



Jersey Financial
Services Commission

Consultation on proposals regarding legislative enhancements to the investment business regime:

Financial Services (Jersey) Law 1998; and

Financial Services (Investment Business (Client Assets))(Jersey) Order 2001

Consultation no 8 2019

Issued: December 2019

Consultation Paper

The Jersey Financial Services Commission (**JFSC**) invites comments on this consultation paper by 1 May 2020. If you require any assistance, clarification or wish to discuss any aspect of the proposal prior to formulating a response, contact the JFSC.

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Alternatively, Lisa Springate at Jersey Finance Limited (**JFL**) is coordinating an Industry response that will incorporate any matters raised by local businesses. Comments should be submitted to JFL by 1 May 2020

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It is the policy of the JFSC to make the content of all responses available for public inspection (unless specifically requested otherwise by the respondent).

It is the policy of JFL (unless otherwise requested or agreed) to collate all responses and share them verbatim with the JFSC on an anonymised basis (with reference made only to the type of respondent, e.g. individual, law firm, trust company etc.). This collated, anonymised response will, typically, be placed in JFL's permanent electronic archive which is currently open to all JFL members.

Glossary of Terms

Defined terms are indicated throughout this document as follows:

Abbreviation	Full Name
CAO	Financial Services (Investment Business (Client Assets)) (Jersey) Order 2001
CIFO	Channel Islands Financial Ombudsman
Commission Law	Financial Services Commission (Jersey) Law 1998, as amended
CP	Consultation Paper
FCA	Financial Conduct Authority (UK)
FSJL	Financial Services (Jersey) Law 1998
G20	The Group of Twenty
IB	Investment Business
IB Code	Code of Practice for Investment Business
IOSCO	International Organisation of Securities Commissions
JFSC	Jersey Financial Services Commission
MiFID II	Markets in Financial Instruments Directive (MIFID - 2014/65/EU) and the Markets in Financial Instruments Regulation (MiFIR - 600/2014/EU)
registered person	a person who is registered by the JFSC under Article 9 of the FSJL to carry on Investment Business as defined in Article 2 (2) of the FSJL

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1 Executive Summary

1.1 Overview

- 1.1.1 The JFSC is committed to enhancing the Investment Business (**IB**) regime; there have been a number of changes to regulation both at European and international level and the JFSC is committed to maintaining international standards where applicable and proportionate for Jersey.
- 1.1.2 Changes were brought into effect through revisions to the Code of Practice for Investment Business (**IB code**) in June 2019, reflective of the consultation process that had already occurred. In that consultation process, detailed proposals were made with respect to the IB Code, whereas the legislative proposals were conceptual only, and thus sought feedback only at that level. Please see links below:
 - 1.1.2.1 [CP No.4 2018](#)
 - 1.1.2.2 [Feedback on CP No.4 2018](#)
- 1.1.3 The JFSC approved the conceptual legislative proposals in March 2019, and requested the Law Draftsmen to write new legislation accordingly.
- 1.1.4 This consultation paper (**CP**) seeks feedback on those legislative proposals.

1.2 What is proposed and why?

What

- 1.2.1 In Section 4.1 of the CP detailed changes are proposed for the Financial Services (Jersey) Law 1998 (**FSJL**).
- 1.2.2 In Section 4.2 of the CP detailed changes are proposed for the Financial Services (Investment Business (Client Assets)) (Jersey) Order 2001 (**CAO**).

Why

- 1.2.1 The rationale for each proposal predominantly relates to enhancing the IB regime. Recommendations/regulatory practice from the International Organisation of Securities Commissions (**IOSCO**), Financial Conduct Authority (UK) (**FCA**), the Markets in Financial Instruments Directive (MIFID - 2014/65/EU) and the Markets in Financial Instruments Regulation (MiFIR - 600/2014/EU) (**MiFID II**), or responding to global commitments such as The Group of Twenty (**G20**) have been considered with the desired outcome being enhanced protection for the consumer and for the integrity of Jersey and its financial services industry.
- 1.2.2 The JFSC considers all of the changes to be regulatory enhancements/clarifications maintaining Jersey's IB regime in alignment with international standards.
- 1.2.3 A number of proposed enhancements respond to facets of MiFID II but only where relevant and proportionate to the Jersey industry.

