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Jersey Brief

voisin volaw

Further changes to Jersey's Companies Law

In previous issues of *Jersey Brief* we have described various changes to Jersey's Companies Law, which began in earnest in 2002 with the introduction of new corporate vehicles such as no-par value companies and procedures for redomiciliation of companies both in and out of Jersey.

The introduction in 2006 of protected cell companies and incorporated cell companies have enabled a growth in Jersey's investment funds, insurance structures and in other areas where the legal segregation of assets is vital. These changes have been extremely beneficial and are set to continue with the introduction of Amendment No. 9 to the Companies (Jersey) Law 1991, which will take effect when the Law has gone through the Privy Council and received the Royal Assent in early 2008.

These latest reforms are expected to enhance the Island's international competitiveness, and are widely welcomed by Jersey's finance industry, whose practitioners have been a driving force behind the changes.

The most significant change is the amendment to Articles 114 and 115, which will allow a Jersey company to make a distribution to its shareholders without regard as to whether or not gains and profits are realised or unrealised, provided the directors make a statement relating to the company's solvency. This dispenses with the need for directors to "make full enquiry into the affairs and prospects of the company", an ambiguous statement which often led to the preparation of audited accounts. Directors authorising a distribution and making a solvency statement without having reasonable grounds to do so will now be guilty of an offence. This change will greatly simplify the ability of a company to make payments to its shareholders while maintaining protection for creditors and is in accordance with a general trend in corporate law worldwide.

Similarly, the prohibition introduced last year against a company giving financial assistance for the purchase of its own shares (without a rather convoluted "whitewash" procedure) is to be removed.

It is also proposed to allow a company to purchase its own shares to be held "in treasury" for a limited duration, rather than purchasing them to be cancelled immediately. Treasury shares should prove popular with Jersey investment funds as well as employee share schemes and employee benefit trusts due to their greater flexibility on redemptions and repurchases. This will bring Jersey in line with the Companies Act in the UK. The amendment also simplifies the ability of certain types of company to reduce their capital accounts, again with the focus being on creditor protection.

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One long-awaited change is to allow a regulated financial services business (such as Volaw) to be appointed as a director of a Jersey company. Volaw have already created two subsidiary companies for this purpose, and we will move to using corporate directors for the majority of our client companies as quickly as possible, in place of the individuals from Volaw who are currently holding positions as directors. This will provide greater flexibility on our part for handling company matters.

All Jersey companies will be required to file details of their directors in the annual return form submitted to the Jersey Companies Registry. At present only public companies are required to do so. Jersey companies will need to inform the Registry of changes to their board within 14 days of such changes occurring. With certain exceptions, the identity and details of board members of Jersey companies will become available for public scrutiny.

Every Jersey company is currently required to have a registered office address in the Island, and the provision of such addresses is a regulated activity. There is, however, no mechanism currently in place to ensure that the owner of that address has agreed to provide this service, or that the address is bona fide. In this respect, it is proposed that the Jersey Companies Registry will only correspond with the registered office of any company and if the owner of that address subsequently disputes that it is the correct registered office, the Registrar will have the power to wind up the company and strike it off the Register.

Amendment No.9 will allow for cells of cell companies to have different boards of directors. such that experts in a particular field can sit on the board of a cell without being on the board of the main Incorporated Cell Company, as is presently the case. The ability to appoint the most appropriate directors for the individual Incorporated Cell (coupled with the ease of set up of an Incorporated Cell) allows Jersey to further enhance its fund expertise.

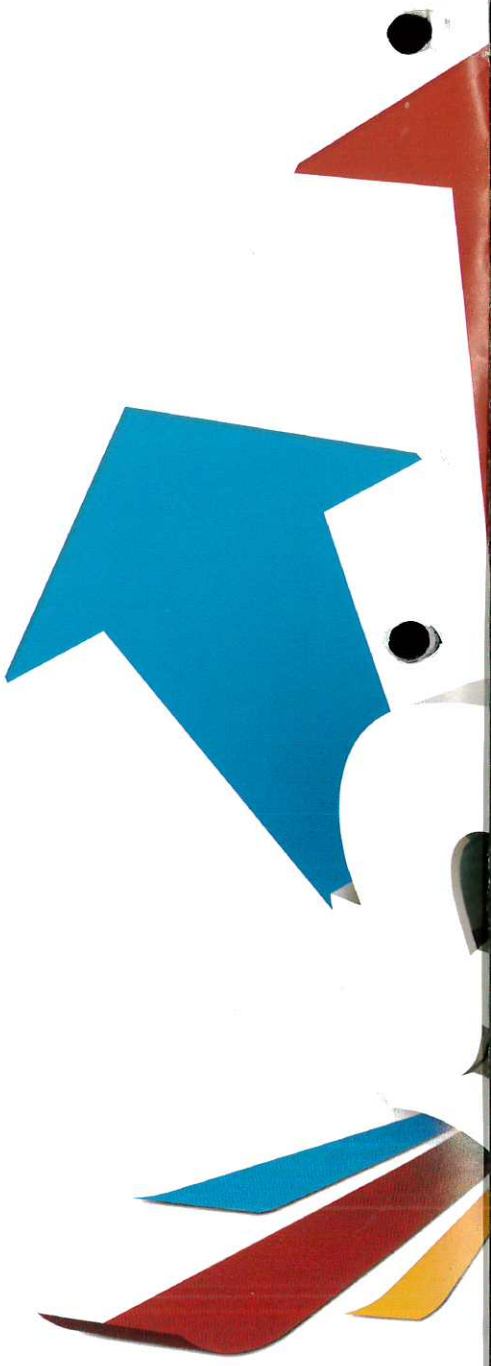
There are also a number of minor changes aimed at increasing the Law's flexibility, such as allowing a public company to include the abbreviation "plc" in its name, and reducing certain notice periods to 14 days.

The new changes will be introduced by Companies (Amendment No. 2) (Jersey) Regulations 200-, and are currently expected to be effective from 22 January 2008. Taken together, it is hoped that the amendments will further encourage the use of Jersey companies, and be beneficial to the Island's finance industry.

For further information about these changes, and about Jersey Companies in general, please contact Ian Strang (ianstrang@voisinlaw.com of Voisin or Mark Healey (mhealey@volaw.com) or Simon Perchard (sperchard@volaw.com) of Volaw.

UK Pre-Budget Report 2007

Three areas from Alistair Darling's first Pre-Budget Report stand out from an offshore perspective: the long-awaited completion to the Government's review of residence and domicile, the major reform of capital gains tax and the publication of a consultation paper on simplification of the offshore funds regime.



Residence and Domicile

The UK Government has been reviewing the tax treatment of non-domiciled individuals since 2003. It is perhaps no surprise that the advantageous treatment extended to non-domiciled individuals, which is a factor in attracting them to the UK, should continue, given the benefits to the UK economy. There are several important changes which will take effect from April 2008, including an additional tax charge for the remittance basis.

The Pre-Budget Report Notes state, "After a non-domiciled individual has been resident in the UK for seven years they will only be able to use the remittance basis of taxation if they pay an additional tax charge of £30,000 a year. Where an individual then decides not to use the remittance basis (and not pay the additional tax charge) they will be taxed on all their worldwide income and gains whether or not they are remitted to the UK.

The new rules will come into force on and after 6 April 2008 and all previous years of residence will count from that day. So, for example, an individual not domiciled within the UK who has been resident in the UK for five years in April 2008 will only be able to claim the remittance basis of taxation for two years before they have to pay either the £30,000 annual tax charge or account for tax under the arising basis."

All UK resident but non-domiciled individuals will need to establish their first year of residence in the UK in order to ascertain when the new rules will apply to them. They will then need to consider whether to pay the £30,000 annual charge and continue to claim the remittance basis or to pay tax on an arising basis. Draft legislation will be published later in the year, further to which there will be a period of consultation on whether people who have been resident in the UK for more than ten years should make a greater contribution.

Residence

Currently, any individual who is present in the UK for 183 days or more during a tax year, or if visits to the UK amount to an average of more than 90 days per year, is regarded as resident. Travel days from and to the UK have been regarded as days of absence, but from 6 April 2008 it is proposed to count these days as days of presence in the UK for residence test purposes, which will impact most on those who make multiple short visits to the UK.

All individuals for whom this test is relevant will need to urgently review their travel arrangements to take account of the significantly reduced number of days they spend in the UK from 6 April 2008.

Personal allowances

UK residents are entitled to a personal allowance, but from 6 April 2008, subject to a *de minimis* limit, individuals who are resident but not UK domiciled or not ordinarily resident will not be able to claim the benefit of both the remittance basis and any of the personal income tax allowances. Although the amounts of tax will be small this change will likely affect a surprisingly large number of people who manage remittances of income to the UK to be within their personal allowance.

The Pre-Budget Report Notes state, "The change will apply to personal allowances, married couple's allowance and the blind person's allowance. A *de minimis* limit will apply such that remittance basis users who have unremitted foreign income of less than £1,000 a year will be able to retain their personal, married couple's and blind person's allowances as appropriate.

A person who has triggered the additional tax charge detailed above will still have no entitlement to UK personal allowances in the following year if they decide to continue using the remittance basis and pay the additional charge. If, at any future point, that person no longer uses the remittance basis, they will again be entitled to UK personal allowances."

Anti-avoidance measures

There are other changes affecting the remittance basis.

The Pre-Budget Report Notes state, "Anomalies in the current rules mean that individuals using the remittance basis of taxation can avoid paying UK tax on their foreign income and gains effectively brought into the UK. A number of charges are being made to ensure that where foreign income and gains are remitted to the UK then tax is charged on those remittances. The changes include:

- Correcting a flaw in the current claims mechanism which allows income arising in one year to be remitted tax free the following year by claiming the remittance basis in the first year but not in the second;
- Reducing the scope for the alienation of income and gains through the use of offshore structures, such as companies and trusts, which convert taxable income and gains into non-taxable payments;
- Extending those existing anti-avoidance measures which currently do not apply to remittance basis users so that in the future they do;
- Removing the 'ceased source' rule; and
- Extending the definition of remittance in relevant foreign income."

Draft legislation in this area is expected to be published towards the end of the year. It will be interesting to see whether or not the capital gains tax anti-avoidance provisions that apply to non-resident settlements and companies will be extended to those created by individuals domiciled outside of the UK.

Capital Gains Tax Reform

Changes in respect of the tax treatment of capital gains have been announced, which have far-reaching impact, affecting private equity and offshore funds:

"For the tax year 2008-09 there will be a single rate of capital gains tax set at 18 per cent. The rate will apply to individuals, trustees and personal representatives. The 18 per cent rate of CGT does not affect the income tax rates.

The main taper relief provisions are in section 2A of and Schedule A1 to TCGA. Taper relief came into effect for disposals on or after 6 April 1998. The relief may reduce the amount of the gain chargeable to capital gains tax (and hence reduce the effective rate of tax payable on the gain). The amount of relief available depends on the length of time an asset has been held since that date, and whether the asset is classified as a business or non-business asset for taper relief purposes. Currently maximum business assets taper relief is available if the business asset has been held for 2 years, and the maximum non-business asset taper relief is available if the non-business asset is held for 10 years.

For disposals on or after 6 April 2008 and held over gains coming into charge on or after 6 April 2008 taper relief will no longer be available (even if assets were held before this date) and the chargeable gain will be liable to tax at the new rate of 18 per cent (subject to the deduction of allowable losses, any other reliefs and the AEA).

The indexation allowance rules are in sections 53 to 57 of TCGA. Indexation was introduced as a mandatory relief with effect from 31 March 1982. It was frozen for CGT purposes at 6 April 1998 for assets held at that time. Currently where an asset was held at 6 April 1998 and is disposed of after that date the gain on the disposal may be eligible for indexation and taper relief.

For disposals on or after 6 April 2008 indexation allowance will no longer be available in computing the gain arising. This change will only affect assets that were acquired before 6 April 1998."

It is expected that draft legislation in this area will be published towards the end of the year. This measure is clearly aimed at those who were able to benefit from the very low rates of CGT available for business assets and anything which increases the CGT rates onshore may increase the attractiveness of structures based offshore.

Offshore Funds

A discussion paper has been issued that sets out the Government's proposals to modernise the taxation of offshore funds, some of which will be welcomed by the Investment Management industry.

The paper *(which can be found at http://www.hm-treasury.gov.uk/pbr_csr/documents/pbr_csr07_offshore.cfm)* covers changes to the definition of offshore funds for UK tax purposes, a proposed framework for offshore funds and the tax treatment of UK investors into those funds. Views on these proposals are sought by 9 January 2008, and it will behove all involved in offshore funds to study the paper carefully.

If you are likely to be affected by these new measures, we suggest that you contact your tax adviser for assistance.

Royal Court gives directions in costly trust dispute

The Royal Court recently delivered two judgments concerning the impact upon a particular Trust of certain English Orders made in matrimonial proceedings. The family Trust in question (the H Trust) was administered in Jersey and distributions from it had enabled the husband and wife to live what was described as a lavish lifestyle until the marriage came to an acrimonious end. The Royal Court, not for the first time, noted that the costs involved in the battle to a large extent depleted the Trust Fund, thus reducing the amount available to distribute to the warring parties.

In this case around £440,000 or 18% of the assets of the Trust had been devoured in litigation which had taken place in England. A High Court Order was made, which to a large extent, favoured the wife, whose Representation to the Royal Court was the basis upon which Commissioner Clyde-Smith gave his decision in the first judgment.

The Trustee had not submitted to the jurisdiction in England. It carefully considered the Order which had been made but determined that it would not be in the interests of all of the beneficiaries of the Trust to give effect to it. The Trustee made proposals to the parties which it considered dealt with matters in a far more even handed manner than the English Court had done. Perhaps unsurprisingly, the wife felt that her hard earned victory in the High Court should be followed to the letter.

Proceedings were commenced in Jersey by the wife and the Court noted with some dismay that a further £240,000 had been sucked from the Trust Fund as a result. The Trustee was not criticised for having failed to put the English Order into effect but it was criticised for deciding to await the outcome of certain other proceedings regarding underlying Trust assets before referring the matter to the Royal Court. The decision to delay was considered to be one which no reasonable Trustee could have arrived at and, as such, it was set aside.

Having so ruled the Court exercised its supervisory powers by giving directions to the Trustee as to what it should do, having described as unwise the decision to "enter the arena of debate and to take sides". The Court determined that it was in the interests of the beneficiaries to achieve the result contemplated by the English Order as far as was reasonably possible. The Trustee's policy of "wait and see" was one which the Court criticised stating that if there was further delay the Trust would "continue to leech funds at an unsustainable rate supporting the parties and the [former matrimonial pile] as well as funding unquantified litigation costs and the acquisition of the [former matrimonial pile] if the [English] proceedings are successful".

Practitioners and Trustees alike can certainly see that the Royal Court is less likely to tolerate what might be termed 'gravy train litigation' where the advisers to various parties are perceived to be feasting upon a Trust Fund for their benefit rather than for the benefit of the beneficiaries. Whether cases involve oil rich Middle Eastern families or even relatively wealthy men and women, the Royal Court will take a very dim view of such practices and encourage the swift resolution of disputes at a reasonable cost.

Commissioner Clyde-Smith delivered a further judgment in relation to this matter when he considered the wife's application to be entitled to enforce any claim she may have against the proceeds of sale of certain properties, insofar as those proceeds exceeded certain valuations. This application had been prompted by the belief that the properties in question might be sold for considerably more than the valuations had at first suggested.

Having considered written submissions, the Court declined the application on the basis that it did not regard its role as encompassing the investigation and supervision of the agreed payment of the wife's debts out of capital sums, which the English Court had determined that she should receive. Whilst the Court accepted that it was desirable to achieve finality between the parties, it considered its role to be limited to the supervision of the Trust and to give directions in relation to the assets of the Trust. It was not within the ambit of the Court's role to interfere with the rights of other parties who were subject to the English Order.

