

**POSITION PAPER
NO. 4 2007**

**AMENDMENTS TO REGULATORY
LEGISLATION**

**Notification of proposed amendments to Regulatory
Legislation related to a forthcoming assessment of the
Island's Regulatory framework**

POSITION PAPER

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Glossary of terms

Banking Business Law (Jersey) Law 1991	BB(J)L
Collective Investment Funds (Jersey) Law 1988	CIF(J)L
Financial Services (Jersey) Law 1998	FS(J)L
Insurance Business Law (Jersey) Law 1996	IB(J)L
Collectively this paper refers to these as the “Regulatory Laws”	

Basel Committee on Banking Supervision	BCBS
International Association of Insurance Supervisors	IAIS
International Organisation of Securities Commissions	IOSCO
Financial Action Task Force	FATF
Collectively this paper refers to these as the “international regulatory bodies”	

Adjusted Net Liquid Assets	ANLA
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Codes of Practice	Codes
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Offshore Group of Banking Supervisors	OGBS
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The Minister for Economic Development	the Minister
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Unless stated otherwise “principal person” should be read as covering:

- the meaning given to “controller”, “manager” and “director” in Article 1 of the BB(J)L;
- the meaning given to “principal person” in Article 1 of the FS(J)L and CIF(J)L; and
- for category B permit holders the meaning given to “shareholder controller” and “chief executive” in Article 1 of the IB(J)L along with directors of such permit holders.

In this paper “licence” is being used as a generic term to cover:

- a registration granted under the BB(J)L;
- a permit granted pursuant to the CIF(J)L;
- a registration granted under the FS(J)L; and
- a permit granted pursuant to the IB(J)L.

POSITION PAPER

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1 Executive summary

WORK OF THE IMF

- 1.1 In May 1999, the International Monetary Fund (the “IMF”) and World Bank introduced a Financial Sector Assessment Program (“FSAP”) with the aim of increasing the effectiveness of efforts to promote the soundness of financial systems in member countries. Subsequently in July 2000, the IMF’s Executive Board asked that its financial sector work be extended to include offshore financial centres (“OFCs”) through a voluntary programme of assessments and technical assistance.
- 1.2 The aim of the IMF’s work with OFCs is to help to strengthen financial supervision so that international rules and arrangements apply, and to promote greater cooperation among supervisors. To this end, IMF staff undertake detailed assessments of the extent to which OFCs meet the standards set by the international regulatory bodies. These are:
 - 1.2.1 IOSCO Objectives and Principles of Securities Regulation (“**IOSCO Objectives**”) - using the Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation (“**IOSCO Methodology**”);
 - 1.2.2 Core Principles for Effective Banking Supervision issued by the BCBS (“**Banking Core Principles**”);
 - 1.2.3 Insurance Core Principles and Methodology issued by the IAIS (“**Insurance Core Principles**”); and
 - 1.2.4 the FATF’s 40 Recommendations and 9 Special Recommendations - using the Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations.
- 1.3 Assessments are undertaken on a roughly five-year rolling cycle and there are no opportunities in the interim years to amend the assessment results, which will be publicly available on the IMF website.
- 1.4 Whilst standards, and methodologies for assessing compliance with international regulatory standards, are contained in separate documents, the approach taken in each case is very similar. Each document contains a number of Principles against which a series of key¹ or essential² questions are posed.
- 1.5 Once the assessor has considered all the collated data his view will be reported as a “mark” against each of the applicable Principles. The “mark” represents the level of compliance the assessor considers the jurisdiction has achieved and it is delivered as a classification of the Principle into one of four categories³. No overall score is attached and consequently each Principle of each international standard must be properly considered.

¹ IOSCO terminology.

² BCBS, IAIS and FATF terminology.

³ IOSCO: Fully implemented; Broadly implemented; Partly implemented and Not implemented.
BCBS: Compliant; Largely compliant; Materially non-compliant; Non-compliant.

Footnote continues on next page.

JERSEY'S ASSESSMENT

- 1.6 Jersey, along with the other Crown Dependencies of Guernsey and the Isle of Man, was last assessed in 2002/2003 and the resultant report published in October 2003. It is currently expected that each of the Crown Dependencies will all be re-assessed in the second quarter of 2008.
- 1.7 In the assessment, the Island's regulatory framework will be assessed against the relevant international regulatory standards. The assessment will consider legislation, Codes, policy statements and guidance notes, the practical implementation of the framework by the Commission (and other relevant agencies) - including resources that are available, and input provided by Industry.
- 1.8 One of the themes to emerge from recent IMF assessments is the importance that assessors will place on the practical implementation of legislation and the effectiveness of the Commission's processes and procedures.
- 1.9 The assessment by the IMF will be important for a number of reasons. As already noted, the Island will not be assessed again for another five years, and will not have an opportunity to address any deficiencies that may be highlighted by the IMF in the interim period.
- 1.10 Another reason is that external commentators will use the assessment as the basis for determining whether Jersey is a place to do business with. For example, the European Commission ("EC") will use the report to determine whether or not Jersey's Anti-money Laundering/Countering the Financing of Terrorism regime ("AML/CFT") is equivalent to its own. It is likely that the EC will also use the report to inform on its assessment of the equivalence of provisions to oversee auditors. [See 1.15.]
- 1.11 The IMF report is also likely to be a factor in future discussions on the development of Jersey's international personality.

SCOPE AND FORMAT OF PAPER

- 1.12 As a precursor to the Island's 2008 IMF assessment, the Commission has undertaken a comprehensive self assessment exercise - reviewing the Island's regulatory framework, including practical application of the framework, against the standards set by the international regulatory bodies. In addition to this, the Commission has also assessed itself against the Best Practice Statement for Trust and Company Service Providers issued by the OGBS (the "OGBS Statement").
- 1.13 The Commission's self assessment exercise has included a review of primary and secondary legislation, Codes, policy statements and guidance notes published by the Commission, along with the policies and procedures that define the day to day operations of the Commission, as it undertakes its functions under Article 5⁴ of the Financial Services Commission (Jersey) Law 1998 (the "Commission Law"). The conclusions drawn from this

IAIS: Observed; Largely observed; Partly observed; Not observed.

FATF: Compliant; Largely compliant; Partially compliant; Non-compliant.

Not applicable is used whenever a particular business sector is not present in the local market e.g. Jersey does not support a local clearing and settlement system.

⁴ The requirements of Article 5 have been provided at 2.2.

self assessment, and action proposed, are set out in this paper, which sets out the Commission's position with respect to amendments proposed to Regulatory Legislation.

- 1.14 At the same time, the Commission has continued with "business as usual", and, in addition to changes proposed as a result of the self assessment exercise, this paper proposes a number of changes anticipated in the 2007 business plan.
- 1.15 The self assessment exercise has also highlighted one amendment to the Companies (Jersey) Law 1991 with respect to oversight of auditors. This item does not form part of the policy discussions included in this paper, as it will be subject to a separate consultation paper.
- 1.16 Nor does the paper consider the results of the self assessment against the FATF 40 Recommendations and 9 Special Recommendations. These are being addressed by the Island-wide AML/CFT Strategy Group⁵, which is issuing its own series of consultation papers.
- 1.17 Whilst the focus of this paper is on legislative amendments, the IMF self assessment exercise has also highlighted the need for amendments to the various Codes, policy statements and guidance notes issued by the Commission. Proposed amendments to Codes will be the subject of separate consultations during the course of this year and a position paper in respect of amendments to the Commission's policies and procedures directly impacting the Jersey finance industry will be published towards the end of the year.
- 1.18 Many of the concepts that underpin the international regulatory standards are very similar therefore the construct of this paper is unlike that of many other Commission papers. It does not concentrate on one policy area or one regulatory law, rather it covers a number of policy initiatives across a number of Regulatory Laws and Orders. To assist the industry in assessing the impact of the policies discussed we have included Appendix A - a Matrix of policy change against finance sector impacted.
- 1.19 Sections 3 to 7 discuss policies that propose amendments to the Regulatory Laws; sections 8 to 10 address amendments to secondary legislation; section 11 address those amendments that update the Regulatory Laws in light of the Human Rights (Jersey) Law 2000, and section 12 is an amalgam of proposals to amend Regulatory Laws and Orders.

