Jersey Private Funds

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With the release of the Jersey Private Funds Guide (the JPF Guide) in April 2017, Jersey introduced a welcome simplification of its funds regime, by providing for a single Jersey private fund product, called the "Jersey Private Fund" (**JPF**). Over 300 JPFs have been formed since the launch of the JPF regime in 2017.

The JPF replaced the three existing fund products which previously catered for private funds in Jersey, namely "COBO Only Funds", "Private Placement Funds" and "Very Private Funds". A new private fund may now be launched only as a JPF. It is no longer possible to launch a new fund as a Very Private Fund, COBO-Only Fund or Private Placement Fund, all of which were categories of private funds that could be launched prior to March 2017.

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).

A JPF must have a consent issued under the Control of Borrowing (Jersey) Order 1958 (**COBO**) and subject to meeting the following eligibility and structuring requirements may be established using a streamlined authorisation process:

Scope of JPF Guide

A JPF is a private investment fund involving the pooling of capital raised for the fund and which operates on the principle of risk spreading. In order to fall within the scope of the JPF Guide, therefore, there would need to be both (1) at least two investors pooling their capital and (2) a number of assets being acquired, such that there would be "risk spreading".

Importantly, however, the following are expressly stated as <u>not</u> being intended to fall within the definition of a JPF:

1. holding companies;
2. joint ventures;
3. securitisation vehicles;
4. family office vehicles; and
5. carry/incentivisation vehicles.

Eligibility criteria

In order to satisfy the requirements of the JPF Guide, the following marketing considerations and investor requirements will need to be met:

Marketing considerations

1. offers to invest in the JPF may not exceed 50 – for these purposes an "offer" means an "offer that is capable of acceptance" by an investor and so pre-marketing materials sent to prospective investors will not constitute an offer for these purposes;

2. where a JPF is marketed to investors in the European Union or European Economic Area and is an "Alternative Investment Fund" (**AIF**) for the purposes of Regulation 3 of the Alternative Investment Funds (Jersey) Regulations 2012 (**AIF Regulations**), Jersey's

AIFMD legislation and Code of Practice for AIFs and AIF Services Businesses will apply;

3. there is no requirement for a JPF to have an offer document (although it can do so, in which case, that document must contain all material information required by investors and their professional advisers for the purposes of making an investment in the JPF); and

4. the offering materials of the JPF must contain the investment warning and disclosure statement prescribed for within the JPF Guide.

Target investors

1. the number of investors shall not exceed 50, with each investor being either:

   (a) a "professional investor" (as defined the JPF Guide); or

   (b) an "eligible investor", in that it either:

(i) invests a minimum initial investment or commitment of not less than £250,000 (or other currency equivalent);

(ii) is the holder of non-participating founder/ management shares or interests, is an involuntary transferee of an interest in the JPF (eg a personal representative or trustee in bankruptcy of a registered holder) or is a carry vehicle; or

(iii) is a discretionary investment manager investing on behalf of its clients, for whom, it is satisfied, can bear the economic consequences of the investment,

in either case, such investors needing to acknowledge in writing their receipt and acceptance of a stipulated investment warning and disclosure statement (which is in the form set out in part E of the JPF Guide);

2. retail investors are not permitted to invest in a JPF (directly or indirectly) (unless as a consequence of being an involuntary transferee or through a discretionary investment manager investing on behalf of its clients).

Where all of the above eligibility criteria are met:

1. a JPF will not be a collective investment fund under the Collective Investment Funds (Jersey) Law 1988 and is not required to comply with the Code of Practice for Certified Funds;

2. personal questionnaires (**PQs**) are not required of any director, beneficial owner, controller, key persons/compliance staff or service provider to the JPF, aside from the Designated Service Provider (**DSP**);

3. the promoter of a JPF will not need the prior approval of the Jersey Financial Services Commission (the **JFSC**); and

4. the JFSC's outsourcing policy will not apply to the JPF (but will apply to the DSP).