These decisions give useful guidance as to the extent to which the Royal Court will become involved in disputes of this nature and in the exercise of its supervisory jurisdiction.

For further information about litigation matters in Jersey, please contact Ashley Hoy (ashleyhoy@voisinlaw.com), Michael Preston (michaelpreston@voisinlaw.com) or Dexter Flynn (dexterflynn@voisinlaw.com) of Voisin Litigation.

High Value Residency in Jersey: the facts

We are delighted to publish an article by Nigel Philpott, the Director of High Value Residency for the Economic Development department of the States of Jersey, describing the attraction of Jersey to those considering relocating to a low-tax jurisdiction.

For those with significant wealth considering a move to a country offering an exceptional quality of life and appreciable financial benefits, Jersey must rank highly. The advantages are mutual; the individual enjoys the privileges of residing on the Island and the community enjoys the proceeds of the additional tax revenue.

In 2004 the States approved the Strategic Plan 2005 – 2010 in which was a specific policy:

"To attract more high wealth individuals who contribute economically and socially to the future of the Island".

Such individuals are known locally as 1(1)Ks, being the category within the Housing Law. However, the title is now "High Value Resident" reflecting both the financial and social benefits that they bring. It is also more clearly understood elsewhere.

High value residence is not granted lightly and in November 2007 circa 170 permits existed, out of a total population of almost 90,000.

Prior to the new policy, entry into the Island under the 1(1)K category was by way of an individually negotiated agreement. Now those wishing to relocate must demonstrate their ability of contribute, in Income Tax, a sum of no less than £100,000 per annum. Jersey income is taxed at the normal 20%, other worldwide income is taxed on an agreed scale: 20% on the first one million, 10% on the next £500,000 and 1% on everything thereafter.

Social benefits will also be taken into account and these can be wide-ranging. Each application will be considered on its own merits.

The process for application has also been simplified. Interested parties now need only contact the Director of High Value Residency who provides a personal service advising on the requirements, assisting with the actual application and dealing on behalf of the applicant with the other relevant bodies on the Island. Once approved, the new resident is given any assistance they may require to ensure a smooth entry into the community. This system means a single point of contact, the speediest handling of the application and, of course, ensures maximum confidentiality.

So, apart from the obvious tax benefits, why is Jersey so attractive? One can do no better than quote some of the reasons given by those considering relocations:

"There is such a high quality of life"

"I have a feeling of safety being on an Island"

"I like being part of a small community"

"The Island has a very friendly feel"

"Jersey has a strong identity but is very cosmopolitan"

"Jersey is well located being close to the UK and other European countries"

"There are excellent transport links, health and educational provisions"

"Living in Jersey is like life should be"

Combine the above and many more, including the lack of Capital Gains Tax and Death Duties and it is not hard to see why Jersey is a jurisdiction that probably offers a more comprehensive and balanced environment in which to live than most others.

Anyone who would like further information about moving to Jersey should contact the Director of High Value Residency, Nigel Philpott, by any of the following means:

Write to: Economic Development, High Value Residency, Liberation Place, St Helier, Jersey, JE1 1BB or

Telephone: +44 (0)1534 448830
e-mail: nigel.philpott@jersey.com
www.reflectonjersey.com

The recoverability of legal fees in Trust Litigation

The Court of Appeal recently delivered a judgment in relation to the long running Alhamrani case, which will be of interest to lawyers as well as those involved in Trust business.

The latest decision in the case of Alhamrani is yet another that concentrates solely on the issue of costs: who should pay the legal fees involved and at what rate seems to have taken precedence over dealing with the substance of the dispute. The various decisions that have been published do, however, provide useful guidance on the issue of Trustees' costs and the recoverability of legal fees in trust litigation.

This decision resulted from an appeal by Sheikh Fahad Alhamrani, who argued that he should receive his costs upon the same basis as the Trustee rather than on the standard basis (which involves a partial contribution towards legal fees by another party rather than payment of all of those fees).

The Deputy Bailiff ruled that Sheikh Fahad, as a party to the proceedings, was not entitled to his costs on the same basis as the Trustee who essentially recovers all that it spends. However, the basis upon which the Sheikh should be paid was increased from standard to indemnity, whereby the successful party does not receive all of his or her costs, but there is a greater contribution towards those costs than otherwise.

One hopes that on the next occasion that the Courts are asked to rule in relation to this long running dispute, it will be upon a substantive issue rather than on questions of the costs generated by the litigation itself. The Courts have certainly indicated in recent years that lawyers and parties should be encouraged not to deplete Trust Funds in fighting technical battles but should rather get on with the resolution of the underlying dispute either by mediation or by way of a good old-fashioned trial.

For further information about trust litigation in Jersey, please contact Ashley Hoy (ashleyhoy@voisinlaw.com), Michael Preston (michaelpreston@voisinlaw.com) or Dexter Flynn (dexterflynn@voisinlaw.com) of Voisin Litigation.

Employment Law: Brown -v- Voisin revisited

The judgment has been released in relation to the claim brought by the former General Manager of Voisin's Department Store in the Employment Tribunal. The Hearing followed the first appeal against a Tribunal's decision under the Employment (Jersey) Law 2003.

The original Tribunal had found that Mr Brown was unfairly dismissed by Mr Voisin but that decision was quashed and the matter remitted to a different Tribunal by the Deputy Bailiff sitting in the Royal Court. In essence, the first Tribunal had applied the wrong legal test to the question of whether or not Mr Brown had been unfairly dismissed.

The new Tribunal relied upon the evidence which had been given at the first Hearing and then applied the appropriate test which was, whether in the particular circumstances of the case, the decision to dismiss Mr Brown fell within the band of reasonable responses which a reasonable employer might have adopted. Where the first Tribunal had elevated certain procedural steps into strict requirements of law, the second Tribunal properly considered the particular circumstances of the case and concluded that Mr Voisin had behaved reasonably and that, as a consequence, Mr Brown had not been unfairly dismissed.

The Tribunal went on to give certain guidance with regard to good practice in the workplace, which will be of interest to employers and employees alike.

For further information about employment law or litigation matters in Jersey, please contact Ashley Hoy (ashleyhoy@voisinlaw.com), Michael Preston (michaelpreston@voisinlaw.com) or Dexter Flynn (dexterflynn@voisinlaw.com) of Voisin Litigation.

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Briefing Notes for Rapporteur

P175/2007/ - Draft Companies (Amendment No. 2) (Jersey) Regulations 200-

P174/2007/ - Draft Companies (Amendment No. 9) (Jersey) Law 200-

P174/2007/Amd. - Draft Companies (Amendment No. 9) (Jersey) Law 200- (P.174-2007) - amendments

Introduction

1. Members will be aware that there are three projets to be debated. The purpose behind the Amendments and the Regulations is to modernise aspects of the Companies Law in accordance with international developments to introduce more flexibility and simplicity. All jurisdictions have found that Company Law needs updating on a regular basis and Jersey is no different in this regard.

2. For example, the UK has just completed the most sweeping and significant changes to UK company law in the last 20 years with an almost complete replacement of the 1985 Companies Act.

3. The proposed changes to be debated shortly reflect up to date thinking sweeping away outdated concepts such as the reliance on share capital in order to protect creditors and moving towards solvency statements.

4. There will be also further changes shortly to be debated. The Commission is currently working on Companies Law Amendment No 10. This will reflect changes in Company Law which are essential in order to prepare for the IMF assessment in 2008.

5. The proposed changes are interlinked in many cases as temporary Regulations will be made before the Amendment comes into force. Some of these temporary Regulations will be replaced by Articles in the Amendment with exactly the same effect. This apparent oddity is due to technical difficulties in making consequential changes to Articles by Regulation where there is power to make a change to one Article by Regulation but there is no power to change the Article in a different section of the Law by consequential amendments made by Regulation. These temporary articles will be discussed further below.

Consultation

6. Both the proposed changes to the Regulations and the Law have been through the normal consultation process. The proposals have been subsequently comprehensively discussed with industry following a consultation paper published in 30 April 2006. The draft legislation

has been considered by a steering group, industry and the Commission neither of whom object to their adoption.

P175/2007/ - Draft Companies (Amendment No. 2) (Jersey) Regulations 200-

Overview

6. The Regulations contain a number of substantial and important changes to the Companies Law, all designed to ensure that Jersey companies remain flexible vehicles suitable to the widest possible range of corporate activity. The most significant changes are as follows:

7. Regulations 5 and 6 remove the prohibition against a company giving financial assistance for the purchase of its own shares. This has been a longstanding problem, as it effectively makes it difficult for a

person to acquire a company using a loan and at the same time using the shares in the company as security for that loan. As with many changes to the new Law, the principle is that, provided the company remains solvent, the actions of a company are its internal affairs. The prohibition against financial assistance has been lifted in the UK and it will significantly assist the finance industry to follow suit in Jersey.

8. Regulation 7 introduces treasury shares, which will permit a company that purchases its own shares to hold them for a limited duration, rather than cancel them. This means that a company can purchase its own shares and them transfer them to a new investor much more easily, which will be of particular use to the funds sector.

9. Regulation 8 permits a regulated financial services business to act as a corporate director of a Jersey company, which will again assist industry. In practice, many directors are provided by regulated businesses, and it makes sense that those businesses, rather than its employees, should act as directors.

10. Regulation 12 permits cells of cell companies to have different boards of directors.

11. There are also a number of minor changes of a technical nature. The majority of these arose from the introduction of Amendment No.8 to the Companies Law and suggestions that have been received in relation to how these provisions could better operate in practice.

12. There are temporary Articles proposed, for example see T55. These are transitional provisions to ensure that offences introduced by Regulations have tariffs in the period after the Regulations are passed and prior to the Amendment No 9 being passed by the Privy Council.

13. Industry has commented and is in favour of the amendments.

SIR I MAKE THE PREAMBLE

Debate on the preamble>>>

14. The proposed changes are all designed to ensure that Jersey companies remain flexible vehicles suitable to the widest possible range of corporate activity.

The Regulations

15. Turning to the Regulations where there are very minor changes these will not be discussed.

16. Regulation 2 puts a temporary provision into Part 11 of the Law until Parts 1 of the Law and Schedule 1 to the Law can be amended by Amendment No 9 to ensure that there are penalties in place for breaches of Article 55 concerning the making of solvency statements.

17. Regulation 3 amends Article 55, to remove the requirement that directors may only make solvency statements in relation to the redemption of shares after having made "full enquiry into the affairs and prospects of the company". This is believed to place too onerous a duty on directors who should have to form the opinion that the company is able to discharge its liabilities prior to the redemption and looking forwards over the next year of trading.

18. Regulation 3 (b) amends paragraph (12) of Article 55 so that requirements placed on directors relating to an authorization of the redemption of shares shall only relate to those directors who authorize the redemption, not the directors generally.

19. Regulation 3 (c) amends Article 55(18) to dovetail with the amendments permitting treasury shares to be held (which will be permitted under the changes proposed in Regulation 7). That Article currently states that when a par value company is about to redeem shares, it may issue shares up to the nominal amount of the shares to be redeemed as if those shares had never been issued. Regulation 3(c) removes from the ambit of the paragraph redeemed shares that are to be held as treasury shares, since such shares will not automatically be cancelled on redemption.

20. Regulation 3 (d) inserts a new Article 55(21). The new paragraph (21) makes clear that shares redeemed by a company are cancelled on redemption. This Article does not apply to shares redeemed by a company and held as treasury shares.

21. Regulation 4 makes an amendment to Article 57(7) that is consequential to the new Articles in relation to treasury shares inserted by Regulation 7.

22. Regulation 5 removes the prohibition in Article 58 of the Law against a company giving financial assistance for the purchase of its own

shares. This has been a longstanding problem, as it effectively makes it difficult for a person to acquire a company using a loan and at the same time using the shares in the company as security for that loan. As with many changes to the new Law, the principle is that, provided the company remains solvent, the actions of a company are its internal affairs. The prohibition against financial assistance has been lifted in the UK and it will significantly assist the finance industry to follow suit in Jersey.

23. However Article 58 may have had the effect of altering (and overriding) the "customary law" rules that previously related to such matters. The repeal of the provision raises the prospect of the "customary law" rules re-emerging to govern the matter, which is not intended.

24. Regulation 6 inserts a new Article 58 to prevent this occurring. The provision as amended also permits transactions and permitted financial assistance started under the old rules but finished under the new regime to still have the same effect as they would have if the law hadn't changed. In particular this means that such transactions or

financial assistance will not be regarded as unlawful distributions under Part 17 of the Law.

25. Regulation 7 introduces the concept of treasury shares, which will permit a company that purchases its own shares to hold them for a limited duration, rather than automatically cancel them and reduce the share capital of the company. This change will mean that a company can purchase its own shares and then transfer them to a new investor much more easily, which will be of particular use to the funds sector.

26. With this greater freedom and flexibility, there are also checks put in place to prevent a company owning its own shares being able to operate voting rights and receive dividends.

27. The proposed Article 58A will enable a company to buy back treasury shares if it is authorized to do so by a resolution of the company, and if its memorandum or articles of association do not prevent it from doing so.

28. The proposed Article 58B contained in Amendment No 9 sets out principles relating to the minimum number of shares to be held by

another party when treasury shares are held by the company. These restrictions prevent a company entirely owning itself.

29. Until Amendment 9 is passed T58B is a temporary Article which fulfils the same function.

30. Regulation 8 permits a regulated financial services business to act as a corporate director of a Jersey company by altering Article 73. This measure will assist industry and bring significant costs to regulated businesses. In practice, many directors are provided by regulated businesses, and it makes sense that those businesses, rather than its employees, should act as directors.

31. However a body corporate may be a director of a company only if the body corporate is registered as a director under the Financial Services (Jersey) Law 1998, and if the body corporate itself does not have a director that is a body corporate. This check is to ensure that there is always a human person who must be the directors of the corporate director and who may be found liable for the actions of a corporate director. Further the corporate director is regulated by the

Commission to prevent abuse and ensure that the corporate director operates to the high regulatory standards required by the Commission.

32. Regulation 9 amends Article 116, which relates to takeover offers, to enable treasury shares to be included in takeover offers.

33. Regulation 10 alters Article 117, which relates to the rights of offerors to buy out minority shareholders. Article 117(1) currently requires the offeror to have obtained 9/10ths "in value of the shares". The amendment alters this to "9/10ths of the nominal value of the shares". Similar amendments are made in the Regulation in relation to classes of shares.

34. Regulation 11 makes similar amendments to those in Regulation 10 to Article 119, which relates to the rights of minority shareholders to be bought out by an offeror.

35. Regulation 12 replaces certain Articles in the Law relating to the creation of cells of cell companies, in order to clarify some aspects of the current provisions introduced in Amendment No 8.

36. The proposed Article T127YDA does more than this, however, in that it alters the existing policy in relation to cell companies. Currently, a cell of a cell company must have the same directors as the cell company itself. The amendment will change this by permitting cells of cell companies to have different boards of directors form the cell company. The duties imposed on a cell of a cell company under Part 9 (duties relating to registers and certification of shares) are, under this Article, imposed on the cell company and according the cell comes under an obligation to furnish such information to the cell company in order for the cell company to comply with such duties.

37. The amendment also clarifies that a director of a cell does not have, just because he or she is such a director, any duties or liabilities, or entitlements to information, in relation to the cell company or any other cell of the cell company.

38. Regulation 13 amends Article T127YE so as to place a duty on cells to provide such information to their cell companies as will enable the cell companies to comply with their obligations under the Law in relation to the preparation of annual reports that include information in relation to the cells.

39. Regulation 14 repeals Article 127YF, which places the obligation to keep accounting records on the cell company in relation to a cell, rather than on the cell itself. Following the amendment, the cell itself will be obliged to keep accounting records.