1.3 Who would be affected?

- 1.3.1 The proposals in this CP have the potential to affect:
 - 1.3.1.1 all registered persons licensed to carry on IB in accordance with the FSJL;
 - 1.3.1.2 all registered persons within the scope of the CAO;

- 1.3.1.3 any business providing advice on defined contribution pension transfers;
- 1.3.1.4 any business that arranges or brings about arrangements for another person to buy, sell, subscribe for or underwrite a particular investment; and
- 1.3.1.5 any business carrying out exchange business.

1.4 Summary of Proposals

FSJL Changes	
Include Hold	Extend the provision of advice to include 'hold' as well as 'buy' and 'sell'.
Financial Derivatives	Update the definition of investments to include all financial derivatives.
Futures Update	Update the definition of futures, when for commercial purposes.
Arranging	Include the activity of arranging as an IB activity, and give the JFSC the power to ban the distribution of certain products to retail clients.
Exchange Business	Prepare to include the oversight of exchange business in the FSJL.
Advice on Pension Transfers	Include the oversight of advice on transfers from defined contribution schemes in the FSJL.
CAO Changes	
3 rd Party Due Diligence & Disclosure	Enhance client asset protection related to 3 rd party due diligence and transparency on disclosure of protection in overseas regimes, in line with IOSCO recommendations.

1.5 Costs & Benefits

- 1.5.1 The JFSC recognises the potential costs to industry when amending legislation and has considered this in the scope and approach of the proposals. The proposals in this paper will, in aggregate, improve the clarity of the IB legislation for registered persons, enhance consumer protection and contribute towards the Island meeting international regulatory standards.

2 Consultation

2.1 Basis for consultation

- 2.1.1 The JFSC has issued this CP in accordance with Article 8(3) of the Financial Services Commission (Jersey) Law 1998, as amended (**Commission Law**) under which the JFSC “may, in connection with the carrying out of its functions ...consult and seek the advice of such persons or bodies whether inside or outside Jersey as it considers appropriate”.

2.2 Responding to the consultation

- 2.2.1 The JFSC invites comments in writing from interested parties on the proposals included in this CP. Where comments are made by an industry body or association, that body or association should also provide a summary of the type of individuals and/or institutions that it represents.
- 2.2.2 A response form has been published alongside this consultation, available at www.jerseyfsc.org
- 2.2.3 Respondents are requested to use this form when providing feedback, either directly or via JFL.
- 2.2.4 Comments should be received by the JFSC no later than 1 May 2020.

2.3 Next steps

- 2.3.1 Following this consultation, the JFSC will publish feedback in H1 2020.

3 The JFSC

3.1 Overview

- 3.1.1 The JFSC is a statutory body corporate established under the Commission Law. It is responsible for the supervision and development of financial services provided in or from within Jersey.

3.2 The JFSC's functions

- 3.2.1 Article 5 of the Commission Law prescribes that the JFSC shall be responsible for:
- 3.2.1.1 the supervision and development of financial services provided in or from within Jersey;
 - 3.2.1.2 providing the States of Jersey, any Minister of any other public body with reports, advice, assistance and information in relation to any matter connected with financial services;
 - 3.2.1.3 preparing and submitting to the Minister recommendations for the introduction, amendment or replacement of legislation appertaining to financial services, companies and other forms of business structure;
 - 3.2.1.4 such functions in relation to financial services or such incidental or ancillary matters:
 - › as are required or authorised by or under any enactment, or
 - › as the States of Jersey may, by Regulations, transfer; and
 - 3.2.1.5 such other functions as are conferred on the JFSC by any other Law or enactment.