TIMETABLE

- 1.20 The Commission has issued a position paper rather than a full consultation paper on the basis that the timetable in which to facilitate changes to primary legislation is extremely tight and dictates that law drafting instructions are currently being placed with the Law Draftsman's Office.
- 1.21 Many of the elements of the legislative process are outside of the Commission's control. These include the need for a Ministerial Decision, States debate and approval of the amendments by the Privy Council. Nevertheless, to place itself in the position of being able

⁵The Island's AML/CFT Strategy Group is chaired by the Chief Executive to the Council of Ministers and comprises officers from the following Government Departments and agencies: the Chief Minister's Department, the Economic Development Department, the Law Officers' Department, the Joint Financial Crimes Unit, the Jersey Financial Services Commission, and the Shadow Gambling Commission.

to demonstrate practical application of the regulatory framework, the amendments to the Regulatory Laws need to be finalised and submitted to the Minister by mid-September 2007.

- 1.22 However, feedback on the policy proposals in this paper is actively welcomed in advance of consultation on the subsequent draft legislative text, which will occur through two separate consultation papers. The first will provide interested parties with an opportunity to comment on the changes proposed to Regulatory Laws whilst the second will provide the same opportunity in relation to Orders. Whilst the actual publication date for the consultation papers is not fixed, it is currently anticipated that the draft legislation relating to the Regulatory Laws will be issued for consultation towards the end of July, with the draft legislation on Orders following slightly later in the year.
- 1.23 As a consequence of the reduced comment period that will be available on the amending legislation, the Commission intends to hold informal interactive briefing sessions either at, or close to, the point of publishing the consultation paper or changes proposed to Regulatory Laws.

WHO WOULD BE AFFECTED?

- 1.24 The Commission is of the opinion that many of the proposed changes do not impose new requirements on licensed entities, rather they provide greater clarity of existing practices and aim to protect the interests of investors and customers and broaden the scope of regulatory sanctions so that the most appropriate is used.
- 1.25 This is not to say that there will be no operational impact arising from the proposed amendments. It is the Commission's opinion that amendments proposed to Orders by sections 8 to 10 and two of the miscellaneous amendments in section 12, Public display of licence and Disclosure by funds, are likely to have the greatest operational impact. Additionally, there is an operational impact on investment businesses resulting from the amendments set out in section 6, Disclosure of the identity of senior management/investment employees.
- 1.26 To the extent that there is any impact on investors and customers, it is the opinion of the Commission that the proposed amendments provide them with greater information or protection when dealing with Jersey regulated entities.

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| <p>1.27 As an aid in navigating the paper we have provided, as Appendix A, a matrix of proposed policy and the finance sector impacted. We believe this will assist the reader to identify areas of interest to them.</p> |
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2 The Commission

2.1 The Commission 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.

2.2 The Commission Law prescribes that the Commission shall be responsible for:

- the supervision and development of financial services provided in or from within Jersey;
- providing the States, any Minister or any other public body with reports, advice, assistance and information in relation to any matter connected with financial services;
- 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; and
- 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 may, by Regulations, transfer.

2.3 The Commission's guiding principles in the fulfilment of its functions require it to have particular regard to:

- the reduction of risk to the public of financial loss due to dishonesty, incompetence or malpractice by, or the financial unsoundness of, persons carrying on the business of financial services in or from within Jersey;
- the protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters;
- the best economic interests of Jersey; and, in pursuit of the above,
- contributing to the fight against financial crime.

3 Powers to prevent individuals working in the prudentially supervised finance sector

- 3.1 The majority of the Regulatory Laws currently include provisions that require persons⁶ intending to be a principal person of either an applicant for, or a holder of, a licence to interact with the Commission, generally in advance of taking up their position.
- 3.2 Against this background, there are two items that should be noted both of which will be returned to later in this paper:
- 3.2.1 currently the requirements to interact with the Commission do not extend to all individuals that the Commission commonly refers to as “key persons⁷” – for a further discussion of this point see Section 4 of this paper; and
- 3.2.2 the legislative position with respect to those applying to be principal persons of entities applying for, or holding, a licence under the CIF(J)L or BB(J)L is currently less clear with respect to the assessment criteria and the timing of the take up of the principal person position. See Section 7, *Fit and proper criteria for entities and individuals*, for discussion of the steps the Commission proposes to clarify this position.
- 3.3 The Commission operates a well established process for considering principal person applications. The process requires an individual to complete fully and submit a Personal Questionnaire (“PQ”) to the Commission. The PQ has been designed such that on submission, a complete and accurate PQ will furnish the Commission with the information required to form an opinion on the suitability of an individual for his/her proposed position. In exceptional circumstances, the Commission may request additional information to clarify, support or augment submitted information.
- 3.4 Following the review of all relevant information, the Commission will form a view on the person’s application and issue a letter outlining its decision. In the majority of cases the Commission issues a letter of “no objection” and the person becomes free to take up their position. However, should the Executive of the Commission conclude that it is unable to form an opinion or the opinion is negative then the PQ will pass to the next stage in the Commission’s decision making process⁸.
- 3.5 It is a matter for the Board of Commissioners to refuse an application to be a principal person. There are a variety of reasons that might result in an application being refused, some

⁶ In this section unless stated to the contrary “person(s)” means both an individual and corporate person.

⁷ Key persons are considered to be Compliance Officers; Money Laundering Reporting Officers and, from 1 January 2008, Money Laundering Compliance Officers.

⁸ Website address for the Commission’s Guidance Note on decision making
http://www.jerseyfsc.org/pdf/guidance_on_decision-making_nov_2006.pdf.

of which can be addressed by the individual such that a subsequent application would be approved.

- 3.6 However, in the circumstances where the Commission, taking into account all relevant information available to it, reaches the decision that an individual's situation is such that they should not be allowed to operate at all in the local finance industry (and not just at principal or key person level), the Regulatory Laws do not contain explicit powers allowing the Commission to achieve that outcome efficiently.
- 3.7 The Commission is of the opinion that the benefit of providing explicit powers in this area is that increased clarity of power and appeal provides a fairer position for all concerned and will be of benefit to investors, customers and the industry. The Commission is also able to demonstrate compliance with the first of its guiding principles (see 2.3).
- 3.8 The decision that an individual should not be allowed to operate at all in the local finance industry is not a decision that the Commission would take lightly. All decisions of the Commission must be proportionate and reasonable given the information available at the time the decision is reached, therefore it seems inequitable that having reached such a conclusion the Commission is unable to affect the desired outcome efficiently
- 3.9 Looking to the international regulatory standards and methodologies both IOSCO and IAIS require the Commission to have clear powers with respect to addressing individuals in this situation.
- 3.10 IOSCO Objectives, Principle 21 states:
- 3.10.1 *Regulation should provide for minimum entry standards for market intermediaries.*
- 3.11 IOSCO Methodology, key question 3 part c asks:
- 3.11.1 *Does the relevant authority have the power to take effective steps to prevent the employment of persons (or seek the removal of persons) who have committed securities violations or who are otherwise unsuitable from continuing to engage in intermediary activities, even if these persons are not separately licensed intermediaries if they can have a material influence on the firm?*
- 3.12 Insurance Core Principle 15 states:
- 3.12.1 *The supervisory authority enforces corrective action and, where needed, imposes sanctions based on clear and objective criteria that are publicly disclosed.*
- 3.13 Essential criteria (i) then states:
- 3.13.1 *Individuals can be barred from acting in responsible capacities in the future.*
- 3.14 Whilst international regulatory standards are only explicit in the insurance and securities sectors, relating to the prevention/removal/barring of an individual, it is the view of the Commission that, should an individual fail the fitness and propriety tests for one aspect of the finance industry, it would be illogical that they could continue to operate in another sector. This is, of course, subject to decisions meeting a "reasonableness" test, given all information available to the Commission at the time the decision is taken.