40. Regulation 15 replaces Article 127YG. The current Article places the obligation to prepare regular accounts on the cell company in relation to a cell, rather than on the cell itself. Subsequent to the amendment, the cell will be obliged to keep the records rather than the cell company. The amendment will also limit the information that the cell company will be entitled to obtain from the cell to so much information as is necessary to enable the cell company to prepare its annual return (which must include information in relation to each cell).

41. Regulation 16 replaces current provisions relating to transfers of cells and how companies may become cells of cell companies, so as to clarify the effect of such alterations in status.

42. Regulation 17 puts a temporary provision into Part 18D of the Law to permit tariffs to be applicable for criminal offences until Schedule 1 to the Law is amended by Amendment No 9 being brought into force.

43. Regulation 18 amends a trivial error in the current Law.

44. Regulation 19 amends Article 127YM so that a memorandum or articles of a company may be altered so as to enable the company to become a cell company, if the alteration is sanctioned by the court as an arrangement under Article 125 – without (as is currently the case) a special resolution of the company being required. The Regulation also establishes in proposed paragraphs (8) and (9) certain requirements in relation to certification of cells that have been created after alteration of memorandums or articles.

45. Regulation 20 corrects a trivial error in the current Law.

46. Regulation 21 amends Article 127YT(5), which relates to the provision of a "solvency statement" by a director of a protected cell company that intends to meet a liability, attributable to a particular cell, from the company's non-cellular assets. The amendment

requires the director to make the statement as to the predicted solvency in respect of the "non-cellular liabilities" of the company, not just the "liabilities" generally of the company.

47. Regulation 22 gives to the court a power to determine, on the application of a protected cell company, to what extent an asset of the company is a cellular asset or a non-cellular asset of any of the cells of the cell company.

48. Taken together with the proposed changes in the Amendment No 9 these changes will enable Jersey's company Law to be modernised and made more flexible for the benefit of all users of companies.

END OF SPEECH

P174/2007/ - Draft Companies (Amendment No. 9) (Jersey) Law 200-

("the Amendment")

P174/2007/Amd. - Draft Companies (Amendment No. 9) (Jersey) Law 200- (P.174-2007) - amendments

("the New Amendment")

49. Sir, I propose to take the proposition as amended.

50. The proposed changes contained in the New Amendment to P174 are important changes brought about to the audit and accounts requirements of the Law. These were not included in the Amendment because at the time that the Amendment was lodged no agreement had been reached between industry and the Commission as to whether the proposals were in accordance with IOSCO principles. This was critical as these principles will be tested in the IMF Assessment. Once agreement was reached, as there was time to amend the Amendment prior to today's debate, the New Amendment was lodged for debate.

51. The purpose of the Amendment is to amend the Law in accordance with international developments to introduce more flexibility and simplicity.

Overview

52. The Amendment makes a number of changes to the Law, both minor and important. The Amendment is much shorter than the Regulations, however it has been lengthened by the need for temporary articles in the Regulations which are replaced with exactly the same provisions in the Law. Where this occurs this is not referred to as this has already been debated in the Regulation debate.

53. Significant changes in the Amendment are contained in the proposed changes to Articles 114 and 115 of the Law. These permit a Jersey company to make a distribution out of any capital account provided that the directors make a statement in relation to the company's solvency. This will greatly simplify the ability of a company to make payments to its shareholders while maintaining protection for creditors and is in accordance with a general trend in corporate law worldwide. Current thinking has moved towards requiring directors to make solvency statements with a penal sanction in order to protect creditors in situations where there could be abuse at the expense of creditors.

54. Importantly, the amendment also simplifies the ability of certain types of company to reduce their capital accounts, again with the focus being on creditor protection by focusing on the solvency statement as a means of protecting creditors.

55. Finally, there are a number of minor changes aimed at increasing the law's flexibility. Examples include allowing a public company to include the abbreviation "plc" in its name and reducing certain notice periods to 14 days.

56. Taken together, the amendments will further encourage the use of Jersey companies, and be beneficial to the Island.

57. The background to these changes are the modernisation of company law both in the UK and elsewhere such as Australia in order to make the company best equipped to function effectively and efficiently.

58. The proposals have been comprehensively discussed with industry following a consultation paper published on 30th April 2006. The draft legislation has been considered by a steering group, industry and the Commission none of whom object to their adoption.

59. Industry has commented and is in favour of the amendments.

SIR I MAKE THE PREAMBLE

Debate on the preamble>>>

The Amendment

60. Where Amendments make very minor changes these will not be highlighted.

61. Article 3 deletes a limited power the Minister has to amend the Law and replaces it with Article 4 which provides the States with a power to amend Part 1 by Regulations.

62. Article 5 amends Article 13 of the Law to enable a public limited company to end its name in "public limited company", "PLC" or "plc", and in any combination of upper and lower case characters, that it prefers. This is to avoid any technical offence being committed by the use of the wrong case.

63. Article 6 makes a correction by amending Article 17 of the Law by deleting Article 17 (4), which purported to create an offence in relation to a provision which was not capable of being an offence.

64. It is proposed that Article 8 amends Article 55 of the Law, which relates to the power to redeem shares. Currently the law imposes restrictions on the sources of capital from which redemptions, in respect of par value, and no par value, companies, that are not open-ended investment companies, may be made. It is now considered that such restrictions on the sources of redemption should be removed on the grounds that they no longer serve their purpose of creditor protection. Providing a solvency statement is made in order to protect the creditors it is considered that fully paid up shares should be capable of being redeemed.

65. The amendment also deletes paragraphs (13), (14) and (15) of Article 55. Paragraph (13) is removed as it relates to paragraph (5), which is being deleted. The deletion of Paragraph (14) removes the requirement to maintain capital in a par value company by transferring an equivalent sum to the capital redemption reserve as that paid away to redeem shares. The rationale for this provision is removed now that the method of creditor protection has moved to

considering whether a company is solvent rather than the value of a company's capital.

66. The same reason is behind the removal of Paragraph (15). Currently, when limited shares are redeemed wholly or partly out of the proceeds of a fresh issue of shares, and the proceeds are less than the nominal value of the shares that are redeemed, the company must transfer the amount of the difference to the capital redemption reserve out of distributable profits. It is considered that no such payments need to be made to a capital redemption reserve to maintain the capital of the company provide that solvency statements are made to protect the creditors under Article 55(9).

67. The substitution of paragraph (16) of Article 55 then ensures that capital redemption reserves may be applied in the issue of shares to be allotted as fully paid up bonus shares. This provision ensures that existing capital redemption reserves held by Jersey companies may be utilised.

68. Article 9 repeals Articles 58(4) and (5) of the Law, which will be rendered otiose by amendments to Article 115 of the Law by Article 23 of this Law.

69. Article 10 makes an amendment to Article 58A, consequential to the repeal of Articles 55(14) and (15) by Article 6.

70. Article 11 amends Article 61 of the Law, by including in the list of capital reductions that shall not require court confirmation reductions of capital that take place by way of distribution in accordance with Article 115.

71. Article 12 deletes a limited power the States have to amend one Article of Part 14 and replaces it with Article 13 which gives a general power for the States to amend Part 14 by regulations.

72. Article 14 amends Article 87 of the Law. That Article currently allows members of *private* companies to dispense, by agreement, with the requirement for an annual general meeting to be held. The amendment, by omitting the word "private", alters the provision so that it will apply to all companies, public or private. This provision aims to increase the flexibility of companies to operate where all shareholders agree that no annual general meeting is required, thus saving costs.

73. Likewise Articles 15 and 16 amends Article 90 and 91 of the Law, by reducing from 21 days to 14 days the period for which notice shall be given of a meeting at which a special resolution is proposed to be made, or any meeting that is to be held. Again the aim of this is to reduce costs and simplify the law so that companies can operate more flexibly and efficiently saving costs.

74. The new Article 17 and Article 21 as contained in the News Amendment amends Article 104 and Article 110 of the Law in order to give more flexibility to companies to prepare accounts in accordance with any generally accepted accounting principles as well as ensuring that auditors are able to sign off on accounts prepared under both UK and US accounting principles in the event that auditors are appointed.

75. Article 18 inserts into Article 106 of the Law a provision to enable a public company that becomes a private company during the accounting year to satisfy the requirement to give accounts in relation to its existence as a public company, by giving accounts that either relate to just the period before it became a private company, or that include periods before and after it became a private company.

76. Article 19 replaces Article 108 of the Law with a provision that will allow the States a wider power to amend Part 16 (accounts and audit) of the Law by Regulations.

77. Article 20 makes amendment to Article 109 of the Law which are consequential on the amendments to Article 87 of the Law.

78. The following articles are referred to by their numbering in the Amendment.

79. Article 21 amends Article 113A of the Law, which relates to qualifications for appointment as auditors. The Article currently requires that, in order for a partnership to be eligible for appointment as an auditor, all partners must hold a relevant qualification, or that at least 75% of the partners, and the voting rights, must be, or be held by, respectively, persons with relevant qualifications. This is seen as too prescriptive in the modern world where auditors may qualify and work in many different jurisdictions. The amendment reduces this percentage to 50%.

80. Article 22 makes similar amendments to the requirements in Article 113B of the Law that a body corporate must satisfy in order to be eligible to be appointed as an auditor.

81. Article 23 alters provisions relating to distributions contained in Articles 114 and 115 of the Law. These changes are linked to the same principles behind the changes proposed relating to the redeeming of share capital under Article 55 of the Law.

82. The proposed Article would expand the definition of distribution to include paying off any amount standing to capital accounts other than the nominal capital account or the capital redemption reserve. If adopted, the test in determining whether a distribution may be made is whether the company is solvent. The directors must make a statement in relation to the company's solvency which both looks at the current situation and at the likely situation in a year's time. The test set down in the law is that the directors must reasonably believe that immediately after the distribution is made the company will be able to discharge its liabilities as they fall due and also will be able to continue to carry on business and discharge its liabilities as they fall due for a period of 12 months following the date on which the distribution is proposed.

83. This will greatly simplify the ability of companies to make payments out of share capital to shareholders while maintaining protection for creditors and is in accordance with the general trend in company law worldwide. Current thinking has moved towards requiring directors to make solvency statements with a penal sanction in order to protect creditors in situations where there could be abuse at the expense of creditors.

84. Article 24 inserts a new Article 115B, to enable the States to amend Part 17 by Regulations.

85. Article 25 amends Article 125 of the Law so that compromises or arrangements may only be agreed to by ¾ of the value of creditors or a class of them, or ¾ of the *voting rights* of the members or a class of them. The current provision requires the agreement of ¾ of value of creditors or a class of them, or of the *value* of the members or a class of them.

86. Article 26 corrects an error in the Law, whereby a reference is made to "Committee" rather than "Commission".

87. Article 27 amends the existing requirement in relation to statements to be made by directors, so that it fits the new standard requirement for statements as to solvency introduced by this amending Law.

88. Article 28 repeals temporary Article T127YN, the provisions of which are incorporated into Schedule 1 of the Law by Article 31.

89. Article 29 alters the provisions of Article 186, which relate to the distribution of company property on winding up. The amendment inserts a new paragraph enabling a liquidator (or if a liquidator has not yet been appointed, a director) to distribute property of the company to the company's members, before settling all debts and expenses, if he or she is satisfied that the assets of the company shall enable all the creditor's claims and all the company expenses to be satisfied after the distribution is made.

90. Article 30 amends Article 220 to provide that when the States is permitted to make Regulations to amend any provisions of the Law (for example, those in Part 18D of the Law) it can make Regulations that may make consequential amendments to other provisions of the Law (for example, those in Part 1 - Interpretation or in Schedule 1 - penalties for offences under the Law).

91. Article 31 amends Schedule 1 to the Law, which sets out the penalties to which offences against the Law are to be subject.

92. Article 32 as amended by the New Amendment sets out the name by which the amending Law may be cited and that it shall come into force 7 days after it is registered other than the provisions 17-22 which shall come into force on such day or days as the States may by Act appoint. The reason for this amendment is that it is not known whether a subsequent Company Law Amendment No 10 will leapfrog over this law by virtue of being IMF related and fast-tracked by the Privy Council. This gives the ability to ensure that the proposed changes to the Law come into force in the correct order.

93. In summary, the changes will further encourage the use of Jersey companies, and be beneficial to the Island.

94. No measurable cost or manpower implications arise for the Commission, or the States .

END OF SPEECH

Briefing Notes

Will permitting corporate directors allow the abuse of companies with no one held to account?

The restrictions on who can be corporate directors are designed to combat this point. Because only a regulated corporate can be appointed they are obliged to comply with the high standards of regulation set by the Commission. Further it is not something that has resulted in look through provisions being enacted in jurisdictions that permit corporate directors.

Are we reducing creditor protection by permitting companies to reduce share capital?

No as the solvency statement is a much better form of protection. No creditor finds out the amount of share capital before offering credit. Instead if someone wishes to be covered they can take security over assets or other forms of protection.

Consequential Orders

There are no consequential orders to be made as a result of the changes to the Law.

James Mews

11 January 2007

Chapter 4 The Comparative Dimension

4.1 We attach great importance to learning from the experience of other countries as we develop proposals for reform, as indeed was foreshadowed in the March 1998 Consultation Paper. With this in mind we commissioned two comparative surveys, one from Professor Cally Jordan, building on her comparative work for the Hong Kong review which was completed in 1997, and a second, focusing particularly on recent developments in Continental Europe, from the Centre for Law and Business at the University of Manchester. Space prevents us reproducing these surveys in full. They can however be downloaded from the Review's Internet site (see paragraph 1.20).

4.2 Here we attempt to provide a brief indication of the recent developments in company law reform in other countries, which are likely to be of most value and relevance. Caution is needed in assessing and adopting comparative developments as their success is frequently dependent on their context in the overseas jurisdiction. However, many Commonwealth jurisdictions have, at least until recently, operated systems of company regulation and administration very like ours and we share many institutional values with the USA. We concentrate therefore on the Commonwealth and the USA, where there has also been most activity recently, with some reference to Continental Europe.

Commonwealth Developments

4.3 Until the 1970s Commonwealth countries tended to follow British company law and most countries and jurisdictions adopted our 1948 or 1927 Act. However, beginning with the Canada Business Corporations Act (CBCA) in 1975, there has been a trend towards radical reappraisal and simplification along largely American lines.

Canada

4.4 The CBCA closely followed a draft proposed by the three-man Dickerson Committee in 1974. Canadian law in most jurisdictions already departed from British precedents in many respects, deriving from the letters patent rather than the deed of settlement model which was the basis of the Gladstone reforms in 1844 to 1862. But Dickerson took a much more radical approach, following the enabling philosophy of the US Model Business Corporations Act, whilst

pending in the European Court of Justice[17]). However, as the emphasis of the Review is on ensuring the UK's company law regime makes the UK an attractive place to do business, this does not seem likely.

European Convention On Human Rights

3.8 Finally, it should be noted that the rights granted under the ECHR (summarised in Annex C), such as the right to freedom of association and to peaceful enjoyment of possessions, impose constraints on the scope and substance of the UK legislation, while other provisions impose constraints on the way the corporate regulatory system may operate. The ECHR operates as a boundary setting device, rather like Article 52, and rights conferred can be restricted or abridged only where the action taken is for a legitimate purpose under the ECHR and the means are proportional to the ends. Again, this constraint needs to be recognised, but it is only likely to be a problem were the UK to adopt stringent regulatory or structural measures affecting the rights of companies and of participants in companies as described in Annex C.

17: C212/97 opinion of Advocate General La Pergola presented 16 July 1998. (Available in Italian at ECJ website – europa.eu.int/cj/en/index.htm)

3.4 Unless agreement can be obtained to their amendment, substantive requirements of the Directives must be maintained whatever views may be as to their merits. The rules in the Second Directive are a particular constraint for the Review, preventing, for example, the issue of 'true' no par value shares. The Fourth Directive may also prove a constraint in that it would appear to rule out a radical re-evaluation of the need for annual accounts in the case of small companies.