3.3 Guiding principles

- 3.3.1 Article 7 of the Commission Law sets out the JFSC's guiding principles which require the JFSC to have particular regard to:
- 3.3.1.1 the reduction of risk to the public of financial loss due to dishonesty, incompetence, malpractice, or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey;
 - 3.3.1.2 the protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters;
 - 3.3.1.3 the best economic interests of Jersey; and
 - 3.3.1.4 the need to counter financial crime in both Jersey and elsewhere.

4 Proposals related to Legislative Changes

4.1 FSJL

4.1.1 Advice on “holding” an investment	
Requirement	The class of IB which relates to the provision of advice be extended so that a registered person must also give advice on the merits of “holding” an investment in addition to providing advice on the purchase or sale of such an investment.
Rationale	A decision to hold an investment can be just as important as a decision to either purchase or sell an investment. The JFSC considers that in the interests of investor protection and to ensure that Jersey meets international standards, such as MiFID II, Article 2(2)(c) of the FSJL should be amended to include the provision of advice in respect of holding assets.
Proposed Legislation	Article 2 (“Financial service business” defined) amended: In Article 2 of the FSJL – <ul style="list-style-type: none"> › in paragraph (2)(c)(i), after “purchase,” there is inserted “holding,” › in paragraph (2)(c)(ii), after “acquire,” there is inserted “hold,”
Question 1	Do you have any observations on, or concerns relating to the proposed legislation to regulate advice on the merits of holding an Investment? If you do, please state in detail what your observation or concern is and the reason for it.

4.1.2 Financial derivatives	
Requirement	An amendment to the definition of Investments in Schedule 1 so that it includes all financial derivatives.
Rationale	<p>Schedule 1 defines what categories of Investments are caught for the purposes of regulated IB activity. Schedule 1 currently includes some financial derivatives, but not necessary all categories of financial derivatives.</p> <p>Financial derivatives are financial instruments that are linked to a specific financial instrument or indicator or commodity, and through which specific financial risks can be traded in financial markets in their own right. The more common forms of financial derivatives are currently included, but not all financial derivatives are included due to the evolution of the financial services industry. Financial derivatives can be complex securities and transactions in financial derivatives generally carry a higher risk for investors. As such it is proposed that the list of investments be expanded to include all types of financial derivatives and not just those that are currently listed. This will mean that all financial derivatives will be brought within the scope of regulated IB activity under the FSJL.</p> <p>The treatment of Options, Futures and Contracts for difference is already specifically prescribed within the FSJL.</p>

Proposed Legislation	Schedule 1 (Investments) amended to include a new paragraph: “Financial derivatives All categories of financial derivatives, except options, futures and contracts for difference.”
	Schedule 6 (Securities) amended to include a new paragraph: “Financial derivatives All categories of financial derivatives, except options, futures and contracts for difference.”
JFSC Comments	Transitional provisions have been inserted in Schedule 5 for this amendment and a number of the other changes (broadly, a 6 month transition period). Full details of the transitional arrangement is available in the appendix.
Question 2	Do you have any observations on, or concerns about, the proposed legislation to amend Schedule 1 of the FSJL to include all financial derivatives? If you do, please state in detail what your observation or concern is and the reason for it.

4.1.3 Futures Update	
Requirement	Futures may be considered not to be investments if they are for commercial purposes even when they have a settlement period greater than 7 days.
Rationale	Currently a Futures instrument with a settlement period of greater than 7 days cannot be considered to be made for commercial purposes. This is not consistent with the equivalent FCA requirements, and we have indicated that our intention is to be consistent in this area. Some entities in Jersey, trading forward foreign exchange transactions for commercial purposes only, are caught under our IB regime for such activity but not in the UK.
Proposed Legislation	Schedule 1 (Investments) amended: In Schedule 1 to the FSJL, in Note (2) to paragraph 7, after “within 7 days” there is inserted “unless it can be shown that there existed an understanding that (notwithstanding the terms of the contract) delivery would not be made within 7 days”.
Question 3	Do you have any observations on, or concerns about, the proposal to update the definition of Futures in Schedule 1 of the FSJL? If you do, please state in detail what your observation or concern is and the reason for it.