Structure of JPF

A JPF may be established in Jersey or overseas and may be open-ended or close-ended, provided that the "50 or Fewer Test", set out below is met.

Where established in Jersey, a JPF can be established in the form of:

1. a company (including a protected cell company, an incorporated cell company or any cell thereof);

2. a partnership (including a limited partnership, limited liability partnership, separate limited partnership, or incorporated limited partnership); or

3. a unit trust.

Where established overseas, a JPF may be formed in the equivalent forms available in the relevant overseas jurisdiction.

Where a JPF is structured as a company, there is no requirement for Jersey resident directors. Similarly, where a JPF is structured as a partnership or unit trust, there is no requirement for the general partner/ trustee to be incorporated in Jersey or for the general partner/ trustee to have Jersey resident directors. However, whilst there is no explicit requirement for mind and management to be in Jersey, the JPF Guide does state that the JFSC's expectation is that in the majority of cases, there would be one or more Jersey resident directors on the board of a JPF's governing body.

If a private investment structure is a JPF, it is likely to involve a Jersey entity (for example, a corporate general partner of a JPF or a self-managed JPF) which will be conducting 'fund management business' and which will therefore fall within the scope of the Taxation (Companies - Economic Substance) (Jersey) Law 2019 (the **Economic Substance Law**), which came into force on 1 January 2019 (as set out in further detail below).

A JPF must appoint a Jersey "Designated Service Provider". The DSP and, to the extent applicable, the governing body of the JPF are required to comply with the Money Laundering (Jersey) Order 2008 and the JPF will be a "specified Schedule 2 business" for the purposes of the Proceeds of Crime (Jersey) Law 1999 and the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008.

A JPF may not be a listed fund, which prohibition also extends to technical listings.

50 or Fewer Test

The JPF Guide provides guidance around the application of the "50 or Fewer Test", as follows:

1. a transfer of an interest from one investor to another will not be permitted if it means that the number of investors exceeds 50 at any one time;

2. a top-up investment by an investor shall be treated as part of the original offer to that investor;

3. a split (transfer) of part of an investor's holding of an interest to another will not be permitted if it means that the number of investors exceeds 50 at any one time;

4. where a person acquires an interest with no rights attaching to it other than management or control rights (ie acquires a non-participating interest in the profits of the JPF), that person shall not be counted as an investor;

5. a carried interest vehicle shall not be counted as an investor, but each participant in the carried interest vehicle must be a "professional investor" or an "eligible investor";

6. a general partner of a JPF shall not count as an investor provided it does not commit capital to the limited partnership for the purposes of co-investment;

7. where a "professional investor" acquires an interest for or on behalf of one of more retail investors, it will not be necessary to look through to the number of underlying investors. A "professional investor" may, therefore, acquire interests on behalf of retail investors;
8. feeder funds associated with a JPF, whose investors are not "professional investors" or "eligible investors" will only be permitted with the consent of the JFSC;
9. where feeder funds, whose investors are "professional investors" or "eligible investors", invest in a JPF, there is a look through to each underlying investor for the 50 or Fewer Test, however the feeder fund itself will not be counted for these purposes; and

The JPF Guide provides that derogations from the above may be permitted by the JFSC in exceptional circumstances.

Application Procedure, Timescale and Ongoing obligations

The DSP must complete and file an application form for authorisation (the **JPF Form**) in respect of the JPF.

The JPF Guide provides for a 48 hours streamlined authorisation process for all JPFs which meet the eligibility criteria, provided that the JFSC's FSB/TCB authorisation team receives the fully completed JPF Form and requisite application fee.

Any material changes to the information provided by the DSP in the JPF Form prior to launch of the JPF, which would impact the accuracy of the information provided in the JPF Form, must be notified to the JFSC as soon as possible.

Material changes to the JPF occurring following the launch must be notified to the JFSC as soon as reasonably practicable and within 28 days.

The DSP is required to submit each year an annual compliance return (the **JPF Return**) in respect of the JPF.