3.5 The European Commission is sympathetic to the case for updating the Directives, but points out that amendments will require the agreement of other Member States. Clearly UK proposals for change will not make headway unless they receive the backing of others. The Department has begun the process of bilateral discussions with other Member States to see if there is common ground. It may also be possible to take advantage of the forthcoming review of the Second Directive under the SLIM process (Simpler Legislation in the Internal Market), and the Department hopes that the Commission's proposal for a Company Law Forum will soon be implemented as this will provide the opportunity to debate company law issues among Member States as a whole.

The EC Treaty

3.6 Another constraint on the legislative powers of the UK as a Member State is the right to freedom of establishment under Article 52 of the EC Treaty. This defines the boundary of what are acceptable Member State legislative or administrative measures within the single market. Broadly speaking the UK must not discriminate – whether overtly or covertly, directly or indirectly – against an individual, company or firm which wishes to move within the EU. Non-discrimination encompasses all barriers or burdens which would make the cross-border activities more difficult or less attractive, unless those barriers or burdens are proportionate to some legitimate public interest requiring protection and are 'objectively justifiable'.

3.7 The above constraint needs to be recognised, but is not expected to be a problem for us. A charge of failure to respect rights of establishment would be most likely to arise if the UK were to adopt relatively strict rules (compared to other Member States) and seek to impose them on those in other Member States seeking to operate in the UK (cf. the *Centros* case, currently

Chapter 3 The European Dimension

The Purpose of this Chapter

3.1 In this Chapter we set out the legal framework under European Union Law and the European Convention on Human Rights ('ECHR') which constrain and shape the options open to the UK in this field.

Company Law Directives

3.2 The main constraint arises from the Directives adopted under Article 54 of the Treaty in pursuance of the EC programme for the harmonisation of company law. In legal terms a Directive requires a Member State to enact into its law its specific substantive requirements. Member States are not allowed to enact their own provisions in breach of these requirements, though the Directive may permit Member States to make additional provision in the particular area. (The Second Company Law Directive, for example, requires that a public company has a minimum subscribed capital, but permits Member States to require higher amounts for their own companies).

3.3 The main Directives adopted under this programme are summarised in Annex C. In brief:

- the First Directive requires various details – eg a company's constitution and the amount of capital subscribed – to be disclosed in a public register;
- the Second Directive lays down minimum requirements on the formation of public companies and maintenance of their share capital;
- the Fourth and Seventh Directives require the preparation and publication of accounts and contain provisions regarding the content of accounts; and
- the Eleventh Directive imposes minimum and maximum requirements for branches established in a Member State by limited companies formed in another, or in a third, country.

Chapter 5.4 Capital Maintenance

Introduction

5.4.1 This section of the Document is entitled 'capital maintenance' because that is the traditional title given to the topic by company lawyers. However it is not about the broad issue of ensuring that companies are adequately capitalised, but about a narrower and more technical issue concerning the preservation of certain reserves which are currently designated as not normally distributable to members.

5.4.2 The principle of capital maintenance is at least as old as the limited liability company. The law gave the shareholder the privilege of limiting his liability, so that once he had paid, or promised to pay on call,[80] an amount equal to the nominal value of the shares he took up he had no further responsibility for the debts of the company. In order to protect members and creditors, however, a body of rules was erected; such rules were designed to prevent the capital so provided from being extracted or otherwise eroded, save as a result of trading or other business events[81]. The most important rules are those concerning reduction of capital, purchase by a company of its own shares, financial assistance by a company for a third party's acquisition of its shares and distribution of profits. Discussion of these rules requires consideration of accounting rules separating capital account from profits, and of no par value shares. It is also necessary to take account of the Second EU Company Law Directive, which harmonises provisions on the maintenance and alteration of the share capital of public companies.

5.4.3 Our limited enquiries tend to indicate that creditors and potential creditors do not any longer regard the amount of a company's issued share capital as a significant matter when

80: In the case of partly paid shares, the shareholder was liable for the unpaid part of the nominal value and the value of the reserve fund was of a different and in some ways more valuable character than paid up capital. Its preservation seems to have been one of the major objectives of the capital maintenance rules; but partly paid shares are now uncommon.

81: These rules were subsequently extended, to ensure that any 'premium' subscribed in excess of the nominal value was treated substantially in the same way as share capital proper (with its own separate undistributable reserve, subject to slightly different rules on its reduction), and to ensure that, if share capital, or this share premium account, was eroded by trading, the relevant reserves would have to be replenished before a distribution of assets to members could take place.

deciding whether or not to extend credit to it – this is particularly true in the case of the two thirds of registered companies which have a share capital of £100 or less. Whilst the existence of a substantial share capital may sometimes be regarded as a comfort, sophisticated creditors pay much more regard to the size of the company's total resources, including non-distributable reserves, and to its cash generation. This approach is reflected in the form of modern financial statements. We would welcome views from consultees on the following:

Question 26 **What is the significance of the amount of a company's share capital (as opposed to its net assets or other features of its financial performance) for decisions on whether to extend credit to it?**

Reduction of Capital

5.4.4 The Companies Act 1867 introduced provisions permitting companies to reduce their capital. The two specific requirements were a special resolution of shareholders and confirmation by the Court. The legislation included provisions under which the Court, prior to confirming the reduction, was to ensure that the interests of creditors were adequately safeguarded, but court approval was required even where there could be no conceivable real threat to creditors.

5.4.5 In essence the reduction process today remains the same as in 1867. Both the legislative provisions for the protection of creditors and their operation have become more flexible; nonetheless a company wishing to reduce capital may find that the court requires it to provide an expensive bank guarantee to cover present and future claims of its existing creditors, however financially sound the company may be, making creditors better protected than they would otherwise have been, at the expense of the company. We do not regard this rule as efficient.

5.4.6 The reduction of capital process is used to return capital to shareholders, to write off losses, and for many less obvious purposes – for example, in the past, to write off goodwill on consolidation and to produce a fund of profit which can be used to redeem or purchase shares.

5.4.7 We believe that the distinction between share capital (including share premium) and other funds should be retained. This is because, in brief, the distinction between capital contributions and other reserves from trading is an important one, in terms of historic disclosure

at least. However, reduction of capital should become a simpler and more efficient process. Our provisional view is that it would be preferable for companies to be permitted to reduce capital:

(a) with the sanction of a special resolution (ensuring the appropriate endorsement by shareholders of the change in status of funds which they envisaged as a contribution towards the trading capacity of the company[82]); and

(b) following the giving of a declaration of solvency by the directors (to ensure reasonable, but not excessive, protection of creditors from the risk of insolvency).

5.4.8 The declaration of solvency would be required to address the position of the company immediately following the reduction. We do not think that the declaration need take the form of a statutory declaration. We believe that directors should be required to make a proper enquiry and then to reach a reasonable judgement on solvency[83]. We would however expect that directors who make a declaration without having reasonable grounds for the opinion expressed will be liable to a fine and perhaps should be personally liable for any losses to creditors which result from a reduction made in circumstances which they should have known were likely to lead to insolvency. However it may be arguable that the law on directors' duties and insolvency law provides an adequate remedy already[84] and would be reinforced if the provisions on directors' fiduciary duties are clarified and strengthened.

5.4.9 We would welcome views on:

Question 27 **(a) Should the procedure for capital reductions, without court approval, but subject to shareholder approval and solvency certification, as proposed in paragraph 5.4.7, be adopted?**

(b) if so, what is the appropriate sanction or sanctions for a defective certificate of solvency?

82: In our view no special minority protections are required here because reductions discriminating between shareholders would amount to a change of class rights, requiring separate class meetings.

83: Along the lines of section 156(2).

84: Insolvency Act 1986 section 214.

(c) and what is the case for, or against, requiring an auditor's certificate in relation to such a certificate of solvency?

5.4.10 We are in principle in favour of extending provisions on these lines to all companies. But for public companies this would in most cases require an amendment to Article 32 of the Second Directive which sets out safeguards for creditors on a capital reduction. It seems clear under that Article that we must give creditors a right to obtain security for their claims or other 'adequate safeguards' or the assurance that the company's assets are sufficiently large to make such safeguards unnecessary. If creditors are not satisfied with what is offered by the company, they must be given the right to apply to the Court. We believe that such a regime puts unjustified power in the hands of creditors. Even an ability to delay a reduction of capital is something that should be avoided, for fear that it would be used for an improper purpose.

5.4.11 The current British regime goes even further, requiring an application to the Court in every case, whether or not any creditor could conceivably have good grounds to object. However, it would in our view be possible within the confines of the Directive to enable public companies to make capital reductions by special resolution and to issue declarations of solvency; and for the law to provide for creditors to be allowed to challenge the proposal in court on the ground that they had neither security, nor adequate safeguards, and that the state of the company's assets was not sufficient to make such safeguards unnecessary. To allow creditors a reasonable time to object, our preliminary view is that the reduction should be undertaken not less than four weeks after the passing of the special resolution (cf. section 158) and fair notice to the creditors of what is intended. The reduction would need to be suspended pending any such challenge. We believe that while this still enables creditors to hold up the carrying through of a capital reduction the transfer of the onus onto them to challenge (with express provision in the law for costs penalties if they fail) would be a useful change and that in many cases of capital reduction it would be obvious that the commercial position of creditors is not materially prejudiced, given the asset position of the company.

5.4.12 However, Article 32 of the Second Directive does not apply to certain kinds of share capital reductions, ie broadly speaking, those made to write off losses, or made by transfer to a separate reserve only to be used to write off losses, and involving, in either case, no distribution

to shareholders[85]. We believe that it would be useful to take advantage of this flexibility for public companies, on the assumption that Article 32 cannot be altered for the generality of cases, by providing that in the case of such capital reductions to write off losses the private company regime proposed above should apply.

5.4.13 We would welcome views from consultees on the following:

Question 28 **(a) If the Second Directive precludes the adoption of the same scheme for public companies, is it desirable to enable such reductions without prior court approval, but subject to the right of creditors to apply to the court to prevent the reduction on grounds that they are not secured, nor have adequate safeguards, and that the state of the company's assets is not sufficient to make such protection unnecessary?**

(b) would there be value for public companies in adopting the scheme mentioned in question 27 in cases of capital reductions to write off losses, as permitted by Article 33 of the Second Directive?

Question 29 **If amendments to the Second Directive can be agreed to permit this should the scheme in question 27 be extended to public companies?**

Purchase of Own Shares

5.4.14 It would be premature to make any recommendations on this topic, pending the completion of the DTI's consultation process on its proposal to permit companies which purchase their own shares to retain the shares in treasury, instead of, as now, being required to cancel them (URN 98/713, May 1998).

5.4.15 In any event since purchase of own shares is very similar to reduction of capital our view on this topic would be likely to follow a path equivalent to, and consistent with the one described above, subject, for public companies, to EU constraints, in particular Articles 19 and 22, Second Directive.

85: See Second Directive, Article 33, setting out the provision in greater detail.

Distribution Rules

5.4.16 A statutory regime for the determination of distributable profit has been part of our law since 1980. In part it was dictated by EU law and in part by a desire to modernise the existing common law rules and to introduce certainty and in some cases a checking mechanism on over-enthusiastic distribution.

5.4.17 Our general view is that these provisions have worked well and have introduced both certainty and some checks. There is clearly scope for some detailed redrafting but we should welcome consultees' views on whether they share our assessment that no major change is required.

5.4.18 We have considered, but are not attracted by, the idea that a distribution should not be made without a declaration of solvency by the directors. This has never been a requirement in the UK and experience with dividend-paying in the past does not indicate that the law has been abused significantly.

5.4.19 The question of what is a realised profit is a vexed one and we understand that the accountancy profession is considering an alternative approach to identify 'real' profits, although British legislation and the Fourth Directive set legal limits to the reinterpretation of realised profit. This is an area for detailed examination and consultation, and is also mentioned in the context of our review of high level accounting issues (see Chapter 6).

Financial Assistance

5.4.20 The provisions which, subject to exceptions, prohibit companies and their subsidiaries from giving financial assistance for the purpose of acquisition of shares of the company are normally regarded as part of the capital maintenance regime and are therefore addressed here.

5.4.21 Following various consultation steps effected by the DTI between 1993 and 1997, proposals to reform the law in this area have been announced but not yet implemented[86].

86: DTI circular letters of 21 November 1996 and 21 April 1997, available from the address at paragraph 1.20, above.

5.4.22 We are firmly of the view that changes to the existing law should be made in this area. We are aware that the relevant provisions are ones on which legal advice is sought very frequently; it has been estimated that the cost to companies of the provisions concerned is some £20M per annum.

5.4.23 Speaking generally, we do not regard the financial assistance provisions as strictly necessary for the maintenance of capital. Clearly there is in effect a partial reduction of capital where, for example, a company, having lent money on the security of its own shares, finds that the borrower is insolvent. But if the security is good the company is able to sell the shares and recoup any loss. It is only if the security is inadequate that the company will make a loss which might, because of its provenance, be regarded as an unauthorised reduction of capital. It could be argued that there need be no special prohibition other than that, when considering any loan or other financing of an acquisition of the company's shares, directors of a company should disregard the value, either then or at a future date, of the relevant shares.

5.4.24 We are inclined to think that this may be too radical, and our provisional preference is that private companies at least should be permitted to give all kinds of financial assistance if approved, in general meeting, by the members of the company other than any who have a special interest in the outcome, and preceded by a declaration of solvency covering the situation following the giving of the assistance. This is a more flexible provision in some respects, and less so in others, than the DTI's final proposals of April 1997, which envisaged freedom to engage in financial assistance financed out of distributable profits, without general meeting approval, where the assistance diminished net assets by less than 3%, and with general meeting approval, by special resolution. We believe that shareholder approval is appropriate in all cases, but that an ordinary resolution of disinterested members is sufficient and that it is appropriate for assistance to be permissible out of capital, so long as it is approved and creditors are protected. We agree with the Department's proposals for redefining assistance, that the exemptions should remain, for all cases, and that proper notice of resolutions is appropriate. However, we would welcome views on the rival merits of these two sets of proposals.

5.4.25 We consider that the arguments for such a relaxation apply on merit equally to private and public companies. But in the latter case a radical amendment to Article 23 of the Second

Directive would be needed; we hope that this possibility can be explored. If Article 23 must be accepted as it stands, we would favour implementation of the more modest reforms proposed by the DTI in 1997. We would welcome views on:

Question 30 **(a) Should private companies be permitted to provide financial assistance in connection with the acquisition of their shares subject to approval by disinterested shareholders and solvency certification?**

(b) or are the Department's proposals for a de minimis provision and a special resolution 'whitewash' provisions a better way forward (see paragraph 5.4.24)?

Question 31 **(a) If amendments to the Second Directive can be agreed, should the same regime be applied to public companies?**

(b) if not, should the Department's proposals set out in its consultation document be adopted?

No Par Value (NPV) Shares

5.4.26 The **nominal** value of the issued share capital was the traditional yardstick for the maintenance of capital, but this has now in effect been replaced by a measure corresponding to the total consideration (consisting of both nominal value and share premium) which is paid or payable on the shares. The question therefore arises whether the distinction between nominal value and share premium, or any similar distinction, needs to be retained.