- 3.15 Jersey does not currently operate, and is not intending to implement, a scheme of individual registration, beyond the current practice. However, the Commission is aware that there are activities that an individual may perform, within a licensed entity, that fall outside of the current regulatory scope but which may, if performed in an inappropriate manner, have a detrimental impact on the standing of the entity.
- 3.16 During the course of fulfilling its functions the Commission becomes privy to a volume of information, some of which will relate to individuals who do not fulfil the role of either a principal or key person. There are circumstances in which the information is of such nature that the Commission is compelled to investigate further.
- 3.17 On conclusion of further investigative work and having taken decisions in line with the Commission's Guidance Note on decision making, the Commission may form an opinion that the circumstances are such that the individual should be prevented from continuing to work in the local finance industry. The difference in this scenario is that the individual in question would not have been required to complete a PQ.
- 3.18 To ensure there is legislative clarity for the benefit of investors, customers and the finance industry it is proposed to amend the relevant Articles of each Regulatory Law such that the Commission will have explicit powers to prohibit an individual from acting in any capacity within any or all entities undertaking business that requires licensing under one of the Island's Regulatory Laws. The ban might include individuals undertaking activities at a licensed entity that are not regulated, if the Commission considers that the involvement of the individual in those areas would adversely impact on the regulated business of that entity.

4 Extension of “principal person” regime to “key persons”

- 4.1 It was noted in 3.2.1 that the requirements in the Regulatory Laws for individuals to interact with the Commission do not currently extend to those individuals intending to act in the capacity of “key persons”.
- 4.2 For the purposes of clarification, key persons are considered to be those holding the position of Compliance Officer, Money Laundering Reporting Officer and, from 1 January 2008, Money Laundering Compliance Officer.
- 4.3 The term “key persons” is applied across all finance sectors and, given the increasingly important position they hold within the governance structure of many entities, the Commission believes it to be inappropriate that they are not treated in a manner similar to principal persons.
- 4.4 It is proposed therefore that each Regulatory Law will be amended in order to capture key persons in a similar manner to principal persons and that all consequential powers of the Commission, and rights accruing to principal persons, will extend to those holding the positions of key persons. In short, key persons, will be treated the same as principal persons.
- 4.5 This amendment should have no impact on entities and their key persons as the Commission, through the Codes⁹, currently requires that individuals applying for the positions of key persons submit PQs to the Commission in exactly the same manner as principal persons.
- 4.6 The amendments to the Regulatory Laws will provide the Commission with explicit powers to process the information and issue letters of “no objection”, but they will also provide procedural certainty for both the Commission and the person concerned should the Commission be unable to form a view, or form a negative view, of an individual.

⁹ Within the Funds sector, Codes are still in the process of being introduced; however, information is currently collected as part of the permit application process as implemented under Article 6 of the CIF(J)L.

5 Disclosure of conditions

- 5.1 Each of the Island's Regulatory Laws provides the Commission with the ability to condition the licence of an entity. These conditions take one of two forms being either: a general condition, applicable to all registered entities undertaking a particular type of regulated activity; or conditions that are specific to an entity.
- 5.2 Historically the Commission has not published specific conditions. On the other hand, general conditions are public information by virtue of being prescribed in Orders, made by the Minister and published on the website of the Jersey Legal Information Board.
- 5.3 When assessing the Island's compliance with the IOSCO Principles relating to market intermediaries, the Commission considered the information that is freely available and readily accessible in respect of investment businesses.
- 5.4 The IOSCO Objectives, as part of Principle 21, state:
- 5.4.1 *To enable investors to better protect their own interests, the regulator should ensure that the public have access to relevant information concerning the licensee, such as the category of licence held, the scope of its authorised activities, the identity of senior management and those authorised to act in the name of the intermediary. The information must be freely available and readily accessible.*
- 5.5 IOSCO Objectives, Principle 21 states:
- 5.5.1 *Regulation should provide for minimum entry standards for market intermediaries.*
- 5.6 IOSCO Methodology, key question 6 asks:
- 5.6.1 *Is the following relevant information about licensed intermediaries available to the public*
a) the existence of a licence, its category and status?
b) the scope of permitted activities or identity of senior management and names of other individuals authorised to act in the name of the intermediary¹⁰?
- 5.7 With reference to 5.6.1 the Commission considers that it cannot confirm compliance due to the lack of publicly available information. In the case of part a) the issue relates to the lack of information regarding the "status" of an entity's licence – this is discussed further at 5.11. With respect to part b) the issue relates to the identity of senior management and names of individuals authorised to act in the name of the entity – see section 6.
- 5.8 With respect to those registered under the FS(J)L, including investment businesses, the Commission considers it has a power to make available publicly the specific conditions on an entity's licence according to the following rationale:

¹⁰ *Intermediary* is taken to mean those licensed to undertake investment business as defined by Article 2(2) of the FS(J)L.

- 5.8.1 Where a condition, general or specific, is applied to a licence, that condition forms part of the licence itself in the same manner as the class¹¹ of business for which the licence has been granted; and
- 5.8.2 Article 38(d) of the FS(J)L permits the disclosure of whether or not a person is registered.
- 5.9 Taking 5.8.1 and 5.8.2 together it can be interpreted that conditions placed on an entity's licence can be (and perhaps should be) included with any disclosure of a licence by the Commission. This is not current practice.
- 5.10 The Commission makes the following information available on its website about entities that have been granted a licence:
- 5.10.1 An entity's full name;
- 5.10.2 An entity's reference number;
- 5.10.3 The type of business undertaken by that entity (e.g. investment business);
- 5.10.4 Registered address of the entity; and
- 5.10.5 Regulated activities and the classes of business for which the Commission has granted a licence.
- 5.11 Some specific conditions, applicable to an entity's licence, may limit the scope of its permitted activities, even within a class of business: the existence of these conditions is not currently available to the public. Consequently, there are times when the public may not be aware of the precise terms of an entity's licence. For example, if an entity were in the process of closing for business, the Commission's website would continue to show the entity as fully licensed.
- 5.12 The interpretation of the Law applied by the Commission in 5.9 does not permit the selective disclosure of conditions. The Commission believes it to be right and proper that some conditions placed on an entity's licence are disclosed, in the public interest. However, the Commission also believes that there are circumstances where certain information contained within conditions should remain restricted.
- 5.13 Where circumstances involve an exercise of discretion by the Commission there must, of necessity, be an appeal mechanism against that decision available to the licensee.
- 5.14 It is proposed to amend the Regulatory Laws to permit the Commission to make disclosure of conditions where it believes it is in the public interest to do so. Given the permissive nature of the proposed amendment, dependent on the nature of the conditions some may contain information that is of a private nature and therefore details of the condition will be considered restricted information.

¹¹ e.g. investment business classes A, B, C, D and E, as described in the Financial Services (Investment Business (Registration and Fees)) (Jersey) Order 2003.

- 5.15 Whilst the argument for disclosing conditions has been made in the context of investment businesses, the Commission considers that the same policy should, logically, extend to other regulated finance sectors. Consequently, it is proposed that similar amendments are made to the IB(J)L, BB(J)L and CIF(J)L. To clarify, the amendment to the FS(J)L will be effective for all financial service businesses.
- 5.16 The Commission intends issuing a Policy Statement explaining the criteria against which decisions to make all or any licence conditions publicly available will be made. Current thinking is that those conditions limiting the scope of an entity's activities will be disclosed.
- 5.17 The current intention is that where conditions meet the criteria for being made available to the public, the publication will be made on the "regulated entities" pages of the Commission's website.

6 Disclosure of the identity of senior management/investment employees

- 6.1 The policy proposal in this part only applies to those entities holding a licence to conduct investment business as defined by Article 2(2) of the FS(J)L.
- 6.2 By letter dated 23 March 2007, the Commission notified investment businesses what it was proposing to do by way of disclosure of information to the public. To date there has been no adverse feedback from Industry on the proposal.
- 6.3 The Commission wishes to emphasise that it is not introducing an individual registration scheme for investment employees nor is the Commission looking for those solely employed as investment employees to complete a PQ.
- 6.4 As noted in 5.7, the Commission is not fully compliant with IOSCO Principle 21 key question 6 part b), as it does not make freely available and readily accessible to the public the identity of senior management and those authorised to act in the name of the investment business.
- 6.5 In assessing its compliance with IOSCO Principle 21, the Commission has considered carefully the terminology utilised and has interpreted certain phrases as follows:
- 6.5.1 “senior management” is considered to mean those individuals captured by the definition of “principal person” contained in Article 1 of the FS(J)L; with the exception of those who are principal persons solely by virtue of their shareholding¹²; and
- 6.5.2 “those authorised to act in the name of the intermediary” is considered to be individuals falling within part (a) of the definition of “investment employee”.
- 6.6 For clarification, the definition of an investment employee in the Financial Services (Investment Business (Registration and Fees)) (Jersey) Order 2003 is:
- 6.6.1 (a) *a person employed on the relevant date under a contract of service or a contract for services by the registered person as -*
- (i) *a dealer,*
 - (ii) *a discretionary investment manager,*
 - (iii) *an advisor, or*
 - (iv) *a supervisor; and*
- (b) *a person employed on the relevant date either under a contract of service or a contract for services in any of the categories of work specified in paragraph (a) of this definition by a person who is himself or herself employed on the relevant date either under a contract of service or a contract for services by the registered person,*

¹² FS(J)L Article 1(b)(i) or (c)(ii) of the “principal person” definition.

and if, on the relevant date, there exists a post in the service of the registered person that is vacant but would normally be occupied by a person to which paragraph (a) of this definition applies, includes that person.

