier.com)

T: [+44 1534 514355](tel:+441534514355)

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