5.4.27 We believe that the requirement that shares should have a nominal value has become an anachronism. There is no real distinction between share capital and share premium account, except that the latter may be applied in certain (very limited) ways in which share capital account may not. The existence of a nominal amount of share capital attributable to a share, which rapidly ceases to have any significance other than a historical one, tends to confuse the layman. The only real function of nominal value is to set a minimum price below which shares cannot be issued. But as long as all the proceeds of an issue are retained in an undistributable capital

account, there is no reason to impose any particular limit below which the issue price cannot fall. Thus arguments based on the need for a minimum issue price are in our view misconceived. New issues of shares can never damage creditors, indeed they will always be for their benefit. Members of a company issuing NPV shares are well aware of the commercial position on the price that can be charged for a new issue. For these reasons, we would favour the end, for public and private companies alike, of the requirement for shares to have a nominal or par value.

5.4.28 There is no formal requirement in the EU Company Law Directives for shares to have a nominal value. However, both the Second and the Fourth Directives require that shares have assigned to them, if not a nominal value, then at least a quantity called the 'accountable par' or 'accounting par value'. Furthermore, Article 8 of the Second Directive requires that NPV shares of public companies may not be issued below their 'accountable par'. The precise constraints imposed by this 'accountable par' regime are still being investigated: in particular, the question whether (unlike nominal value) the accountable par of a class of share can be adjusted for new issues, enabling shares to be issued at a lower accountable par to the previous issue. In any event, however, it seems clear that the Second Directive would not permit a true NPV regime, in which the issue price would be freely determined at the time of issue and all the proceeds of issue credited to a single capital account.

5.4.29 We understand that the Department will be exploring with the Commission the scope for modifying the requirements of the Second Directive relating to the nominal or 'accountable par' values of shares of public companies, and will be consulting on the options.

5.4.30 If this is not achievable, we recognise that to introduce NPV shares only for private companies would mean that when they go public they will need to convert into par value form. But we do not regard this as a major difficulty.

5.4.31 We also recognise that our proposal raises transitional questions:

- whether existing companies should be required to convert their existing share capital and register the conversion;

- or whether a system which merely deems existing nominal value shares to be NPV would be feasible[87];
- or whether it would be better to allow existing companies to choose between the two approaches.

5.4.32 We would suggest that the funds subscribed for NPV shares, less the amounts paid out in expenses and commission on the issue of those shares, should be treated as capital funds which could only be reduced as discussed above. But by contrast with the provisions of section 130(2) for application of share premium account, we would not include the expenses of an issue of debentures as an exception to the general rule on the ground that this is inconsistent with the principle that the reserve established on the issue of share capital should be at least equivalent to the net proceeds of the issue.

5.4.33 We would welcome the views of consultees on the following points:

Question 32 **Should both new public and new private companies cease to be permitted to assign nominal values to their shares?**

Question 33 **If the Second Directive continues to require that shares of public companies are assigned either a nominal or an 'accountable par' value (ie that the shares have attributed to them a fixed amount of the share capital reserve) is there value in taking advantage of the limited flexibility provided by the accountable par provisions of the Directive?**

Question 34 **If nominal shares are abolished for any class of new companies:**

(a) should existing companies be required to convert their existing share capital and register the conversion?

(b) or should existing shares merely be deemed to be of no par value with consequential effects on the balance sheet?

87: As has been done in New Zealand – see Chapter 4.

(c) **or should existing companies be permitted to choose between having nominal value shares and no par shares?**

Question 35 **In cases where no par value shares are adopted should the rules on the distributability of reserves be as proposed in paragraph 5.4.32 – ie there should be a single reserve for share capital equal to the net proceeds of the issue – ie with no right to write off the expenses of an issue of debentures against this reserve?**

Question 36 **If nominal value shares continue to be permitted, should the equivalent regime be applied to share capital and share premium accounts?**

5.5.1 The main topics dealt with by the Act include the formation of companies of various types; shares and share capital; company disclosure, including accounts and audit; and company management, including the role of directors and of the general meeting, where auditors also have a role to play. But much of the regulation in these areas is not in the Act. A substantial body of secondary legislation has been made under the Act; accounts must, in most circumstances, be prepared in accordance with accounting standards; listed companies are bound by the Stock Exchange Rules; takeovers are conducted according to the City Code on Takeovers and Mergers; listed companies must, under the listing rules, indicate in their annual report compliance with the Combined Code on corporate governance. The nature of the obligation, and the consequences of breach, are different in each case. In some areas two or three layers of regulation are superimposed. The table at Annex F summarises the different rule-making and enforcement jurisdictions currently operating in company law and related areas[88].

5.5.2 The table illustrates a spectrum of techniques. At one end, there are statutory obligations set out in the Act itself, with criminal and/or civil sanctions for non-compliance. At the other are the provisions of the Combined Code on corporate governance, where the obligation is one of disclosure only, and the formal sanctions for non-disclosure are limited to those provided for in the Stock Exchange Rules. (In this case, as in some others, the most effective sanction in practice is loss of reputation and of shareholder support). In between are accounting standards, where the rule-making role has been conferred upon a qualified non-governmental body, while the rules themselves are accorded some statutory recognition[89]. The table is not fully comprehensive, notably for investment exchanges[90].

88: The definition of 'related areas' is somewhat arbitrary. We have excluded, for brevity, and as not directly within our terms of reference:- corporate insolvency; corporate forms other than limited and unlimited Companies Act companies, including building societies, friendly societies and open ended investment companies; and sector-specific regulation e.g. insurance, banking, charities, and investment business. However, we recognise that there may be 'knock-on' effects, of which we must take account, between any of these areas and company law as we have defined it.

89: Schedule 4, paragraph 36A requires company accounts to state whether they are prepared in accordance with accounting standards, and to explain departures (other than small and medium-sized companies, see Chapter 6.14-15 below).

90: The main Stock Exchange Listing Rules are included in the Annex, but the rules of the Exchange's Alternative Investment Market (AIM) are not. Equities traded on AIM are unlisted, and must therefore produce a prospectus complying with the Public Offer of Securities Regulations (q.v.). Nor are the rules of Tradepoint – the only recognised UK investment exchange apart from the London Stock Exchange on which equities are traded – mentioned. These equities are officially listed and must comply with those of the Stock Exchange 'Yellow Book' provisions which implement Part IV of the Financial Services Act.

PAGE 14, ARTICLE 17 –

For Article 17 substitute the following Article –

"17 Article 104 amended

In Article 104 of the principal Law –

(a) for paragraph (2) there shall be substituted the following paragraphs –

'(2) The accounts must be prepared in accordance with any generally accepted accounting principles.

(2A) The accounts of a company must specify the generally accepted accounting principles that have been adopted in their preparation.

(2B) The accounts of a company must show a true and fair view of, or be presented fairly in all material respects so as to show –

(a) the company's profit or loss for the period covered by the accounts; and

(b) the state of its affairs at the end of the period,

and must otherwise comply with any other requirements of this Law.';

(b) in paragraph (4)(b) for the words 'subject in the case of a private company to paragraph (5)' there are substituted the words 'subject to paragraph (5)'.".

PAGE 14 –

After Article 20 insert the following Article –

"21 Article 110 amended

In Article 110 of the principal Law for paragraph (3) there shall be substituted the following paragraph –

'(3) The report must state whether, in the opinion of the auditor, the accounts –

(a) have been properly prepared in accordance with this Law; and

(b) give a true and fair view or, alternatively, are presented fairly in all material respects.'.",

PRESS RELEASE

AMENDMENTS TO THE COMPANIES LAW

A number of key changes to the Companies Law are being proposed by the Minister for Economic Development, Senator Philip Ozouf. The aim of these changes is to both up-date and introduce more flexibility, to the Companies Law. This will benefit all users of Jersey companies and specifically the Funds and Trust sector of the finance industry.

One of the most significant proposals which will benefit the Funds sector is to allow a company to hold treasury shares. This change means that a company can purchase its own shares and hold them for a limited time, rather than cancel them. If adopted this means that a company would be able to purchase its own shares from one investor and then transfer them to a new investor.

Another recommendation is to allow a regulated financial services business to act as a corporate director of a Jersey company. It is currently common practice for directors of companies to be employees provided by a regulated business. It makes more sense that the business itself, rather than the employees, should act as the director. This will benefit the trust industry by reducing the administration burden on companies when an employee leaves.

A further change is proposed to move away from complicated, time consuming and often expensive procedures when certain types of companies wish to reduce capital or distribute money to its shareholders. The key to these changes is the adoption of a simplified procedure requiring directors to make a statement in relation to the company's solvency. This will greatly simplify the ability of a company to make payments to its shareholders while maintaining protection for creditors.

Senator Ozouf is also proposing that some rules are removed. One such rule prevents a person acquiring a company using a loan, and at the same time using the shares in the company as security for that loan. This rule is technically known as the prohibition against a company giving financial assistance for the purchase of its own shares. As with many of the proposed changes to the Companies Law, the new rules permitting financial assistance act to safeguard the interests of creditors by concentrating on the solvency of the company.

Senator Ozouf commented: "The proposed amendments set out a number of substantial and important changes to the Companies Law. They are all aimed at ensuring that Jersey companies remain flexible vehicles suitable for the widest possible range of corporate activity. I am convinced that these changes will help to ensure that Jersey companies continue to be widely used, and will be beneficial to the Island."

Notes to Editors

For further information please contact James Mews Executive, Finance Industry Development on 440413

Timing

The changes have been lodged in order to be debated by the States as soon as possible in 2008.

Consultation

The proposals have been through the normal consultation process. The proposals have been comprehensively discussed with industry following a consultation paper published in 30 April 2006 and the draft legislation considered by a steering group, industry and the Financial Services Commission.

MINISTER FOR ECONOMIC DEVELOPMENT

AMENDMENTS TO THE COMPANIES (JERSEY) LAW 1991

1 THE ISSUE AND RECOMMENDATION

1.1 It is proposed to amendment the Companies (Jersey) Law 1991 ("**the Law**") through the Companies (Amendment No 9) (Jersey) law 200- ("**the Amendment**") and Companies (Amendment No 2) (Jersey) Regulations 200- ("**the Regulations**").

1.2 It is recommended that the Minister for Economic Development approves the Regulations and the Amendment, signs the statement of Human Rights compliance and that the Finance Industry Development Executive takes the necessary steps to lodge the Regulations and Amendment au Greffe by 20 November 2007 to be debated by the States as soon as possible thereafter.

2 BACKGROUND

2.1 The purpose behind the Amendment and Regulations is to modernise aspects of the Law in accordance with international developments to introduce more flexibility and simplicity into the Law.

2.2 The proposals have been through the normal consultation process. The proposals have been subsequently comprehensively discussed with industry following a consultation paper published in 30 April 2006. The draft legislation has been considered by a steering group, industry and the Commission neither of whom object to their adoption.

2.3 There are no financial or manpower implications arising from the proposals.

2.4 The Law Officers Department have indicated that the Amendments do not raise any Human Rights issues and that all tariffs for new offences created are commensurate with similar existing offences.

3 THE AMENDMENT TO THE LAW

3.1 The Amendment makes a number of changes to the Law, both minor and important.

3.2 The most significant change is the amendment to Articles 114 and 115, which will permit a Jersey company to make a distribution provided the directors make a statement in relation to the company's solvency. This will greatly simplify the ability of a company to make payments to its shareholders while

maintaining protection for creditors and is in accordance with a general trend in corporate law worldwide.

3.3 The amendment also simplifies the ability of certain types of company to reduce their capital accounts, again with the focus being on creditor protection.

3.4 Finally, there are a number of minor changes aimed at increasing the law's flexibility. Examples include allowing a public company to include the abbreviation "plc" in its name and reducing certain notice periods to 14 days.

3.5 Taken together, the amendments will further encourage the use of Jersey companies, and be beneficial to the Island.

4 REGULATIONS

4.1 The Regulations set out a number of substantial and important changes to the Companies Law, all encouraged to ensure that Jersey companies remain flexible vehicles suitable to the widest possible range of corporate activity. The most significant changes are set out below.

4.2 Regulation 6 removes the prohibition against a company giving financial assistance for the purchase of its own shares. This has been a longstanding problem, as it effectively makes it difficult for a person to acquire a company using a loan and at the same time using the shares in the company as security for that loan. As with many changes to the new Law, the principle is that, provided the company remains solvent, the actions of a company are its internal affairs. The prohibition against financial assistance has been lifted in the UK and it will significantly assist the finance industry to follow suit in Jersey.

4.3 Regulation 7 introduces treasury shares, which will permit a company that purchases its own shares to hold them for a limited duration, rather than cancel them. This means that a company can purchase its own shares and them transfer them to a new investor much more easily, which will be of particular use to the funds sector.

4.4 Regulation 8 permits a regulated financial services business to act as a corporate director of a Jersey company, which will again assist industry. In practice, many directors are provided by regulated businesses, and it makes sense that those businesses, rather than its employees, should act as directors.

4.5 Regulation 12 permits cells of cell companies to have different boards of directors.

4.6 There are also a number of minor changes of a technical nature. The majority of these arose from the introduction of Amendment No.8 to the Companies Law and suggestions that have been received in relation to how these provisions could better operate in practice.

5 SUMMARY

5.1 In summary, the changes will further encourage the use of Jersey companies, and be beneficial to the Island.

5.2 No measurable cost or manpower implications arise for the Commission, or the States .

6 RECOMMENDATION

6.1 It is recommended that the Minister for Economic Development approves the Regulations and the Amendment, signs the statement of Human Rights compliance, and that the Finance Industry Development Executive takes the necessary steps to lodge the Regulations and Amendment au Greffe by 20 November 2007 to be debated by the States as soon as possible thereafter.

JAMES MEWS
Finance Industry Development Executive

Amending provisions in the Companies (Jersey) Law 1991

2 Meanings of "subsidiary", "wholly-owned subsidiary" and "holding body"

(5) The Minister may by Order modify the provisions of this Article and Article 2A and, without prejudice to the generality of the foregoing, any such Order may amend the meanings of "subsidiary", "wholly-owned subsidiary", "holding body" and "holding company" for the purposes of all or any provisions of this Law.

59 Power of States to amend Part 11

The States may amend this Part by Regulations.

73 Directors

(5) The States may, by Regulations, amend this Article.

108 Power to make Regulations as to accounts

(1) The States may by Regulations extend or modify the provisions of this Part. *["This Part" apparently referring to Part 16]*

(2) Without prejudice to the generality of the foregoing, such Regulations may provide for –

(a) the inclusion in accounts of group accounts dealing with the affairs of a company and its subsidiaries;

(b) the inclusion in accounts of a report by the directors dealing with such matters as may be specified;

(c) the accounting principles to be applied in the preparation of accounts;

(d) the appointment, remuneration, removal, resignation, rights and duties of auditors,

and different provisions may be made for different cases or classes of case.

(3) Such Regulations may further provide for the imposition of fines in respect of offences under the Regulations.

113D Power of Minister to amend qualifications

Notwithstanding Articles 113, 113A, 113B and 113C, the Minister may by Order –

(a) amend the definition of "recognized professional body" in Article 1(1) by adding, deleting or substituting any body;

(b) provide that any partnership or body corporate of a class described in the Order shall, on such conditions as are specified in the Order, be qualified for appointment under Article 109 as auditor of a company; or

(c) amend Article 113C(2)(a), (b) or (c) by adding, deleting or substituting persons who are disqualified for such an appointment, or by varying the circumstances in which persons described in that paragraph are disqualified for such an appointment.

124A Power of States to amend Part 18

The States may amend this Part by Regulations.

127YN Power of States to amend Part

The States may amend this Part by Regulations. *["This Part" apparently referring to Part 18D]*

220 General provisions as to Regulations and Orders

(1) Except insofar as this Law otherwise provides, any power conferred thereby to make any Regulations or Order may be exercised –

(a) either in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of case; and

(b) so as to make in relation to the cases in relation to which it is exercised –

(i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise),

(ii) the same provision for all cases in relation to which the power is exercised or different provisions for different cases or classes of case, or different provisions as respects the same case or class of case for different purposes of this Law, or

(iii) any such provision either unconditionally or subject to any specified conditions.