- 6.7 The extension of the statement in 6.5.2 is that the identity of investment employees who are not directly employed by the entity, that has been registered to conduct investment business, will not be disclosed. Also, the Commission does not intend that vacant positions should be made public therefore for the purposes of disclosure the last part of the definition is not relevant.
- 6.8 Whilst the Commission acknowledges that the narrower definition of an investment employee, for the purposes of disclosing an individual's identity, is not perfect it believes the proposed regime to be reasonable and proportionate.
- 6.9 Additionally, the Commission is of the opinion that customers of investment business ought to take appropriate steps to ensure that individuals with whom they transact financial business are bona fide representatives of the entity they purport to represent. Consequently, where an investment employee is not disclosed, in respect of a particular entity, the customer should make appropriate enquiries of the entity directly.
- 6.10 Currently, the Commission does not hold up to date information to enable it to undertake the proposed disclosures. Consequently, the Commission intends to append a proforma report to the Codes to collect up to date information and assist entities with their submissions. This report will then form the basis of the disclosure on the Commission's website and will need to be resubmitted whenever any staffing changes impact the details as submitted. These proposals will be expanded upon further as part of the consultation on amendments to the investment business Codes due in July 2007.
- 6.11 The Commission considers the legislative amendment to be highly desirable, as it will improve transparency relating to entities undertaking investment business in Jersey. It will also assist in the protection of the public, as there will be a repository of information against which to verify whether a particular entity directly employs an individual.
- 6.12 The Commission intends to disclose the information through the "regulated entities" page of the investment business tab of its website. It is anticipated that the disclosures will be limited to the name of the individual and a notification of their status within the entity, e.g. director or investment employee. A statement identifying the limitations of the information, including the absence of "part (b) investment employees", and where the interested party should seek further information will accompany the disclosure.
- 6.13 It is proposed that the FS(J)L be amended to facilitate the disclosure of the identity of senior managers and investment employees in line with the interpretation of these terms set out in 6.5.

7 Fit and proper criteria for entities and individuals

- 7.1 The Commission is required, by each of the international regulatory standards and its own statutory objectives, to have criteria against which it will assess both applicants for a licence and persons associated with the entities as key and principal persons as being fit and proper. It is equally important that the criteria are clearly stated so that the entities and principal and key persons can determine what is expected of them.
- 7.2 When assessing the Island's Regulatory Laws for compliance with these standards, the Commission found that the criteria were not always presented as clearly as they should be. Consequently, the Commission considers that compliance with some of the IOSCO Principles and Banking Core Principles cannot be demonstrated effectively.
- 7.3 IOSCO Objectives, Principle 4 states:
- 7.3.1 *The Regulator should adopt clear and consistent regulatory processes.*
- 7.4 IOSCO Methodology, key question 3 part (e) asks:
- 7.4.1 *In assessing procedural fairness, are the general criteria for granting, denying, or revoking a licence made public, and are those affected by the licensing process entitled to a hearing with respect to the regulator's decision to grant, deny, or revoke a licence?*
- 7.5 IOSCO Objectives, Principle 17 states:
- 7.5.1 *The regulatory system should set standards for the eligibility and the regulation of those who wish to market or operate a collective investment scheme.*
- 7.6 Within the Methodology, one of key issues of Principle 17 relates to the entry criteria, as the Methodology states:
- 7.6.1 *There should be clear criteria for the eligibility to operate and/or market a collective investment scheme.*
- 7.7 Specifically, key question 2 parts a) and b) ask:
- 7.7.1 *Do the eligibility criteria for collective investment schemes include the following:*
a) honesty and integrity of the operator,
b) competence to carry out the functions and duties of the operator (ie. human and technical resources).
- 7.8 For clarity, when considering the IOSCO requirements the Commission's concern is with the funds sector and not investment businesses.
- 7.9 Banking Core Principle 3 states:

7.9.1 *The licensing authority must have the power to set criteria and reject applications for establishments that do not meet the standards set. The licensing process, at a minimum, should consist of an assessment of the ownership structure and governance of the bank and its wider group, including the fitness and propriety of Board members and senior management, its strategic and operating plan, internal controls and risk management, and its projected financial condition, including its capital base. Where the proposed owner of parent organisation is a foreign bank, the prior consent of its home country supervisor should be obtained.*

7.10 Essential criteria 8 states:

7.10.1 *The licensing authority, at authorisation, evaluates proposed directors and senior management as to expertise and integrity (fit and proper test), and any potential for conflicts of interest. The fit and proper criteria include: (i) skills and experience in relevant financial operations commensurate with the intended activities of the bank; and (ii) no record of criminal activities or adverse regulatory judgments that make a person unfit to uphold important positions in a bank.*

The funds sector

7.11 Considering the funds sector, it is proposed that the CIF(J)L will be amended to:

7.11.1 introduce a basis for regulating who may be a principal and key person, along with the appropriate criteria, in a way that emulates the regime under the FS(J)L. In doing so there will need to be provision for exempting shareholders of a fund company;

7.11.2 introduce the requirement to notify the Commission in respect of the proposed appointment of or changes relating to principal and key persons, including provisions for failing to do so; and

7.11.3 include criteria for refusing to grant a permit, in a way that emulates granting registrations under the FS(J)L.

7.12 It is considered that the proposed changes will have minimal impact on Industry and that there are no cost implications as the proposals aim to provide legislative clarity and procedural certainty for both the Commission and the persons concerned with respect to practical procedures currently undertaken by the Commission.

The banking sector

7.13 With respect to the banking sector, it is proposed that the BB(J)L will be amended to provide greater clarity to the criteria used in considering an application for a licence and principal and key person status, in line with the FS(J)L.

Clarification of fit and proper with respect to AML/CFT

7.14 Currently when considering an application for registration for financial service business, the Commission may refuse to register a person on one or more grounds including whether *the applicant or any person employed by or associated with the applicant for the purposes of the*

applicant's business has been convicted (i) of an offence under this law [the FS(J)L], or (ii) of any offence involving dishonesty¹³.

- 7.15 Following the 2003 IMF assessment, the Commission accepted that the Regulatory Laws are not specific with respect to money laundering or terrorist financing convictions when considering the fitness and propriety of entities and individuals.
- 7.16 Amendments are being proposed to the relevant Articles of each Regulatory Law such that conviction for a money laundering or terrorist financing offence will be specifically listed as an item that the Commission will take into consideration when processing an entity's application to be licensed or an individual's application to be a principal or key person (and continued assessment of fitness and propriety thereafter).

¹³ Article 9(3)(d) of the FS(J)L.