Audit

There is no obligation under the JPF Guide for a JPF to appoint an auditor or audit its financial statements (although a JPF is free to appoint an auditor, if it so wishes).

Transitional Provisions

The JPF Guide does not have retroactive effect and will not apply to existing COBO Only Funds, Private Placement Funds or Very Private Funds, which can continue in operation until the end of their natural life (and will therefore remain subject to their current regulatory regime).

However, such funds may apply to convert into a JPF provided they meet all the eligibility requirements of a JPF. For the purposes of the 50 or Fewer Test, any offer made or any investor admitted during the life of the fund will be counted. An application fee will attach to any such conversion.

Designated Service Providers

As noted above, a JPF must appoint a "Designated Service Provider" and there may be no change to the DSP without the prior approval of the JFSC.

The DSP must be registered with the JFSC under the Financial Services (Jersey) Law 1998

(**FS(J) Law**) to carry on one or more of class V (administrator), class U (manager), class X (investment manager) or class ZG (trustee) of fund services business. However, where the JPF has 15 or fewer offers and professional and/ or eligible investors (to be known as a "very private JPF"), the DSP may instead be registered with the JFSC to carry on any class of fund services business, trust company business and/ or investment business within the meaning of the FS(J) Law.

The DSP must be an existing Jersey full substance entity (as opposed to a "managed entity").

The duties and responsibilities of the DSP do not replace those of the governing body of the JPF and the DSP must assume responsibility for the following:

1. making all reasonable enquiry to ensure that the JPF meets all eligibility criteria, both on its establishment and on a continuing basis;

2. ensuring that all necessary due diligence on the JPF and all related parties (including the promoter and service providers) is carried out;

3. ensuring all documents relating to its due diligence enquiries are readily retrievable in Jersey;

4. ensuring compliance with all necessary Jersey AML/ CFT requirements;

5. completing and submitting the JPF form;

6. notifying the JFSC in writing as soon as reasonably practicable (and within 28 days) of any:

(a) material changes which would reflect the accuracy of the information provided to the JFSC in relation to the JPF;

(b) non-compliance with the JPF's Jersey's AML/ CTF obligations;

(c) material/ unresolved complaints made in relation to the JPF; or

(d) a qualified audit of the JPF's accounts and financial statements (where the JPF has elected to appoint an auditor); and

7. completing and returning the JPF Return.

PIRS exemption availability for service providers

Jersey service providers to JPFs may continue to rely upon the Financial Services (Investment Business) (Restricted Investment Business – Exemption)) (Jersey) Order 2001 and/ or the Financial Services (Trust Company Business) (Exemption No.5) (Jersey) Order 2001 (together the **PIRS Orders**), so as to not be required to be licensed to provide services to a JPF.

Jersey economic substance requirements for self-managed JPFs and managers of JPFs

Managers of JPFs are in scope of the Economic Substance Law where they have gross income in relation to their fund management activities. Fund vehicles themselves are outside the scope of the Economic Substance Law, other than self-managed funds (i.e. corporate funds which do not appoint an external manager but which are managed internally by their board of directors), which will be in scope as fund managers after a change to the Economic Substance Law, which is expected to be effective in 2020.

Where a Jersey entity (e.g. the corporate general partner of a JPF or a self-managed JPF) will be conducting fund management, it will be required to comply with the requirements of the Economic Substance Law and will need to ensure that it is governed and operated in a way that complies with that law, namely that:

- all of its "core income-generating activities" (**CIGAs**) are carried out in Jersey (fund managers must conduct all of their CIGAs in Jersey and must be able to monitor and control any CIGA outsourced to another entity in Jersey);
- it is "directed and managed" in Jersey in relation to the relevant CIGA (it is expected that the majority of board meetings will be held in Jersey with a quorum of directors being physically present, the board must be the decision-making body, and all company records and board minutes must be retained in Jersey); and
- it has adequate employees, expenditure and physical premises in Jersey (these can be provided by an outsourced service provider in Jersey).

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