(2) Without prejudice to any specific provision of this Law, any Regulations or Order under this Law may contain such transitional, consequential, incidental or supplementary provisions as appear to the States or the Minister, as the case may be, to be necessary or expedient for the purposes of the Regulations or Order.

Amending provisions in the Companies (Jersey) Law 1991

2 Meanings of "subsidiary", "wholly-owned subsidiary" and "holding body"[143]

(5) The Minister may by Order modify the provisions of this Article and Article 2A and, without prejudice to the generality of the foregoing, any such Order may amend the meanings of "subsidiary", "wholly-owned subsidiary", "holding body" and "holding company" for the purposes of all or any provisions of this Law.

59 Power of States to amend Part 11

The States may amend this Part by Regulations.

73 Directors[162]

(5) The States may, by Regulations, amend this Article.

108 Power to make Regulations as to accounts

(1) The States may by Regulations extend or modify the provisions of this Part. *["This Part" apparently referring to Part 16]*

(2) Without prejudice to the generality of the foregoing, such Regulations may provide for –

(a) the inclusion in accounts of group accounts dealing with the affairs of a company and its subsidiaries;

(b) the inclusion in accounts of a report by the directors dealing with such matters as may be specified;

(c) the accounting principles to be applied in the preparation of accounts;

(d) the appointment, remuneration, removal, resignation, rights and duties of auditors,

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(c) amend Article 113C(2)(a), (b) or (c) by adding, deleting or substituting persons who are disqualified for such an appointment, or by varying the circumstances in which persons described in that paragraph are disqualified for such an appointment.

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(a) either in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of case; and

(b) so as to make in relation to the cases in relation to which it is exercised –

(i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise),

(ii) the same provision for all cases in relation to which the power is exercised or different provisions for different cases or classes of case, or different provisions as respects the same case or class of case for different purposes of this Law, or

(iii) any such provision either unconditionally or subject to any specified conditions.

(2) Without prejudice to any specific provision of this Law, any Regulations or Order under this Law may contain such transitional, consequential, incidental or supplementary provisions as appear to the States or the Minister, as the case may be, to be necessary or expedient for the purposes of the Regulations or Order.

Reports for Companies Amendment No.9 and Regulations No.2

Amendment No.9

This short amendment to the Companies Law makes a number of changes to the Law, both minor and important.

The most significant change is the amendment to Articles 114 and 115, which will permit a Jersey company to make a distribution provided the directors make a statement in relation to the company's solvency. This will greatly simplify the ability of a company to make payments to its shareholders while maintaining protection for creditors and is in accordance with a general trend in corporate law worldwide.

The amendment also simplifies the ability of certain types of company to reduce their capital accounts, again with the focus being on creditor protection.

Finally, there are a number of minor changes aimed at increasing the law's flexibility. Examples include allowing a public company to include the abbreviation "plc" in its name and reducing certain notice periods to 14 days.

Taken together, the amendments will further encourage the use of Jersey companies, and be beneficial to the Island.

There are no financial or manpower implications arising from this amendment.

Regulations No.2

These Regulations set out a number of substantial and important changes to the Companies Law, all encouraged to ensure that Jersey companies remain flexible vehicles suitable to the widest possible range of corporate activity.

In turn, the more important changes include:

- The introduction of treasury shares, which will permit a company that purchases its own shares to hold them for a limited duration, rather than cancel them. This means that a company can purchase its own shares and them transfer them to a new investor much more easily, which will be of particular use to the funs sector;
- The removal of the prohibition against a company giving financial assistance for the purchase of its own shares. This has been a longstanding problem, as it effectively makes it difficult for a person to acquire a company using a loan and at the same time using the shares in the company as security for that loan. As with many changes to the new Law, the principle is that, provided the company remains solvent, the actions of a company are its internal affairs. The prohibition against financial assistance has been lifted in the UK and it will significantly assist the finance industry to follow suit in Jersey.
- A regulated financial services business will be permitted to act as a corporate director of a Jersey company, again helping the industry. In practice, many

directors are provided by regulated businesses, and it makes sense that those businesses, rather than its employees, should act as directors.

- Cells of cell companies will be permitted to have different boards of directors.

There are a number of minor changes of a technical nature. The majority of these arose from the introduction of Amendment No.8 to the Companies Law and suggestions that have been received in relation to how these provisions could better operate in practice.

Taken together, the amendments will further encourage the use of Jersey companies, and be beneficial to the Island.

There are no financial or manpower implications arising from this amendment.

CHAPTER 8
DIRECTORS' RESIDENTIAL ADDRESSES: PROTECTION FROM DISCLOSURE

240 Protected information

(1) This Chapter makes provision for protecting, in the case of a company director who is an individual—
(a) information as to his usual residential address;
(b) the information that his service address is his usual residential address.
(2) That information is referred to in this Chapter as "protected information".
(3) Information does not cease to be protected information on the individual ceasing to be a director of the company.
References in this Chapter to a director include, to that extent, a former director.

241 Protected information: restriction on use or disclosure by company

(1) A company must not use or disclose protected information about any of its directors, except—
(a) for communicating with the director concerned,
(b) in order to comply with any requirement of the Companies Acts as to particulars to be sent to the registrar, or
(c) in accordance with section 244 (disclosure under court order).
(2) Subsection (1) does not prohibit any use or disclosure of protected information with the consent of the director concerned.

242 Protected information: restriction on use or disclosure by registrar

(1) The registrar must omit protected information from the material on the register that is available for inspection where—
(a) it is contained in a document delivered to him in which such information is required to be stated, and
(b) in the case of a document having more than one part, it is contained in a part of the document in which such information is required to be stated.
(2) The registrar is not obliged—
(a) to check other documents or (as the case may be) other parts of the document to ensure the absence of protected information, or
(b) to omit from the material that is available for public inspection anything registered before this Chapter comes into force.
(3) The registrar must not use or disclose protected information except—
(a) as permitted by section 243 (permitted use or disclosure by registrar), or
(b) in accordance with section 244 (disclosure under court order).

243 Permitted use or disclosure by the registrar

(1) The registrar may use protected information for communicating with the director in question.
(2) The registrar may disclose protected information—
(a) to a public authority specified for the purposes of this section by regulations made by the Secretary of State, or
(b) to a credit reference agency.
(3) The Secretary of State may make provision by regulations—
(a) specifying conditions for the disclosure of protected information in accordance with this section, and
(b) providing for the charging of fees.
(4) The Secretary of State may make provision by regulations requiring the registrar, on application, to refrain from disclosing protected information relating to a director to a credit reference agency.
(5) Regulations under subsection (4) may make provision as to—
(a) who may make an application,
(b) the grounds on which an application may be made,
(c) the information to be included in and documents to accompany an application, and
(d) how an application is to be determined.
(6) Provision under subsection (5)(d) may in particular—
(a) confer a discretion on the registrar;
(b) provide for a question to be referred to a person other than the registrar for the purposes of determining the application.
(7) In this section—
"credit reference agency" means a person carrying on a business comprising the furnishing of information relevant to the financial standing of individuals, being information collected by the agency for that purpose; and
"public authority" includes any person or body having functions of a public nature.
(8) Regulations under this section are subject to negative resolution procedure.

244 Disclosure under court order

(1) The court may make an order for the disclosure of protected information by the company or by the registrar if—
(a) there is evidence that service of documents at a service address other than the director's usual residential address is not effective to bring them to the notice of the director, or
(b) it is necessary or expedient for the information to be provided in connection with the enforcement of an order or decree of the court,
and the court is otherwise satisfied that it is appropriate to make the order.
(2) An order for disclosure by the registrar is to be made only if the company—
(a) does not have the director's usual residential address, or
(b) has been dissolved.

(3) The order may be made on the application of a liquidator, creditor or member of the company, or any other person appearing to the court to have a sufficient interest.
(4) The order must specify the persons to whom, and purposes for which, disclosure is authorised.

245 Circumstances in which registrar may put address on the public record

(1) The registrar may put a director's usual residential address on the public record if—
(a) communications sent by the registrar to the director and requiring a response within a specified period remain unanswered, or
(b) there is evidence that service of documents at a service address provided in place of the director's usual residential address is not effective to bring them to the notice of the director.
(2) The registrar must give notice of the proposal—
(a) to the director, and
(b) to every company of which the registrar has been notified that the individual is a director.
(3) The notice must—
(a) state the grounds on which it is proposed to put the director's usual residential address on the public record, and
(b) specify a period within which representations may be made before that is done.
(4) It must be sent to the director at his usual residential address, unless it appears to the registrar that service at that address may be ineffective to bring it to the individual's notice, in which case it may be sent to any service address provided in place of that address.
(5) The registrar must take account of any representations received within the specified period.
(6) What is meant by putting the address on the public record is explained in section 246.

246 Putting the address on the public record

(1) The registrar, on deciding in accordance with section 245 that a director's usual residential address is to be put on the public record, shall proceed as if notice of a change of registered particulars had been given—
(a) stating that address as the director's service address, and
(b) stating that the director's usual residential address is the same as his service address.
(2) The registrar must give notice of having done so—
(a) to the director, and
(b) to the company.
(3) On receipt of the notice the company must—
(a) enter the director's usual residential address in its register of directors as his service address, and

(b) state in its register of directors' residential addresses that his usual residential address is the same as his service address.
(4) If the company has been notified by the director in question of a more recent address as his usual residential address, it must—
(a) enter that address in its register of directors as the director's service address, and
(b) give notice to the registrar as on a change of registered particulars.
(5) If a company fails to comply with subsection (3) or (4), an offence is committed by—
(a) the company, and
(b) every officer of the company who is in default.
(6) A person guilty of an offence under subsection (5) is liable on summary

conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale.

(7) A director whose usual residential address has been put on the public record by the registrar under this section may not register a service address other than his usual residential address for a period of five years from the date of the registrar's decision.

INVESTMENT BUSINESS LAW CHANGES REQUIRED FROM REVIEW OF IOSCO/IAIS CORE PRINCIPLES

REF	ACTION	LAW / ORDER	SITUATION
(1)	Amend Financial Services (Jersey) Law 1998 to provide Commission with authority to disclose following information regarding market intermediaries: • Conditions in place on licence • Identity of senior management • Identity of investment advisers Requirement comes from ISOCO Principle 21.	Law	Amendments are currently being made to the FSJL as part of the CIF/FSJL merger. This should be a relatively simple change, effected by adding a clause within Article 38, "Permitted Disclosures". Industry will require notice of this change and some procedural changes will be required, particularly in respect of the gathering of information regarding investment employees (which is currently done annually) (PRM/David Banks)
(2)	Require auditors to provide assurance on ANLA calculations at year-end as well as on annual accounts. [Potential] requirement comes from IOSCO Principle 22.	Order (IB Accounts)	This is only a potential change and will need clarification – the IOSCO principles and methodology appear to be somewhat inconsistent. If an amendment is required it will be to the Investment Business Accounts Order.

Current accounting requirements and guidance for treasury shares.

UK GAAP - FRS 25 & IFRS - IAS 32

Where an entity reacquires its own shares, these shares (treasury shares) are deducted from equity. No gain or loss is recognised in the income statement on the purchase, sale, issue or cancellation of an entity's own equity instruments.

The acquisition and subsequent resale by an entity of its own equity instruments represents a transfer between equity holders rather than a gain or loss to the entity. Accordingly any gain or loss is recognised in equity.

The amount of treasury shares held is disclosed separately either on the face of the balance sheet or in the notes.

For information purposes - UK Company Law requirements

Under UK Company Law the purchase of shares to be held as treasury shares is made out of distributable profits and hence they will have been reduced by the amount of the purchase price. Where the subsequent sale proceeds are equal to or less than the purchase price paid by the company for the shares, the proceeds should be treated as a realised profit. Where the proceeds of sale exceed the purchase price paid by the company for its shares, that part of the proceeds that is equal to the purchase price paid should be treated as a realised profit of the company (i.e. to restore the original reduction in realised profits). A sum equal to the excess should be transferred to the share premium account (i.e. so that the purchase and sale of shares cannot create a realised profit).

Amendment to Jersey Law – Article 58

The amended article 58B covers the requirements on the subsequent sale of treasury shares and is in line with the accounting requirements of FRS 25 and IAS 32. There does not appear to be however any thing within Article 58 that notes that the original purchase of treasury shares must be made out of distributable profits. This would appear to be the intention given the ability to credit amounts back to distributable profits and so restore the original reduction.

Also noted there is a reference to share premium which would not be appropriate for no par value companies.

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Maintenance of cap issues.
Not out of dist. profits
Do we need to spell it out?.

COMPANIES (AMENDMENT No. 9) LAW

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JFSC
JERSEY FINANCIAL SERVICES COMMISSION

CONSULTATION PAPER

CONTENTS

JFSC
JERSEY FINANCIAL SERVICES COMMISSION

1 - EXECUTIVE SUMMARY

OVERVIEW

1.1 The Jersey Financial Services Commission (Commission) is determined to ensure that the Companies (Jersey) Law, 1991, as amended (the "Law"), provides a legal framework for companies which reflects the needs of the Island's economy.

1.2 This consultation paper sets out a number of the Commission's proposals in relation to the Law and seeks views on these proposals. The paper also describes the Commission's current policy and practices in those areas that will be affected by the proposals.

1.3 The Companies (Amendment No.8) (Jersey) Law ("Amendment No.8") will shortly become the subject of a separate consultation. This consultation paper is entitled Amendment Number X and assumes that, prior to becoming legislation, Amendment No.8 will precede it and not be subject to material changes.

1.4 Many of the proposed changes set out in this paper reflect the Commission's commitment to protecting the reputation of the Island. Changes that fall into this category include the introduction of a register of directors, and the creation of a record of external companies administered in Jersey. A third change is the clarification of the requirement to disclose to the Commission changes in the beneficial ownership and control of Jersey companies. This topic was the subject of a separate consultation process in 2002. The consultation paper number 1-2002 was entitled "Jersey Companies – The confidential disclosure to the Commission of beneficial ownership and activities". Following the completion of that consultation process a Steering Group has been set up to consider the policies and procedures relating to the definition of a beneficial owner and the procedures for notifying the Registrar of any changes to them. The changes proposed in this consultation paper which are set out in Section 5 relate to the mechanism for the annual notification of beneficial owners and activities.

1.5 Further proposals are made with the intention of easing the administrative burden upon individuals and entities responsible for the administration of Jersey companies through the increased use of electronic communication. In this regard it should be noted that this Amendment No.X is intended to come into effect at or around the same time as the Electronic Communications Order, which will pave the way toward a system of electronic filing of documents at the Registry. A separate section of this paper sets out the changes to the annual return process that are proposed to take place in conjunction with the move to electronic filing.

1.6 It is anticipated and hoped that the majority of changes proposed in this consultation document will be included in the Companies (Amendment No.X) (Jersey) Law ("Amendment No.X"). The Commission would like to be in a position to place Amendment No.X before the States of Jersey by the end of 2003. Should this timetable be met, it is likely that the Amendment would receive Royal Assent in the summer of 2004, with a number of the proposed new requirements to file certain information with the Registry being introduced as part of the 2005 annual return process.

1 - EXECUTIVE SUMMARY - CONTINUED

1.7 The aim of the Registry is to be in a position to accept electronic filing of documents, including annual returns, by no later than the beginning of 2005. The benefits accruing to both the Registry, users of the Registry and FSBs through the introduction of an electronic, automated filing facility will be significant, and should result in reduced administrative costs to all parties. Electronic filing will also pave the way towards establishing a mechanism for a web-based company search facility, which will reduce the administrative burden on all parties still further. The Commission is aware, however, that moving to electronic filing will require careful, often technical, consultation with those who will be using the filing system. This consultation is initially being managed through the Registry Users' Group, a consultation group comprising members of the Registry and a number of users of the facilities offered by the Registry, including representatives from accountancy, company administration, legal and trust company firms.