8 Advertising Order

- 8.1 When assessing the Island's compliance with the IOSCO Principles relating to market intermediaries (IOSCO Principles 21 to 24) the lack of an Order that establishes minimum standards for advertising is of concern.
- 8.2 IOSCO Principle 21 states:
- 8.2.1 *Regulation should provide for minimum entry standards for market intermediaries.*
- 8.3 Key question 8(c)(iii) asks:
- 8.3.1 *In the case of [investment businesses] does regulation include rules and procedures designed to prevent guarantees of future performance, misuse of client assets, and potential conflicts of interest?*
- 8.4 A number of, but not all, the Regulatory Laws refer to advertising¹⁴ and confer on the Minister the power to make Orders relating to the issue, form and content of advertisements, following recommendation from the Commission.
- 8.5 To date, Orders have been made in respect of the banking and funds sectors addressing, in some form, the matter of advertising:
- 8.5.1 the Banking Business (General Provisions) (Jersey) Order 2002 contains an Article and Schedule relating to deposit advertisements¹⁵; and
- 8.5.2 the Collective Investment Funds (Unclassified Funds) (Prospectus) (Jersey) Order 1995 ("UFPO"), sets out requirements in the specific area of documentation designed to provide a potential investor with information in respect of a fund – product information.
- 8.6 However, no Orders have been made relating to those entities licensed under the FS(J)L: investment businesses; trust company businesses and general insurance mediation businesses.
- 8.7 During 2002, the Commission published Consultation Paper No. 2. *Advertising Standards*, (the "2002 consultation paper") which set out policy proposals relating to the introduction of an Advertising Order for those businesses licensed to conduct financial service business under the FS(J)L, at that time¹⁶. The 2002 consultation paper also included proposed text for inclusion in the investment business and trust company business Codes. However, the paper received extensive feedback, such that no Order relating to advertisements for FS(J)L businesses has yet been issued.

¹⁴FS(J)L - Article 31 Control of advertising; BB(J)L - Article 20 Control of advertising and Article 21 Advertising directions; IB(J)L – Article 35 Control of advertising and Article 36 Advertising directions.

¹⁵ Article 12 - control of advertising; and Schedule 2 – conditions applicable to a deposit advertisement.

¹⁶ In 2002 the FS(J)L only covered the conduct of an investment business or a trust company business.

- 8.8 Around half the comments on the 2002 consultation paper related to the investment business and trust company business Codes. Subsequently, an advertising Principle, and associated requirements, has been included in the Codes issued for deposit-taking, insurance and the recently consulted on and soon to be re-issued, trust company business Codes. Similar requirements feature in the draft general insurance mediation business Codes published earlier this month and it is anticipated that the revised investment business Codes, due for consultation this summer, will contain an advertising Principle and associated requirements.
- 8.9 Whilst this has placed industry and the Commission in a better position, the Commission considers that an Advertising Order is still required, as:
- 8.9.1 legislative clarity is required with respect to the minimum standards for advertisements placed in the Island; and
- 8.9.2 in the absence of an Advertising Order the Financial Services (Investment Business (Overseas Persons - Exemptions)) (Jersey) Order 2001 fails to operate effectively as the exemption criteria are directly tied to compliance with an Order made under Article 31 of the FS(J)L [control of advertising].
- 8.10 Consequently, the Commission continues to work on the introduction of an Advertising Order relating to businesses licensed under the FS(J)L. However, the Order that will be consulted on in 2007 will have greater scope than the 2002 paper envisaged as entities conducting general insurance mediation business now fall within the scope of the FS(J)L. It is not anticipated that money service businesses will be subject to the Advertising Order when it is made.
- 8.11 The application of an Advertising Order, made under the FS(J)L, will be considered for fund functionaries as part of the ongoing discussions relating to their transfer to the FS(J)L.
- 8.12 Comments received on the policy direction of the 2002 consultation paper have been taken into consideration in the most recent drafting of the text for the Order. Many of the 2002 comments raised issues relating to the practical implementation and monitoring of the requirements of the Order. Many of these have been considered in the drafting of the Codes. A number of respondents also commented on the wide range of situations that the Commission defined as constituting a financial service advertisement, which has also therefore been re-visited.
- 8.13 The scope of advertisements that will fall within the Advertising Order is driven by the definition of a "financial service advertisement" included within Article 1 of the FS(J)L. The definition has not been amended since the FS(J)L became effective in 1999:
- 8.13.1 *"financial service advertisement" means an advertisement containing -*
(a) an invitation to transact financial service business; or
(b) information which is intended or might reasonably be presumed to be intended to lead directly or indirectly to the transaction of financial service business,
- and includes any means of bringing such an invitation or such information to the notice of any person, and a reference to an advertisement shall be construed accordingly.*

8.14 The Commission is not proposing to amend the definition of a financial service advertisement or the scope of the requirements, which was also the subject of comment and is further established by Article 31(6) of the FS(J)L which states:

8.14.1 *For the purposes of this Article [control of advertising] a financial service advertisement issued outside Jersey shall be treated as issued in Jersey if it is directed to persons in Jersey or is made available to them otherwise than in a newspaper, journal, magazine or other publication published and circulating principally outside Jersey or in a sound or television broadcast transmitted principally for reception outside Jersey.*

8.15 It is proposed that the Advertising Order will prescribe in the following areas:

8.15.1 Identification of issuer: including, inter alia, the name of the person issuing the advertisement; the name of the person who would transact any financial service business to which the advertisement relates and a geographical address for the person.

8.15.2 Written advertisements should be clear, fair and not misleading and state that the person is licensed to undertake the business to which the advertisement relates.

8.15.3 The advertisement should not state, or imply, that the Commission has endorsed either the advertisement or the product/service to which it relates.

8.15.4 Record keeping requirements: both the period for which records should be retained, currently proposed as three years after the last date on which the advertisement was issued, and the nature of the records that should be retained.

8.16 The Order will also set out situations in which the Order will not apply, including:

8.16.1 certain advertisements by overseas persons, in addition to those set out at 8.14.1; and

8.16.2 where business systems exclude Jersey residents.

9 Accounts Orders

- 9.1 Article 17 of the FS(J)L confers on the Minister the power to make Orders providing for matters relating to the accounting and audit of registered persons, following recommendations by the Commission.
- 9.2 To date, Orders in respect of accounting and audit matters have been established under Article 17 for investment businesses¹⁷, trust company businesses¹⁸ and general insurance mediation businesses¹⁹.
- 9.3 Additionally, Position Paper No. 2. 2007, *Implementation of the Future Regulation of Funds and Functionaries of Funds*, included draft secondary legislation on matters relating to accounting and audit of fund functionaries²⁰. This Order will become effective when the regulation of fund functionaries is transferred from the CIF(J)L to the FS(J)L.
- 9.4 It has already been noted in 1.14 of the executive summary that the Commission has a duty to complete the “business as usual” policy aspects of the 2007 business plan; this included completion of work on the IB and TCB Accounts Order.
- 9.5 The Commission has identified that the IB and TCB Accounts Orders are dissimilar in ways that cannot be justified by considering the characteristics of the businesses to which they are applicable. Updates had already been identified to bring the Orders more into line with each other and to ensure they better reflect the practical expectations of the Commission, as well as updating them for recent developments in the accounting and auditing professions.
- 9.6 When assessing the Island’s compliance with the international regulatory standards, the IOSCO Principles relating to market intermediaries (IOSCO Principles 21 to 24) and the Principles relating to collective investment schemes (Principles 17 to 20) required the Commission to consider the IB Accounts Order and draft Fund Services Accounts Order, respectively. The OGBS Statement required consideration be given to the TCB Accounts Order, however, in assessing compliance with the IAIS Core Principles the Commission was not required to consider the GIMB Accounts Order.
- 9.7 As a consequence, the Commission has identified amendments that are required to the IB Accounts Order such that the Island may attain compliance with two key questions of IOSCO Principle 23. The amendments are a subset of those identified in the business as usual work on the accounts Orders referred to in 9.5.

¹⁷ Financial Services (Investment Business (Accounts, Audits and Reports)) (Jersey) Order 2001 (“**IB Accounts Order**”)

¹⁸ Financial Services (Trust Company Business (Accounts, Audits and Reports)) (Jersey) Order 2000 (“**TCB Accounts Order**”)

¹⁹ Financial Services (General Insurance Mediation Business (Accounts, Audits, Reports & Solvency)) (Jersey) Order 2005 (“**GIMB Accounts Order**”)

²⁰ *Financial Services (Fund Services Business) (Accounts, Audits and Reports) (Jersey) Order 200-* (Appendix B, document 4) (“**Fund Services Accounts Order**”)

9.8 IOSCO Objectives, Principle 23 states:

9.8.1 *Market intermediaries should be required to comply with standards or internal organisation and operational conduct that aim to protect the interests of clients, ensure proper management of risk, and under which management of the intermediary accepts primary responsibility for these matters.*

9.9 IOSOC Methodology, key question 2 asks:

9.9.1 *Is an intermediary required to cause an independent, periodic evaluation of its internal controls and risk management processes to be performed? Where the firm elects an evaluation performed by an independent auditor, is that auditor required to report material breakdowns in controls to senior management and to the regulator?*

9.10 And key question 12 part (d) asks:

9.10.1 *Is an intermediary required to establish and maintain appropriate systems of customer protection, risk management and internal and operational controls, including policies, procedures, and controls relating to all aspects of its business intended reasonably to ensure [inter alia] the maintenance of proper accounting and other applicable records and the reliability of the information?*

9.11 As a result amendments are proposed (9.12.1 to 9.12.4) to address the requirements of key question 2 regarding the evaluation of an entity's controls and risk management processes and 9.12.5 is to address key question 12 with respect to the maintenance of accounting records.