4.1.4 Arranging	
Requirement	The activity of “arranging” to be added as a new class of IB.

Rationale	<p>The activity of “arranges dealing in Investments” is not at present an IB activity. The JFSC is considering whether IB under the FSJL should be extended to include this activity. This would mean that arranging dealing in Investments would be regulated as financial service business.</p> <p>After considering the position in other jurisdictions, the JFSC is of the view that the activity of arranging dealing in Investments does pose a number of risks. For example, the arranger may, for personal gain (e.g. commissions or fees paid to them by the provider of the financial service or product), facilitate a customer to obtain a financial service or product, which is not needed, or appropriate for the customer. If the arranger handles customers’ money or Investments, without regulation of that activity, there will be no systems and controls to mitigate loss of such assets in the hands of the ‘arranger’. An Arranger’s fitness and propriety (which includes integrity) will also not be subject to any scrutiny.</p>
Proposed Legislation	<p>Article 2 (“Financial service business” defined) amended:</p> <p>In Article 2 of the FSJL, in paragraph (2)(a) for “subscribes for or underwrites investments”, there is substituted “subscribes for, underwrites or arranges dealing in investments”</p>
JFSC Comments	<p>The JFSC considers that the term arranging includes the MiFID II activity of reception and transmission of orders; this is the same approach as the FCA.</p> <p>Also in line with powers held by other regulators it is proposed that the JFSC have the power to ban the distribution of certain products to retail clients; for example certain regulators have banned binary options and contracts for difference.</p> <p>A JFSC guidance note on the activity of arranging is likely to be necessary.</p> <p>The IB Code may thereafter be updated to include an appropriateness requirement; a proportionate version of suitability for the facilitation of complex products for retail investors.</p> <p>Transitional provisions have been inserted in Schedule 5 for this amendment and a number of the other changes (broadly, a 6 month transition period). Full details of the transitional arrangement is available in the appendix.</p>
Question 4	<p>Do you have any observations on, or concerns about:</p> <ul style="list-style-type: none"> a) the proposed legislation to amend Article 2(2) of the FSJL to include the activity of “arranges dealing in Investments”? b) the JFSC having the ability to ban the distribution of certain products to retail clients? <p>If you do, please state in detail what your observations or concerns are and the reasons for them.</p>

4.1.5 Exchange business	
Requirement	<p>Legislation for a supervisory regime and powers to write codes of practice regarding exchange business.</p>
Rationale	<p>IOSCO has set out its objectives and principles for securities regulation. As a matter of public policy, the JFSC looks to ensure that Jersey complies with</p>

	<p>international standards, including the IOSCO principles. One of IOSCO principles is that the establishment and operation of trading systems including securities exchanges should be subject to regulatory authorisation and oversight to ensure that exchanges and markets are fair, efficient and transparent. Currently the FSJL does not provide the legislative framework to support the regulation and oversight of trading systems.</p> <p>Therefore the JFSC proposes that amendments to the FSJL that would permit the regulatory authorisation and oversight of trading systems is considered such that the JFSC could issue relevant Code of Practice for this activity.</p>
Proposed Legislation	<p>Article 2 (“Financial service business” defined) amended:</p> <p>In Article 2 of the FSJL after paragraph 2(c) there is inserted –</p> <p>“(d) operates an investment exchange, that is, the person provides a facility (whether by electronic means or otherwise) for the trading of investments, or the listing of investments for trading, by members of the investment exchange.”</p>
JFSC Comments	<p>The JFSC intends that this proposed legislation will not be immediately effective when written into the FSJL. As such, it is proposed that this amendment to the legislation may be brought into force relatively quickly, but only when required, and such that the implementation is aligned with introducing elements such as the registration and licensing regime for exchanges. We would suggest that a Ministerial Order would be required to bring this into effect.</p> <p>It is the intention of the JFSC that all types of crypto assets be subject to Exchange business.</p> <p>Transitional provisions have been inserted in schedule 5 for this amendment and a number of the other changes (broadly, a 6 month transition period). Full details of the transitional arrangement is available in the appendix. The transitional provisions would only apply when this is brought into effect.</p>
Question 5	<p>Do you have any observations on, or concerns in relation to:</p> <ul style="list-style-type: none"> a) the introduction of legislation to support the regulatory authorisation and oversight of trading systems? b) all types of crypto assets being subject to Exchange business? <p>If you do, please state in detail what your observations or concerns are and the reasons for them.</p>