It should be emphasised that the new filing requirements proposed in Amendment No. X will only be implemented when an IT solution is agreed with the Registry Users' Group and is in place to facilitate the electronic filing of information.

1.8 A number of disparate, less substantial proposals are also put forward with the aim of simplifying the Law. Many of these proposals are in line with those currently being proposed in the UK. Others will help to clarify certain processes introduced by the Companies (Amendment No.6) (Jersey) Law ("Amendment No.6"), which came into force in 2002. A number of proposals are the result of suggestions made by the Registry Users' Group and by users of the Law generally. It is hoped that the majority of these changes will not prove to be contentious.

1.9 The Commission anticipates that many of the proposals set out in this paper will prove helpful to the overwhelming majority of users of the Law, whether members of the finance industry, directors or owners of Jersey companies, or simply those seeking to transact with Jersey companies.

1.10 As a general principle, it is suggested that basic matters of company law be set out in primary legislation, but that, insofar as is possible, technical matters and points of detail which are likely to require amendment as business practices change and develop, be set out in secondary legislation. This will be a fundamental aspect of the manner in which any changes are introduced to the Law and is in line with current UK proposals.

1 - EXECUTIVE SUMMARY - CONTINUED

1.11 The purposes of this consultation paper are to –

(a) set out the background and particulars concerning each of the Commission's proposals;

(b) request, in confidence, information that will assist the Commission in determining what action, if any should be taken; and

(c) invite comment from all interested parties.

CONSULTATION

1.12 The Commission issues this paper under Article 8(2) of the Financial Services Commission (Jersey) Law 1998, as amended, where the Commission

"may, in connection with the carrying on of its functions consult and seek the advice of such persons or bodies whether inside or outside the Island as it considers appropriate."

1.13 The Commission invites written comments from all interested parties on this consultation paper and the specific questions posed by it.

1.14 Following a general period of consultation, the Commission proposes to:

1.14.1 prepare a brief for the Law Draftsman on amendments to the Companies Law; and

1.14.2 discuss developments of policy, processes and procedures with the Registry Users' Group.

2 - BACKGROUND

COMPANIES REGISTERED IN JERSEY

2.1 The Companies Registry is maintained and managed by the Jersey Financial Services Commission.

2.2 The total number of Jersey registered companies as at 31 December 2002 was 33,043. Approximately two-thirds of these are "exempt" companies[1]. The number of companies incorporated in 2002 was 2829.

2.3 Demand for Jersey registered companies is created not only by the quality, reputation and the expertise of individual financial institutions, but also through the overall business and regulatory climate fostered by the Island's authorities in order to secure and maintain customer confidence in the finance industry as a whole. The Island has a policy of being at the forefront of the world's well-regulated financial centres.

2.4 Companies are registered and administered in accordance with the Law and the Control of Borrowing (Jersey) Order 1958, as amended.

THE COMMISSION

2.5 The Commission is a statutory body corporate established under the Financial Services Commission (Jersey) Law 1998, as amended.

2.6 The Commission's guiding principles[2] require it to have regard to:

2.6.1 the reduction of the risk to the public of financial loss due to dishonesty, incompetence or malpractice by, or the financial soundness of, persons carrying on the business of financial services in or from within the Island;

2.6.2 the protection and enhancement of the reputation and integrity of the Island in commercial and financial matters;

2.6.3 the best economic interests of the Island, and, in pursuit of the above,

2.6.4 contributing to the fight against financial crime.

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1. A company can be exempt from paying Jersey income tax under the Income Tax (Jersey) Law 1961 if it meets certain criteria and pays an annual exempt company fee. To obtain this exemption the company must disclose, to the satisfaction of the Commission, the beneficial owner(s) of the company.

2. Article 7, Financial Services Commission (Jersey) Law 1998, as amended.

3 - REGISTER OF DIRECTORS

3.1 Jersey is unusual among mature jurisdictions in not maintaining a register of directors of all companies[3]. A company search does not reveal the identity of the directors of a private company. This is often information that those requesting a company search both expect and require. In comparable jurisdictions, such a register is maintained, open to public inspection, with details of a company's directors typically provided to the relevant registry on both an ongoing basis and within the annual return.

3.2 This is an anomalous position. Directors are responsible for the day to day administration of the company, and it is reasonable that anyone seeking to transact with a company should be able to confirm the identity of that company's directors. The Commission feels that this information should be in the public domain.

3.3 The Commission can see no reason why the directors of each Jersey registered company should not be revealed by a company search. It is therefore proposed that the Registrar of Companies establish a Register of Directors containing this information.

3.4 Article 71 of the Law currently provides that public companies must submit details of their directors and secretary as part of the annual return process. It is proposed that private and public companies should be subject to the same requirements in relation to this matter, as set out in the following paragraph.

3.5 In order to create and maintain the Register of Directors, it is suggested that an obligation be placed upon all companies to ensure that details of their directors are included at the time each Jersey company is incorporated and in each annual return thereafter. To minimise any administrative burden, it is proposed that existing private companies will not be required to notify the Registrar of their directors until the first annual return following the coming into force of the Amendment No.X. It is further proposed that, following initial registration of directors, both private and public companies be required to inform the Registrar of changes in directorship on an ongoing basis, within 28 days of such changes occurring. It is hoped and anticipated that the majority of all necessary filings in this regard will be made electronically.

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3. Dublin, the Isle of Man and the UK all operate registers of directors along the lines proposed in this paper. Guernsey does not have a centralised register, but requires each company to keep a register of directors open for public inspection at its registered office. Currently, in Jersey, a similar requirement applies only in relation to public companies.

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3 - REGISTER OF DIRECTORS - CONTINUED

3.6 The Commission proposes that the information disclosed to the Registrar should comprise that information kept in the register of directors maintained by each company secretary in accordance with Article 84 of the Law, namely:

3.6.1 his present forenames and surname;
3.6.2 any previous forenames or surname;
3.6.3 his business or usual resident address;
3.6.4 his nationality;
3.6.5 his business occupation (if any);
3.6.6 his date of birth; and
3.6.7 the date upon which he became a director and, where appropriate, the date on which he ceased to be a director.

3.7 The Commission would ask the following questions in relation to the above:

3.7.1 Do any practical difficulties arise from the requirement to disclose directors' particulars in the manner proposed?

3.7.2 Are there any circumstances when it would not be appropriate for the identity of the directors of a Jersey company to be revealed by a company search? If so, what criteria should be established to determine when such information should be withheld?

4 - RECORD OF FOREIGN INCORPORATED COMPANIES ADMINISTERED IN JERSEY

JFSC
JERSEY FINANCIAL SERVICES COMMISSION

4.1 The Commission believes that any companies that can be associated with Jersey may pose a reputational risk to the Island. It is not only companies incorporated in Jersey that will be associated with the Island: any foreign incorporated companies ("FICs") administered or operating in the Island may also pose a significant reputational risk. It is therefore proposed that the Registrar establish a record of all FICs administered or operating in Jersey.

4.2 At present, the Commission keeps no record of FICs administered or operating in the Island[4]. In the absence of such a record, it is impossible to calculate the number of FICs administered in Jersey. Estimates vary, but extrapolating the figures from a representative sample of members of the Jersey Association of Trust Companies taken in late 1999 suggests that at that time the total number of FICs was in the region of 27,000, that the fees generated by such companies was in the region of £80,000,000, and that the total positive economic impact of such companies on the Island could be as high as £200,000,000 annually.

4.3 The Commission believes that the presence of a record of FICs would have at least four significant advantages:

4.3.1 increase the level of transparency surrounding FICs;

4.3.2 provide the Commission with basic information in relation to all economic activity that may be carried on from within the Island;

4.3.3 ensure the Commission may lend assistance to any investigation of such companies; and

4.3.4 allow the Island's authorities to properly assess the economic activity generated by FICs.

4.4 In his report, Andrew Edwards recommended that:

> *Companies administered or otherwise operating in the Islands, but incorporated elsewhere, should be subject to a registration and regulatory regime similar to that for locally incorporated companies. (S102)*

4. A number of FICs are regulated under the Control of Borrowing (Jersey) Order 1958, though this is believed to be a very small proportion of the overall number of FICs administered or operating in the Island.

4 - RECORD OF FOREIGN INCORPORATED COMPANIES ADMINISTERED IN JERSEY - CONTINUED

4.5 Since the publication of the Edwards report, the introduction of the Financial Services (Jersey) Law (the "FSJL") has, by imposing strict 'know your customer' requirements upon FSBs, brought the administration of FICs within the Island's regulatory environment. It would in the Commission's view be inappropriate and counter-productive to introduce further requirements, beyond the establishment of a record of FICs, unless as part of a wider international initiative.

4.6 Nevertheless, for the reasons set out in 4.3 above, the Commission believes it is in the best interests of the Island to ensure that a record is held of all FICs administered in or operating from the Island. The following concerns have been raised in relation to this proposal:

4.6.1 Competing jurisdictions do not operate such a record. Jersey may therefore suffer as a result of introducing further registration requirements which may create a perception among existing and potential customers that legitimate confidentiality is being eroded. Reference has been particularly made to the ease with which the administration of FICs can be transferred to other jurisdictions that do not have the same level of regulation.

4.6.2 The principal responsibility for regulating FICs, and the principal reputational risk attached to them lies with the jurisdiction where such entity was incorporated. Any proposal to monitor in any way FICs may 'backfire' in terms of damaging Jersey's reputation by creating the impression that the Commission regulates such companies. This may actually increase the reputational risk FICs pose to the Island.

4.7 The Commission has reviewed these concerns carefully. It is clear that the existence of a record of FICs is desirable in order to ensure that the Island meets the Edwards' recommendations and in reaffirming the importance of the principle of transparency in financial services business conducted in the Island. The Commission's conclusions in respect of the concerns described above are set out below.

4.7.1 The Commission does not accept that other jurisdictions do not operate a register of FICs. The UK maintains a register of FICs with either a branch or a place of business in the UK. Other offshore jurisdictions, including Guernsey, are in the process of considering this issue. The Isle of Man operates a register of companies incorporated in another jurisdiction that establishes a place of business in the Isle of Man, though this register is primarily of trading businesses and comprised only 241 companies as at the end of 2002. The Commission does not believe that the administrative burden of informing the Registrar of all FICs that FSBs service will be onerous and does not accept that the proposal would have a significant effect upon this type of business.

4 - RECORD OF FOREIGN INCORPORATED COMPANIES ADMINISTERED IN JERSEY - CONTINUED

4.7.2 The Commission does not believe that establishing a record of FICs will result in the erosion of legitimate confidentiality. The information held on the record will be limited to a small number of defined, factual matters, as set out in paragraph 4.8. The Commission cannot envisage any *bona fide* reason for objecting to the disclosure of such information.

4.7.3 The Commission agrees that it does not want to be perceived as regulating FICs, and wholeheartedly endorses the proposition that the principal responsibility for regulating any company must be that company's jurisdiction of incorporation. However, it regards the view that the proposal may 'backfire' as misconceived. The experience of the Commission is that in the event of any disreputable FICs operating from a Jersey address a significant reputational risk is posed to the Island. Whether it is fair or correct to associate such entities with the Island is irrelevant: experience has shown that such an association is made, and consequentially, damage is caused to Jersey's reputation.

4.7.4 In the event that controversy were to arise concerning an FIC administered in Jersey, the Commission does not believe that a regulator that is apparently ignorant of the presence of such FIC and is unable to offer an investigation any assistance would enhance Jersey's reputation. On the other hand, if the Commission is able to provide assistance with such investigation, such as, for example, emphasising the jurisdiction of incorporation of the FIC, this can only be of benefit to the Island's reputation.

4.8 The Commission proposes that the record of FICs should set out, in relation to each FIC, particulars of its name, place and date of incorporation and registered number in that place, its registered office or principal place of business and the address in Jersey at which documents can be served upon the company (usually, this will be the Jersey FSB providing administrative services). The first items are a matter of record in the company's place of jurisdiction and the Commission does not accept that disclosing a service of process address in the Island could be regarded as a breach of client confidentiality.

4.9 Currently, all FSBs providing trust company services (as defined in the FS(J)L) to FICs are required, under Codes of Practice, to have due regard to the principles of the sensitive activities documents issued by the Registry from time to time. This obligation will continue unaltered, as will the right of the Commission to require further information from FSBs in relation to any FICs they administer.

4.10 The goal of the Commission is to place the Record of FICs on its website and to allow online searches to be made against FICs. It is unlikely, however, that such a facility will be in place at the time Amendment No.X comes into force. Initially, therefore, it is anticipated that the Record of FICs will be searchable in a similar manner to the register of Jersey companies: namely, on a company by company basis, with the Registry charging a fee for each search carried out against an FIC.

4 - RECORD OF FOREIGN INCORPORATED COMPANIES ADMINISTERED IN JERSEY - CONTINUED

4.10.1 Do you agree with the proposal to allow searches against FICs to be made in a similar manner to searches against Jersey incorporated companies?

4.10.2 Do you agree with the ultimate goal of placing the Record of FICs on the Commission website?

4.10.3 Do you think there are any occasions where the presence of an FIC should be withheld from public record? If so, please provide further details.

4.11 Article 195 of the Law allows the States by Regulations to make provisions in respect of certain matters concerning "external companies". It is proposed that this power be used to create a record of FICs. However, for the purposes of the Law, an "external company" is defined as:

> *a body corporate which is incorporated outside the Island and which carries on business in the Island or which has an address in the Island which is used regularly for the purposes of its business.*

4.12 The Commission is of the view that for the purposes of maintaining a record of FICs this definition of "external company" is unnecessarily wide and should be amended. In particular, the words "carrying on business" could have an extremely wide meaning, potentially encompassing any company transacting commercially with a Jersey resident. The Commission believes that it need only be concerned with companies that may pose a reputational risk to the Island.

4.13 It is proposed that the definition of "external company" be amended to limit the requirement to register to companies which:

4.13.1 have an established place of business in Jersey (a definition in line with the UK Companies Act); and/or

4.13.2 are provided with a service specified in Article 2(4)(e) or 2(4)(f) of the Financial Services (Jersey) Law 1998 by a trust company business registered under that law, with perhaps an exception for post office boxes provided by the Jersey Post Office where such boxes are opened through a registered trust company business.

4.14 It is expected that the majority of FICs will fall within the second limb of the definition. The obligation to file the required information concerning the FIC will fall upon the FIC itself, though in those cases that fall within the second limb of the definition it is anticipated that this requirement would be carried out by FSBs as part of their contractual relationship with the FIC in question. Compliance with the requirements of the Law by such companies will be policed by the Commission's regular compliance visits under the FSJL. It is anticipated that FSBs, familiar with filing requirements for Jersey companies, will quickly adapt to the new regime.

4 - RECORD OF FOREIGN INCORPORATED COMPANIES ADMINISTERED IN JERSEY - CONTINUED

4.15 However, a number of FICs will fall within the first limb of the definition, such as, for example, all Jersey branches of foreign companies. These are likely to be trading entities, which may not be provided with services by an FSB and may be unfamiliar with the process of filing information with the Registry. It is unlikely to be an efficient use of resources for such entities to file information electronically with the Registry, and for such entities a manual filing system will remain in place. The Commission recognises that it will be essential to publicise the new requirement specifically to this group of companies.

4.15.1 Do you agree with the proposed new definition of "external company"? If not, what definition would you suggest?

4.15.2 Do you agree that the requirement to provide information should fall upon the FICs themselves, or would you prefer the requirement to fall upon FSBs and be set out in the FSJL?