9.12 It is proposed:

9.12.1 That the directors of a licensed entity provide a declaration to the Commission regarding compliance with the relevant Laws, Order and Codes (that have not been waived by the Commission). The declaration should be appropriately signed and submitted to the Commission.

9.12.2 That the auditor prepares and furnishes the licensed entity with a report on the financial statements and the declaration noted in 9.12.1.

9.12.3 That the Commission is provided with reports prepared by an internal or external auditor, for the licensed entity, to address a relevant matter²¹.

9.12.4 That the Commission is provided with reports prepared by an accountant or consultant, for the licensed entity, to address a material relevant matter.

9.12.5 To provide greater detail in the Order with respect to the nature and form of the accounting records that should be kept.

²¹ Relevant matter will be defined within the IB Accounts Order in line with the amended definition proposed for the TCB Accounts Order - 9.19.2.

- 9.13 Many readers will note that the proposed amendments outlined in 9.12 follow requirements that already exist in the Accounts Orders of other finance sectors (trust company business and general insurance mediation business).
- 9.14 Paragraphs 9.15 to 9.19 inclusive contain an outline of the proposed amendments for the IB and TCB Accounts Orders that have been identified through “business as usual” work.
- 9.15 It is proposed that the following should be a requirement for both trust company and investment businesses:
- 9.15.1 that the Commission is provided with an appropriately signed directors’ report that should contain the following minimum information: list of the current directors; details of the responsibilities of the directors; activities of the licensed entity, and the entity’s country of incorporation;
 - 9.15.2 that the financial statements provided to the Commission should be an original signed copy bearing the signature of at least one director and the external auditors of the entity;
 - 9.15.3 that, where relevant, licensed entities should submit their period-end ANLA calculation to the Commission along with their financial statements; and
 - 9.15.4 that the date of submission of the directors’ declaration is within one month of the period-end.
- 9.16 It is also proposed that the TCB Accounts Order be amended to reflect recent changes in the accounting and auditing professions (9.17 and 9.18) and amendments to update the Order as a result of the Commission’s practical experience of receiving documentation - 9.19.
- 9.17 Currently the TCB Accounts Order requires that the financial statements of a trust company business are prepared using UK Accounting Standards issued by the UK Accounting Standards Board, unless the Commission agrees otherwise. Given the recent moves around the world, especially in Europe, towards greater utilisation of the International Financial Reporting Standards issued by the International Accounting Standards Board the Commission considers that the TCB Accounts Order should be amended to permit their use without seeking the Commission’s prior agreement.
- 9.18 Similarly with respect to Auditing Standards, the TCB Accounts Order currently prescribes the use of Auditing Standards issued by the Auditing Practices Board however, internationally the use of the International Standards on Auditing (“ISAs”) issued by the International Auditing and Assurance Standards Board is being encouraged. The Commission considers the use of ISAs to be an acceptable alternative and therefore proposes to amend the TCB Accounts order accordingly.
- 9.19 In addition it is proposed to:
- 9.19.1 require that a director should sign the declaration relating to the licensed entity’s compliance with the relevant Laws, Order and Codes, as currently the Order is silent on this matter;

- 9.19.2 amend the definition of relevant matter²² (as it refers to the reports to be provided to the Commission) such that it refers to "...a breakdown or weakness in the person's internal control procedures..." rather than "...a breakdown or material weakness...". The amendment is proposed as the Commission has found itself engaged in numerous discussions regarding the meaning of "material".
- 9.20 In considering the IB and TCB Accounts Orders the Commission has noted that they often contain the same or similar requirements, however, the sanctions relating to an entity's non-compliance with the requirements differ. In some instances these differences may be proper but in others the Commission believes that alignment is required.
- 9.21 The Commission will complete a full review of the various Orders made that relate to accounting and audit matters with a view to aligning offences and penalties.
- 9.22 The Commission is cognisant of the fact that some investment businesses operate as branches of entities incorporated outside Jersey and complying with the IB Accounts Order is difficult. This is an area where the Commission is still formulating its policy and is therefore unable, as yet, to provide further details.
- 9.23 Consideration is being given to the possibility of combining the TCB and IB Accounts Orders.
- 9.24 Given that many of the proposals fall under "business as usual" the Commission is more actively seeking comments on the amendments proposed in this section.

²² Article 8(4) of the TCB Accounts Order.

10 Trust company business customer assets

- 10.1 Article 21 of the FS(J)L confers on the Minister the power to prescribe the manner in which any classes of trust company business assets are to be protected, following recommendation by the Commission.
- 10.2 During 2000, the Commission issued a consultation paper in respect of a 'Customer Assets Order', which was not restricted to any particular class of assets. The feedback on the consultation was such that the Commission elected to restrict the scope of the Order to Customer Money²³. However, it has always been the Commission's intention that all classes of assets should be covered by an Order relating to their protection and envisaged that this goal would be reached through a stepped approach. After more than six years of regulation the next of those steps is proposed.
- 10.3 In more recent years Orders, addressing the protection of assets, have been established for other finance sectors which are more inclusive than the TCB Customer Money Order:
- 10.3.1 Financial Services (Investment Business (Client Assets)) (Jersey) Order 2001;
 - 10.3.2 Financial Services (General Insurance Mediation Business (Client Assets)) (Jersey) Order 2005; and
 - 10.3.3 draft Financial Services (Fund Services Business) (Client Assets) (Jersey) Order 200-²⁴.
- 10.4 As part of the Island's self assessment exercise in reviewing compliance with the OGBS Statement, the customer asset requirements have been considered against Principle A2(viii) which states:
- 10.4.1 *Those providing the service should exhibit evidence that their business will be or is being conducted in accordance with the following requirements under the heading of Conduct of Client Business. The Service Provider should be able to demonstrate that client business is being properly conducted through the effective handling of clients'²⁵ assets covering – safe custody of assets and proper management of assets.*
- 10.5 The Commission understands the OGBS Principle to refer to more than "money" when it refers to customer assets and, consequently, it is the Commission's view that currently the Island is not fully compliant with this Principle, given the limited scope of current legislation – customer money.

²³ Financial Services (Trust Company Business (Assets – Customer Money)) (Jersey) Order 2000 ("TCB Customer Money Order")

²⁴ Document 5 of Appendix B to Position Paper No.2 2007 - *Implementation of the Future Regulation of Funds and Functionaries of Funds* - April 2007

²⁵ For the purposes of this section the term customer has been utilised in place of "client" as used in the OGBS Statement.

- 10.6 In considering how to expand the range of assets, within the TCB sector, which are subject to an Assets Order, the Commission has revisited its objectives at the time of the 2000 consultation paper and has referred to the recent legislation drafted in this area.
- 10.7 The intention is that customer assets as defined in 10.8 will be within the scope of legislation where a person registered to carry on trust company business, in the course of carrying on that business, has control or otherwise is responsible for those trust company business assets.
- 10.8 In line with the stepped approach it is proposed that customer assets, for the purposes of the Order, should cover:
- 10.8.1 Customer money;
 - 10.8.2 Assets that fall within the meaning of investments as provided in Schedule 1 to the FS(J)L; and
 - 10.8.3 Property consisting of land and buildings.
- 10.9 At this stage it is not clear what precise legislative mechanism will be used to expand the scope of customer assets covered, except that the legislation will take the form of an Order. The options under consideration are to:
- 10.9.1 significantly amend the current TCB Customer Money Order such that it covers additional customer assets by possibly including a new section on assets that are not customer money;
 - 10.9.2 establish a new Order to capture customer assets of a trust company business that do not take the form of customer money, and apply consequential amendments to the TCB Customer Money Order, as necessary; or
 - 10.9.3 repeal the TCB Customer Money Order and replace it with a new TCB assets Order covering customer assets meeting the new definition.
- 10.10 Whichever mechanism is adopted, the intention is that all customer assets covered should be adequately protected and the legislation will cover the following areas:
- 10.10.1 safeguarding of assets;
 - 10.10.2 segregation of assets;
 - 10.10.3 record keeping;
 - 10.10.4 prevention of use of assets for unauthorised purposes; and
 - 10.10.5 maintaining appropriate insurance cover.