4.1.6	Advice on Transfers from Defined Contribution Schemes
Requirement	The activity of advice on transfers from contribution schemes to be expanded to include defined contribution schemes.
Rationale	The JFSC has observed instances of consumers receiving poor advice on transfers from their defined contribution schemes; by introducing this activity within the regulatory framework consumers will be better protected and the JFSC will have the power to supervise such activity and write guidance in this area should it be required.

<p>Proposed Legislation</p>	<p>Schedule 1 (investments) amended: After Schedule 1 paragraph 9A, there is inserted – “9B Defined contribution schemes Defined contribution schemes (within the meaning of Article 130B(2) of the Income Tax (Jersey) Law 1961).”</p> <hr/> <p>Schedule 2 (exemptions) amended: In Schedule 2 to the FSJL – (a) paragraph 18 (Defined benefit schemes) is renumbered as paragraph 17A; (b) after paragraph 17A, there is inserted – “17B Defined contribution schemes (1) Dealing in a defined contribution scheme by buying, selling, subscribing for or underwriting the defined contribution scheme, either as principal or as agent. (2) Undertaking discretionary investment management in respect of a defined contribution scheme by deciding as agent to buy, sell, subscribe for or underwrite a defined contribution scheme on behalf of a principal. (3) Giving investment advice in respect of a defined contribution scheme by giving to persons in their capacity as investors or potential investors advice on the merits of the purchase or sale of, subscription for, or underwriting of, a defined contribution scheme. (4) In this paragraph “defined contribution scheme” has the meaning given to it by Article 130B(2) of the Income Tax (Jersey) Law 1961.”</p>
<p>JFSC Comments</p>	<p>The current regulatory treatment of pension transfer advice in Jersey is somewhat unclear and has some gaps. Whilst the JFSC considers that advice on a transfer out of a defined contribution scheme would often be caught by regulation because of a related recommendation to invest the proceeds in one or more investments as defined under Schedule 1 of the FSJL, there is some inconsistency in how this is interpreted by Industry and there is a possibility that firms could seek to structure themselves in a manner that would avoid regulation.</p> <hr/> <p>This is the same approach that was used to bring the activity of advice on transfers from defined benefit schemes into the IB regime.</p> <hr/> <p>Pension business regulation as a whole is currently under consultation by the Government of Jersey.</p> <hr/> <p>Transitional provisions have been inserted in schedule 5 for this amendment and a number of the other changes (broadly, a 6 month transition period). Full details of the transitional arrangements are available in the appendix.</p>
<p>Question 6</p>	<p>Do you have any observations on, or concerns in relation to the proposal to introduce the regulation of advice on the transfer out of defined contribution pension schemes?</p> <p>If you do, please state in detail what your observation or concern is and the reason for it.</p>

4.2 CAO

It is proposed that this Order be updated in response to IOSCO’s 2017 thematic review of client asset protection recommendations.

