
Richard Le Liard

Good things always come in threes

Richard Le Liard, senior associate at Bedell Cristin, presents a round-up of recent regulatory developments

As a funds lawyer working in a time where the global trend is towards ever-increasing regulatory complexity, it is a pleasure to report on developments in the Jersey funds industry the themes of which are simplification and increased ease-of-use. In the space of two months there have been three significant examples of this. One of which, the new private funds regime, has arrived with much fanfare (and rightly so) but the other two, which relate to outsourcing rules and AML/CFT guidance, are (though they may be less glamorous) also worthy of praise. All three developments have come about following consultation with industry and have been some time and no little effort in the making.

New outsourcing policy and guidance notes

The first good news story for the Jersey funds industry is the issue by the Jersey Financial Services Commission (JFSC) of a new and improved outsourcing policy and guidance notes.

The basic premise underlying the policy is that any person who is licensed by the JFSC should remain fully responsible and accountable for any regulated activities that they outsource, and the starting point is that the policy and guidance notes apply to all regulated funds and fund services providers.

Compliance with the policy and guidance notes is important. It may be taken into account by the JFSC when considering whether a person is deemed 'fit and proper' to be licensed. Moreover, the codes of practice published for regulated funds and fund services providers require compliance with the policy, so the policy requirements are therefore incorporated by reference as codes requirements, making them mandatory.

The new policy is particularly helpful in that it confirms that certain activities relevant to funds and fund operators are deemed not to amount to outsourcing and are therefore not subject to the requirements (clearing up some historical uncertainty around this point). In particular, it is clarified that:

- Regulated funds and fund services providers are not expected to comply with the policy and guidance notes, provided that the service providers who will provide services to the fund are clearly disclosed to the JFSC and, by way of the offer document or an investor notification, to the fund's investors, and provided that certain other conditions are met;
- A custodian (including a prime broker) that is acting in relation to a regulated fund and is a member of an international corporate group is not deemed to be outsourcing where it engages sub-custodians that are members of the same group;
- A manager of a managed entity (MoME) whose arrangements with a fund services provider are consistent with the standards set out in the JFSC's MoME guidance note is not subject to the outsourcing policy; and
- A branch performing activities on behalf of its head office or on behalf of another branch is deemed not to be outsourcing (and this extends to other scenarios where all elements are parts of the same legal person).

New funds section of the AML/CFT handbook

All funds and fund operators (both regulated and non-regulated) in Jersey are subject to the anti-money laundering and countering the financing of terrorism (AML/CFT) requirements set out in a Handbook issued by the JFSC.

The second good news story for the Jersey funds industry is that, following consultation with industry at the end of last year, there is now a new section of that Handbook dedicated to funds and fund operators.

Typically, the introduction of additional AML/CFT materials is not met with particular enthusiasm but in this case, the new section does not amend any existing statutory or regulatory obligations and it does not contain any new requirements. It consists only of additional guidance on existing requirements. In particular, guidance on:

- Conducting risk assessments;
- Customer due diligence measures;
- Who is the customer for funds and fund operators; and
- Specific areas of complexity highlighted by industry, such as deferred verification and enhanced due diligence

The new section also restates some basic principles and confirms the general applicability of AML/CFT obligations to all funds and fund operators in a way that has not been so clearly communicated before.

New private funds regime

And finally, the biggest news so far in 2017 has been the introduction of the Jersey Private Fund (JPF) regime. In the past, if a fund was to be promoted to 50 or fewer investors, it would have been established as either a very private fund, a private placement fund or a 'COBO-only fund'. With effect from 18 April 2017, however, Jersey now offers a single product for all private funds. The JPF replaces the complexity of the private funds space in Jersey with a greatly simplified and streamlined regime.

Under the JPF regime:

- All funds with up to 50 investors will come under one simple regime.
- The regulatory framework will be consistent across the private funds space, extending the current benefits of Jersey's existing very private regime to all private funds.
- A fast-track 48-hour regulatory approval process will apply, with no prior approval of promoters or key persons.
- JPFs will be able to be promoted to 'professional' and other 'eligible' investors, with the eligibility criteria being both straightforward and relatively broad: for example including those whose ordinary business is managing, holding or advising on investments, as well as persons who can meet certain asset or investment thresholds (such as making an investment of at least £250,000).

Alongside the various elements of flexibility, appropriate regulatory oversight will be maintained. This will be achieved through a requirement for a Jersey-regulated 'Designated Service Provider' to be appointed to all JPFs. This follows the trend of focusing regulation on a key service provider, rather than the product.

The regime has a number of other welcome features. For example:

- A JPF can be established as any type of Jersey or non-Jersey vehicle.
- A JPF can be closed-ended or open-ended.
- There are no investment or borrowing restrictions.
- Offering documents are permitted but not required.
- A JPF is not required to have Jersey directors, a Jersey general partner of Jersey trustee.
- There is no audit requirement.
- Holding companies, special purpose and securitisation schemes and vehicles with a relevant family or employment connection are expressly out of scope.

Fans of the very private fund, private placement fund or COBO-only fund will be glad to hear that they will be permitted to continue in operation until the end of their natural life or, alternatively, on application to the JFSC, may convert into a JPF.

We expect that conversion to a JPF will be particularly attractive to those very private funds who are close to their limit of no more than 15 offers/investors, or to private placement funds that are close to their limit of no more than 50 offers/investors and wish to take advantage of the rules set out in the JPF guide that disregard bona fide carried interest vehicles and general partners (where they are not committing capital) from the calculation of the number of offers/investors.