11 Human rights – appeals and penalties

- 11.1 The Commission continues to review the compatibility of the Regulatory Laws with the European Convention on Human Rights, paying due regard to the Human Rights (Jersey) Law 2000, effective from 10 December 2006.
- 11.2 Under each of the Regulatory Laws the Commission has powers to act in ways that could impinge upon the rights of others. Schedule 1, Article 6(1) of the Human Rights (Jersey) Law 2000 opens with:
- 11.2.1 *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*
- 11.3 It has been determined that for the purposes of satisfying Article 6(1) any party aggrieved by an administrative decision taken by the Commission under a Regulatory Law should have a right of appeal to the Royal Court.
- 11.4 As a precursor to an aggrieved party being able to make an appeal it is incumbent upon the Commission to provide appropriate notice of and reasons for the decisions it takes.
- 11.5 The Commission's review of the Regulatory Laws has identified a number of instances where it believes the legislation could be considered as non-compliant with human rights legislation as there is either: no right of appeal, or the giving of notice/provision of reasons, is currently inadequate. One similar example has been identified in the Companies (Jersey) Law 1991 where the Registrar has the power to exercise discretion over the status of a company, as public or private (Article 16).
- 11.6 Additionally, the Commission is aware of instances where the same, or very similar, offences carry differing penalties, dependent upon the Regulatory Law.
- 11.7 The purpose of the proposed amendments is to address the areas of concern identified in each Regulatory Law and provide greater alignment between the Regulatory Laws such that the penalties for the same, or very similar, offences will be consistent, unless there are justifiable reasons for maintaining differences.
- 11.8 Amendments are being proposed to each of the Regulatory Laws plus one amendment to the Companies (Jersey) Law 1991, all of which are designed to provide greater certainty and benefit to those who find themselves in receipt of an administrative decision of the Commission with which they take issue.
- 11.9 The high level policy that is to be implemented is that:
- 11.9.1 The law should normally require that reasons for a Commission decision should be included in the notice of the decision. The principle exception to this general rule will be instances where decisions have been taken that are at the request of the registered person.

- 11.9.2 The law should provide that if an appeal is lodged then the decision of the Commission will not take effect until the appeal has been determined or withdrawn, except as follows:
- 11.9.2.1 When the statute provides, if the Royal Court makes an order, on the application of the Commission;
 - 11.9.2.2 In the case of a direction, other than a direction to wind up the entity; and
 - 11.9.2.3 In the case of a public statement issued for the protection of the public, where the Commission has determined that the period of notice should be less than one month.

12 Other miscellaneous amendments

12.1 This section provides information in respect of a number of minor amendments that are also proposed to the Regulatory Laws. The proposed amendments are a combination of those resulting from the self assessment exercise against the international regulatory standards and “business as usual” work.

Relevant supervisory authority

12.2 Each of the Regulatory Laws provides the Commission with wide powers to co-operate with what is termed a ‘relevant supervisory authority’. Currently, a relevant supervisory authority is defined as

12.2.1 *an authority discharging in a country or territory outside of Jersey supervisory functions corresponding to those of the Commission.*

12.3 Consultation Paper No. 11, 2006, *Money Service Business, draft legislation to effect the oversight of bureaux de change, money transmitters and cheque cashers* included a proposal to amend the definition in the FS(J)L such that the Commission’s ability to co-operate is not restricted to just other financial services supervisors (in the prudential sense). The reason for this change is that, in many countries, responsibility for the oversight of money service business falls to the local Customs authority not the financial regulator.

12.4 Article 2 of the draft Regulations²⁶ will amend the definition of a relevant supervisory authority as follows:

12.4.1 *in the definition of “relevant supervisory authority”, for the words “supervisory functions corresponding to those of the Commission” there shall be substituted the words “any function that is similar to a function of the Commission”.*

12.5 Given the increasingly complex world of international finance, the requirement to exchange information with authorities that undertake similar, but not corresponding, functions to the Commission is becoming increasingly important, for example stock exchanges. To this end, as well as to maintain consistency across the Regulatory Laws, the Commission is proposing the following course of action:

12.5.1 Collective Investment Funds (Amendment No 4) (Jersey) Law 200-²⁷ includes a proposal to amend the relevant supervisory authority definition in CIF(J)L such that it will mirror the FS(J)L definition.

12.5.2 Similar amendments are proposed to the BB(J)L and IB(J)L definitions as part of the draft legislation to be consulted on following this position paper.

²⁶ Regulations were lodged with the Greffe on 5 June 2007 and are subject to approval of the States.

²⁷ Document 11 of Appendix B to Position Paper No.2 2007 - *Implementation of the Future Regulation of Funds and Functionaries of Fund* - April 2007.

Power to issue directions

- 12.6 Currently the power to issue directions under the IB(J)L and BB(J)L is restricted to particular circumstances, whereas the FS(J)L and the CIF(J)L permit the issuance of directions in a wider range of circumstances²⁸.
- 12.7 This lack of consistency between the Regulatory Laws and the restriction on the tools available to the Commission, in the exercise of its supervisory function in the banking and insurance sectors, had been identified and was in the process of being addressed at the time the IMF self assessment exercise was initiated²⁹.
- 12.8 The self assessment exercise has emphasised that this tool should be at the disposal of the Commission across the finance sectors and, therefore, it is proposed that the IB(J)L should be amended in line with the other Regulatory Laws. The Commission has already consulted on changes to the BB(J)L.

Amendment of definitions and exemptions by Regulations

- 12.9 Both the FS(J)L and the IB(J)L permit the amendment of definitions and exemptions contained therein by the passing of a Regulation by the States, rather a primary law amendments.
- 12.10 This permission is not present in either the BB(J)L or CIF(J)L. Consequently, amendments to definitions and exemptions in these Laws cannot be expedited as efficiently. To address this position and to maintain consistency of approach to legislative amendments across the Regulatory Laws the Commission proposes the following course of action:
- 12.10.1 Collective Investment Funds (Amendment No 4) (Jersey) Law 200- includes a proposal to update CIF(J)L such that the power to vary definitions and exemptions by Regulation will be permissible.
- 12.10.2 A similar amendment will be proposed for the BB(J)L, as part of the draft legislation to be consulted on following this position paper.

Regulatory scope over the operation of exchanges/trading systems

- 12.11 IOSCO Principles also apply to the regulation of secondary markets (Principles 25 to 30). Whilst the Island does not currently support an organised secondary market either as an exchange or trading system the Commission has compared the Island's regulatory framework against these Principles as part of its self assessment.
- 12.12 IOSCO Objectives, Principle 25 states:
- 12.12.1 *The establishment of trading systems, including securities exchanges, should be subject to regulatory authorisation and oversight.*
- 12.13 IOSCO Methodology, key question 1 asks:

²⁸Article 23 of the FS(J)L; Article 13 of the CIF(J)L

²⁹ Consultation Paper No.6 2006 -*Amendments to the Banking Business (Jersey) Law 1991*

12.13.1 *Does the establishment of an exchange or trading system require authorisation?*

12.14 Within the present Regulatory Laws the operation of an exchange or trading system is not an activity that falls within the scope of registration and consequential supervision. As a result the Island could be considered non compliant with this Principle.

12.15 Whilst a current mitigant to this situation is that the Commission is not aware of any entity wishing to either operate an exchange or a trading system from the Island, the Commission does not consider this a reason not to amend the Regulatory Laws such that the activity requires registration and oversight.

12.16 Consequently, the Commission has proposed an amendment to Article 2 of the FS(J)L, by regulation, such that the operation of an exchange or trading system falls within its scope.