4.2.1	3 rd party due diligence and transparency on disclosure of protection in overseas regimes
Requirements	<ul style="list-style-type: none"> › apply appropriate due diligence on selection of 3rd parties on behalf of registered person; and › ensure that there is clarity and transparency in the disclosure of the relevant client asset protection regime(s) and arrangements and the consequent risks involved.
Rationale	<p>Jersey is committed to meeting international standards – including the recommendations of IOSCO. Following a review of the CAO, the JFSC has determined that there is a need for minor enhancements to the Order to achieve full compliance with the IOSCO recommendations; Jersey was specifically noted to not have fully adopted measures with respect to due diligence on 3rd party selection and regarding disclosing the protection regime afforded for investments in overseas jurisdictions.</p>
Proposed Legislation	<p>Article 22 (Third parties) amended:</p> <p>In Article 22 of the CAO, there is inserted –</p> <p>(a) in paragraph (1), after “registered person”, there is inserted “or intermediary”;</p> <p>(b) after paragraph (1), there is inserted –</p> <p>“(1A A registered person or intermediary must exercise all due skill, care and diligence when selecting, appointing or reviewing a third party to whom clients’ title documents are lent.</p> <p>(1B) A registered person or intermediary must not lend a client’s title documents to a third party in a foreign jurisdiction, unless the registered person or intermediary has disclosed to the client –</p> <ul style="list-style-type: none"> (a) that the client’s property will be subject to the client asset protection regime or the insolvency regime, as the case may be, of the foreign jurisdiction; (b) the risks to the client arising from the client’s title documents being lent to the foreign jurisdiction; (c) the differences (if any) between the client protection regime in Jersey and that of the foreign jurisdiction, and (d) the potential consequences of those differences.”; <p>(c) after paragraph (3), there is inserted –</p> <p>“(4) In this Article, “foreign jurisdiction” means any jurisdiction outside Jersey.”</p>
Question 7	<p>Do you have any observations on, or concerns about, the proposal to update the CAO?</p> <p>If you do, please state in detail what your observation or concern is and the reason for it.</p>

5 Summary of Questions

Page	Question
9	<p>Question 1:</p> <p>Do you have any observations on, or concerns relating to the proposal to regulate advice on the merits of holding an Investment?</p> <p>If you do, please state in detail what your observation or concern is and the reason for it.</p>
9	<p>Question 2:</p> <p>Do you have any observations on, or concerns about, the proposal to amend Schedule 1 of the FSJL to include all financial derivatives?</p> <p>If you do, please state in detail what your observation or concern is and the reason for it.</p>
10	<p>Question 3:</p> <p>Do you have any observations on, or concerns about, the proposal to update the definition of Futures in Schedule 1 of the FSJL?</p> <p>If you do, please state in detail what your observation or concern is and the reason for it.</p>
10	<p>Question 4:</p> <p>Do you have any observations on, or concerns about:</p> <ul style="list-style-type: none"> a) the proposed legislation to amend Article 2(2) of the FSJL to include the activity of “arranges dealing in Investments”? b) the JFSC having the ability to ban the distribution of certain products to retail clients? <p>If you do, please state in detail what your observation or concern is and the reason for it.</p>
11	<p>Question 5:</p> <p>Do you have any observations on, or concerns in relation to:</p> <ul style="list-style-type: none"> a) the introduction of legislation to support the regulatory authorisation and oversight of trading systems? b) all types of crypto assets being subject to Exchange business? <p>If you do, please state in detail what your observation or concern is and the reason for it.</p>
12	<p>Question 6:</p> <p>Do you have any observations on, or concerns in relation to the introduction of legislation for advice on transfers from defined contribution schemes?</p> <p>If you do, please state in detail what your observation or concern is and the reason for it.</p>
14	<p>Question 7:</p> <p>Do you have any observations on, or concerns about, the proposal to update the CAO?</p> <p>If you do, please state in detail what your observation or concern is and the reason for it.</p>

6 Appendices of Law Drafting

Appendix A	<u>Draft Financial Services (Amendment Of Law) (No. 6) (Jersey) Regulations 201-</u>
Appendix B	<u>Draft Financial Services (Amendment Of Schedules To Law) (No. 2) (Jersey) Order 201-</u>
Appendix C	<u>Financial Services (Investment Business (Client Assets)) (Amendment) (No. 2) (Jersey) Order 201-</u>