Public display of licence

12.17 It is the Commission's practice to issue documentation when it grants a licence to an entity. The documentation takes the form of a certificate, and, for some finance sectors, a schedule of conditions. On issuance the Commission generally requests that the entity place the certificate in public view. However, only the BB(J)L requires that the certificate be displayed.

12.18 It is proposed to amend the FS(J)L and IB(J)L such that an entity is required to make the certificate and conditions, to be disclosed in line with section 5, publicly available, for example, on their website.

Powers over actuaries

12.19 The issue of the Commission's power over actuaries is only of relevance to entities holding a permit to undertake Category B insurance business pursuant to the IB(J)L.

12.20 When assessing the Commission's compliance with the Insurance Core Principles it has been noted that the Commission does not believe it has powers sufficient to satisfy the requirements of Insurance Core Principle 7 - essential criteria (c).

12.21 Insurance Core Principle 7 states:

12.21.1 *The significant owners, board members, senior management, auditors and actuaries of an insurer are fit and proper to fulfil their roles. This requires that they possess the appropriate integrity, complexity, competency, experience and qualifications.*

12.22 Essential criteria (c) then states:

12.22.1 *The supervisory authority disqualifies the appointment of key functionaries including auditors and actuaries that do not comply with fit and proper requirements.*

12.23 Article 25(2) of the IB(J)L places qualification requirements on a person seeking to act as an actuary and Article 25(3) requires the permit holder to notify the Commission of the actuary's appointment within 2 weeks.

- 12.24 However, the Commission does not have the power to object to the actuary appointed nor does it have the power to require the permit holder to terminate the appointment of the actuary on the grounds of it not being fit and proper.
- 12.25 Article 25(4) of the IB(J)L does provide the Commission with the power to require the permit holder to terminate the appointment of an actuary if it contravenes or fails to comply with the duties and responsibilities prescribed to it. This is a very particular set of circumstances and does not cover the wider concept of being fit and proper.
- 12.26 It is proposed that the IB(J)L be amended such that the Commission has the power of objection to the appointment of an actuary on the grounds of fitness and propriety, with appropriate provision for an appeal against such an objection.

Disclosure by funds

- 12.27 The disclosures that funds are required to make to those investing or proposing to invest in funds are fundamental to the regulation of the funds industry. Within the suite of IOSCO Principles, Principles 17 to 20 are those relating to collective investment schemes and of these Principle 19 is dedicated to disclosure: however, other Principles also touch on disclosure.
- 12.28 IOSCO Objectives. Principle 19 states:
- 12.28.1 *Regulation should require disclosure, as set forth under the principles for issuers, which is necessary to evaluate the suitability of a collective investment scheme for a particular investor and the value of the investor's interest in the scheme.*
- 12.29 Disclosure requirements for prospectuses of unclassified funds are currently set out in the following Orders and guides:
- 12.29.1 The Collective Investment Funds (Unclassified Funds) (Prospectus) (Jersey) Order 1995 (“**UFPO**”) which applies to open-ended companies and open-ended unit trusts;
- 12.29.2 The Companies (General Provisions) (Jersey) Order 2002 (“**CGPO**”) which applies to closed-ended companies;
- 12.29.3 The Expert Fund Guide; and
- 12.29.4 The Listed Fund Guide.
- 12.30 This leaves some categories of unclassified funds without any specific requirements regarding the contents of a prospectus. This applies in particular to limited partnerships (open and closed-ended) and closed-ended unit-trusts. In these cases, the UFPO or the CGPO could be used as a baseline. The Commission believes that the majority of these funds are non-retail in nature; however, there may still be a gap for some unclassified retail funds not covered by those Orders.
- 12.31 The IOSCO Methodology for Principle 19, quoted at 12.28, contains nine key questions that the Commission is required to consider for compliance. Having undertaken the self assessment exercise the Commission has determined that the UFPO and CGPO should be amended in order to address gaps that have been identified in disclosure requirements.

12.32 To address these gaps the Commission would prefer to amend the UFPO to cover all fund types requiring the grant of a permit under the CIF(J)L. Consequential amendments will be made to the CGPO such that funds are exempt from requirements of that Order. The Commission believes that these amendments will simplify the regime for fund prospectuses in Jersey.

12.33 An alternative approach being considered is that the UFPO and CGPO are amended so that any deficiencies identified against the IOSCO self assessment are rectified and the Commission issues separate general guidance for funds outside the scope of the UFPO and CGPO.

12.34 Whichever proposal is adopted the Commission will provide a transitional period in order for changes not to be detrimental to existing funds.

Power to appoint a manager

12.35 IOSCO Objectives, Principle 9 states:

12.35.1 *The regulator should have comprehensive enforcement powers.*

12.36 IOSCO Methodology, key question 2 asks:

12.36.1 *Does the regulator or other competent authority within the jurisdiction have the following powers:
part d): power to order the suspension of trading in securities or take other appropriate action?*

12.37 Whilst the Commission currently has a power to suspend trading, the term “take other appropriate action” is open to interpretation. Appropriate action could take different forms, one of which is the appointment of a manager. This is a regulatory tool the Commission can deploy in its supervision of financial service business under the FS(J)L, and, once the transfer of fund functionaries from the FS(J)L to the CIF(J)L has been completed, the power to appoint a manager will also be a regulatory tool deployable against many, but not all, fund functionaries.

12.38 It is therefore proposed to amend the CIF(J)L such that it has a power akin to that contained in the FS(J)L with respect to the appointment of a manager in prescribed circumstances.

12.39 Additionally, Insurance Core Principle 15 states:

12.39.1 *The supervisory authority enforces corrective action and, where needed, imposes sanctions based on clear and objective criteria that are publicly disclosed.*

12.40 Essential criteria (e) states:

12.40.1 *...More generally the supervisory authority in extreme cases, imposes conservatorship over the insurer that is failing to meet prudential or other requirements. The supervisory authority has the power to take control of the insurer, or to appoint other specified officials or receivers for the task, and to make such arrangements for the benefit of the policyholders as are necessary.*

- 12.41 Currently Article 24(5) of the IB(J)L provides the Commission with the power to appoint a special manager acceptable to the Commission either as part of any short term remedial finance scheme (solvency requirements for Category B insurance businesses) or on a more permanent basis with a view to a successful sale of the business or run-off of in force policies to maturity.
- 12.42 The Commission considers the provision of a more explicit power with respect to Category B insurance businesses is required to demonstrate compliance with the Insurance Core Principles, retain consistency across the finance sectors and provide clarity to the Industry.
- 12.43 It is therefore proposed to amend the IB(J)L such that it has a power akin to that contained in the FS(J)L with respect to the appointment of a manager in prescribed circumstances.

Gateways

- 12.44 Consideration is being given to the adequacy of the Commission's domestic gateways and, in particular, whether or not express provision should be made for the Commission to share restricted information with other licensing authorities in Jersey and the Comptroller of Income Tax.

APPENDIX A - Matrix of policy change and finance sector impacted

Chapter & Policy	IB	TCB	GIMB	Banking	Insurance	Funds
3 - Powers to prevent individuals working in prudentially supervised Jersey finance sector	X	X	X	X	X	X
4 - Extension of "principal person" regime to "key persons"	X	X	X	X	X	X
5 - Disclosure of Conditions	X	X	X	X	X	X ³⁰
6 - Disclosure of identity of senior managers and investment employees	X					
7 - Fit and proper criteria for entities and individuals				X		X
7 - Clarification of fit and proper with respect to AML/CFT	X	X	X	X	X	X
8 - Advertising Order	X	X	X			
9 - Accounts Orders	X	X				
10 - Trust Company Business Customer Assets		X				
11 - Human rights - appeals and penalties	X	X	X	X	X	X
12 - Definition of relevant supervisory authority				X	X	X

³⁰ Will apply to Funds Services Business in the future

Chapter & Policy	IB	TCB	GIMB	Banking	Insurance	Funds
12 - Power to issue directions					X	
12 - Amendment of definitions and exemptions by Regulations				X		X
12 - Regulatory scope over the operation of exchanges/trading systems	X					
12 - Public display of licence	X	X	X		X	X
12 - Power over actuaries					X	
12 - Disclosures by funds						X
12 - Power to appoint a manager					X	X
12 - Gateways	X	X	X	X	X	X