4.16 Once established, it is important to ensure that the register of FICs remains current. Although the obligation to register FICs will be placed upon the FIC itself, this obligation will in the vast majority of cases be carried out by FSBs. The Commission's preferred position, once the electronic filing system is up and running, would be to have FSBs provide a quarterly register of all FSBs they administer. It is hoped that the provision of such information would be largely automated. An alternative method would be to have FSBs inform the Registry of any changes to the FICs to which they provide services. It is likely that the method finally chosen will depend in large part upon the IT system in place to facilitate electronic filing, and the Commission is mindful of the need to minimise the administrative burden upon all parties resulting from the new proposal. It is suggested that it may be appropriate to allow the minority of FICs that are not administered by an FSB, and those FSBs that do not wish to take advantage of the new electronic filing system, to register any changes on an ongoing basis.

4.16.1 Do you have any preference for the manner in which the register of FICs is kept up to date, or would you prefer to leave discussion of this issue to the registry User's Group as part of the consultation process in relation to the introduction of electronic filing?

4.17 The Commission proposes introducing a "one-off" fee, payable the first time that an FIC is registered. The scale of this fee has not yet been determined, though it will not be a significant sum.

4 - RECORD OF FOREIGN INCORPORATED COMPANIES ADMINISTERED IN JERSEY - CONTINUED

4.18 Given the number of FICs administered or operating in the Island, the introduction of electronic filing, and the creation of new registers in relation to beneficial owners and directors of companies, it is thought sensible that the requirements to register the information necessary to create these records and registers be phased in gradually. The infrastructure allowing electronic filing of this information to the registrar should be in place prior to 1 January 2005, and it is proposed that all information required to be disclosed to the registrar should be disclosed prior to the end of the annual return process for 2006 (i.e. by February 28, 2006). This would provide a window of twelve months during which FSBs will be able to begin the process of lodging information and ensuring that they are able to comply with the new requirements in advance of the 2006 annual return process. However, it would be hoped that many FSBs would take advantage of the electronic filing facility for lodging the 2005 annual return.

4.18.1 Do you agree with the above proposal for the phasing in of the new requirements to register information with the registry?

4.18.2 If not, what would you consider to be a sensible period for the phasing in of these requirements?

5 - CHANGES TO THE ANNUAL RETURN

5.1 Amendment No.X proposes to codify existing and introduce new reporting requirements in relation to Jersey companies. It is proposed that these changes should be introduced through the adoption of a new system for the filing of annual returns.

5.2 Currently, each company's annual return is processed by the registry and placed on the file of the relevant company. The return is a public document, open to inspection. It is proposed that a new form of annual return be introduced, divided into two sections: the first, similar to the existing format, to be placed on the public file of the company; the other, containing information in relation to, for example, the beneficial ownership of the company and any sensitive activities carried out by the company, to be confidential and held by the Registrar. The second part of the return will not be open to public inspection.

5.2.1 Do you support the introduction of a two-part annual return comprising a public and a confidential section? If not, how would you prefer to manage information flows of confidential information to the Registry?

5.3 It is further proposed that all forms used to make filings with the Registry be available online and that a facility be introduced allowing completed forms to be filed electronically. This facility will be open to both annual returns and to any other filings that need to be periodically made to the registry: for example, the filing of special resolutions or notification of changes of director. The Registry anticipates that this will lessen the burden on FSBs in respect of the administration of companies generally and will also aid the Registry in establishing a database of Jersey companies that can be searched remotely. The Registry will continue to accept manual filings for the foreseeable future.

5.4 A number of amendments to existing legislation will be required in order to implement the proposed changes. The first step will be the introduction of the Electronic Communications (Jersey) Order 200-, which will provide that the Electronics Communications (Jersey) Law 2000 shall apply to the Law.

5.5 A number of provisions of the Law require documents to be "attested", or state that certain documents should be "printed" prior to being sent to the Registrar. It is debatable whether these requirements might technically prevent such documents being filed electronically. Nevertheless, for the avoidance of doubt, it is proposed that a provision be added to the Law clearly stating that the Registrar has the discretion to accept electronic communication of any document in such form as he thinks fit, notwithstanding any requirements as to the form of those documents set out elsewhere in any prior enactment.

5 - CHANGES TO THE ANNUAL RETURN - CONTINUED

5.6 Currently, Article 202 of the Law provides that persons may inspect records kept by the Registrar. There is, arguably, no facility for the Registrar to create confidential records. Amendment No.X proposes establishing a number of confidential records, such as a record of beneficial owners or controllers of Jersey companies and a record of sensitive activities carried out by such companies. Article 202 will therefore be amended to allow for the creation by the Registrar of confidential records, while giving the Registrar discretion to allow inspection of such records if necessary.

5.7 The above changes will establish a legal framework for the introduction of online filing of documents with the Registry. There will clearly be a number of procedural and technical issues that will be address prior to the introduction of any system. Guidelines in relation to online filing will be available to users of the Law in due course.

5.7.1 Do you have any concerns in relation to the introduction of online filing, and if so, what are they and how do you think they can best be addressed?

6 - MISCELLANEOUS AMENDMENTS

6.1 The Commission reviews the Law on a constant basis in order to ensure that it reflects the needs and requirements of a well-regulated and flexible business environment. As a result of this process, there are a number of provisions of the Law that the Commission believes could be usefully amended. It is hoped that, as far as possible, these changes will be uncontroversial and will not require significant consultation. It is also hoped that a number of these changes will simplify the administration of Jersey companies.

6.2 A number of these amendments are in line with those proposed in the current White Paper of the UK Companies Act. The emphasis in the UK has shifted to recognise that the Companies Act should be tailored towards providing a flexible regime for smaller companies, with safeguards in place for larger companies. The Commission believes that this emphasis is correct and that, where possible, the Law should be amended to provide flexibility and to ease the administrative burden on smaller companies. Other proposals are the result of comments that have been received from users of the Law, or arise from the practical experiences of the Registrar.

6.3 Occasions have arisen when the Registrar has contacted the stated registered office of a company only to be informed that the company is no longer administered there. Frequently, this arises around the time of the annual return, when the return is lodged by one of the principals of the company from an address outside Jersey.

Although Article 67 of the Law obliges each Jersey company to have a registered office in the Island, there is no penalty for any failure to do so. A penalty does, however, exist under Article 44 of the Law in the event that a company fails to keep the Registrar informed of the place where the register of members is kept. The Commission feels that there should be a penalty for any breach of Article 67.

It is suggested that it should be clearly stated in the law that each company is obliged to keep the Registrar notified of a valid registered office address, that any document sent to that address will be conclusively deemed to be validly delivered to the company, and that any document required to be sent by the Registrar to the company may only be sent to the registered office address. Failure to maintain a valid registered office should be an offence.

For this purpose a valid registered office address will be an address of either a company services provider licensed to carry out trust company business under the Financial Services (Jersey) Law, or of a director or secretary of the company having a residential address in Jersey. In either case, the owners or occupiers of that address must be willing to be used as a registered office for that company.

Any FSB should be able disassociate itself from any company to which it once provided services by informing the Commission that it is no longer providing a registered office to a Jersey company, and requesting that a note to the effect that the registered office ceased to be at an address provided by the FSB be placed on the company's file at the Registry.

6 - MISCELLANEOUS AMENDMENTS - CONTINUED

Given the important role played by FSBs in the Island's anti-money laundering regime, any company that fails to provide a valid registered office address will be viewed by the Commission as posing a significant reputational risk to the Island. It is therefore suggested that Article 205 of the Law should be amended to give the Registrar the power to strike off any company that he believes is operating without a valid registered office address. It is suggested that the requirement set out in Article 205(1)(a) be clarified by providing that the Registrar's letter of enquiry shall be sent to the registered office address or last known registered office address of the company.

It is also proposed that Article 71 of the Law be amended to provide that an annual return must be submitted through the company's registered office. This will effectively provide an annual confirmation that each Jersey incorporated company is operating with a valid registered office address.

6.3.1 Should an FSB be obliged to inform the Commission when it is no longer providing a registered office to a Jersey company?

6.3.2 Are the penalties proposed for failure to keep the Registrar informed of the correct registered office of a company proportionate?

6.3.3 Are there any other ways in which you would prefer to see this problem addressed or any other comments you have in relation to this proposal?

6.4 Current provisions governing the notice periods for company meetings are unnecessarily complex. It is proposed that Article 91 of the Law be amended to provide that, subject to the company's articles, any meeting of a company can be convened by giving 14 days' notice in writing, and that shorter notice will be acceptable for all meetings if approved by a majority of the members (in the case of ordinary meetings) or by two-thirds of members (in the case of meeting for the passing of a special resolution). The current regime, where different types of meeting require different notice periods is unnecessarily complex. Currently, shorter notice requires the consent of 95% of members. This high level effectively prevents meetings being held at short notice if a minority member of the company is, for example, ill, unavailable or obstructive. It is hoped that the proposed amendment will simplify the process by which any members' meeting can be held.

6.4.1 Do you have any comments in relation to the proposal to simplify notice provisions for meetings?

6 - MISCELLANEOUS AMENDMENTS - CONTINUED

6.5 Article 95 of the Law allows any resolution of the company to be passed unanimously in writing. The UK is proposing to amend its Companies Act to allow written resolutions to be passed by a majority of votes (in the case of ordinary resolutions) and by 75% of votes (for special resolutions). It is proposed that this principle be adopted in the Law, with special resolutions requiring the approval of two-thirds of members (by shareholding). The current position requires all members to sign a written resolution (though of course, pursuant to the Electronic Communications (Jersey) Law (2000), written resolutions can be passed through an exchange of e-mails).

6.5.1 Do you have any comments in relation to the proposal relaxing the requirement that written resolutions be passed unanimously?

6.6 There is some ambiguity in Article 106 of the Law. It is unclear whether a company that is public for only part of a year is required to file accounts for that period, or whether the requirement to file annual accounts only applies to companies that are public at the end of each financial period. It is proposed that the Article be clarified by clearly providing that if a company is public for any part of a financial period it shall be required to file accounts with the registrar for the period ending upon the date when it ceases to be a public company.

6.6.1 Do you have any comments in relation to the proposal to clarify the issue of the filing of accounts for companies that are public for only part of a financial period?

6.7 Articles 113A and 113B of the Law set out the requirement that a partnership or a body corporate may be appointed as auditors of a company if at least 75% of the partners/controllers of such entity are members of a recognised professional body and such persons hold at least 75% of the voting rights in that partnership or body corporate. This is more stringent that in the UK, where legislation sets a majority requirement but allows recognised professional bodies to impose a more stringent requirement. In practice, such bodies have relaxed their requirements to those of the law.

The Commission sees no reason why the qualifications for auditing a Jersey company should be more onerous than those imposed in the UK. It is therefore proposed that any reference to "at least 75 per cent" in Articles 113A and 113B of the Law be replaced by "a majority".

6.7.1 Do you have any comments in relation to the proposal that the qualification requirement for auditors be modified in the manner proposed?

6 - MISCELLANEOUS AMENDMENTS - CONTINUED

6.8 There is currently no stated limitation period in the Law governing the time period within which actions can be taken against Jersey companies. Over the past decade, a number of cases have been heard before the Royal Court, the Court of Appeal and the Privy Council in relation to the extent of prescription periods under Jersey Law. It is fair to describe this area in general as both contentious and uncertain. This is clearly an undesirable position.

It is therefore proposed that a limitation period be set out in the Law in relation to actions brought against Jersey companies. The purpose of introducing such a provision is simply to clarify an uncertain position, thus avoiding the need for lengthy legal battles to be fought on this preliminary issue.

The Commission is minded to introduce a provision in the Law providing that, subject to the express terms of any other enactment, any breach of contract, offence or tort committed by any Jersey company should be prosecuted within a stated period. This period would run according to principles laid down in caselaw: broadly, from the time that such offence and/or tort could reasonably have been discovered. The Commission is minded to set the limitation period at 10 years.

6.8.1 In principle, do you agree that it would be helpful to have a limitation period set out in the Law?

6.8.2 Do you agree that the stated period should be 10 years? If not, what period do you suggest and why?

6.8.3 Are there any other comments that you wish to make in relation to this proposal?

JFSC
JERSEY FINANCIAL SERVICES COMMISSION

7 - SUGGESTED IMPROVEMENTS

7.1 The Companies Law (Amendment No.6) brought significant changes to the Law and introduced several new types of companies and procedures. As with all significant amendments, particularly those introducing new procedures, the Commission would be interested to receive comments from all users of the Law in relation to these changes, particularly in relation to whether any procedures could be made clearer or more efficient.

7.1.1 What practical improvements could be made to the procedures introduced by Amendment No.6?

File note on discussions held at the Executive Board on Tuesday the 17th of November 2003, concerning my paper on Companies (Amendment No.X) (Jersey) 200X

I presented this paper to the Executive Board and we discussed the three key issues contained within it.

Register of Directors

The first subject was the register of directors and I explained to the Board that the industry was supportive of the concept of maintaining a register of directors subject to providing the facility for corporate directors. It was agreed by the Board that we supported this concept where the corporate director was a regulated entity under the Financial Services (Jersey) Law 1998.

We then discussed the timing of making this change and it was felt that it would be unwise to try and put this within amendment no.8 because of a number of issues within the company law that had to be explored and discussed within the industry concerning the implications of establishing the concept of corporate directors especially in the concept of Article 181. It was therefore agreed that this amendment should be included within amendment no. X and discussed further with the industry possibly through the steering group.

Foreign Incorporated Companies

We then discussed the proposal from the Edwards' report that the Commission should establish a record of Foreign Incorporated Companies, which are administered in the Island.

I explained that this is probably the most contentious issue that was in the consultation paper and that the industry, were generally hostile to it. I explained at the meeting that an alternative proposal was put forward whereby the industry offered to maintain the information within their own computer systems and to provide a guaranteed response to the Commission within 24 hours should any request or enquires for assistance be received.

There was a general discussion on the board with regard to this proposal. Andrew raised the point that we should research the Edwards' report to see exactly what he said and what promises had been made to the industry with regard to bringing this into effect.

It was generally agreed that circumstances had changed since the Edwards' report and that it did appear that if Jersey were to follow this to the letter we would be out of step with competitor jurisdictions.

David was also anxious to be able to justify the proposal on cost benefit grounds and wanted to know precisely how many enquiries were received and how many we failed to answer in respect of such companies. Gary explained that in his view there was probably up to around 30 enquiries a year and to his knowledge they've not yet been unable to supply the information requested.

It was David Carse's view that we should perhaps put this proposal on a slow track and consider all the alternatives and options with the industry before coming to a final conclusion.

Beneficial Ownership

We then discussed the concept of using the Companies Law to maintain the information on beneficial owners and updating information on beneficial owners. This again was an Edward's recommendation and

David was of the view that we should not necessarily have to be committed to this proposal. Again it was subject to his views of cost benefit review to see what other alternatives could be provided we did discuss the option of going to the option 2 model of the OECD paper on misuse of corporate vehicles which did accept the concept of the service provider maintaining the information and the regulator obtaining it from them as and when required.

It was agreed that we would need to look at this and see what savings could be made also by the Registry if we gave up this requirement rule so what the impact would be on the Income Tax Department.

Conclusion

It was agreed therefore that we would generally review the position on these two issues, look at the alternatives, consider the costs and benefits and come up with some proposals, which could provide the solution in alternative ways.

Action Points

Register of Directors

- Incorporate in brief to Law Draftsman for Amendment Number X
- Discuss impact on Companies Law with Steering Group e.g. Article 181

Record of Foreign Administered Companies

- Research Edwards papers and review background to decision
- Obtain from Enforcement and Registry Statistics on number of requests for assistance and enquiries for information on non Jersey Companies.
- Consider more fully the alternative Steering Group option
- Look at Cost/benefit of all options

Beneficial Owners

- Examine benefits to Registry of not updating beneficial owners information
- Discuss with Income Tax impact of not collecting information on changes to Tax Exempt companies.
- Evaluate cost benefits of current proposals with OECD option 2 i.e. Service Provider maintains the up to date beneficial ownership information

RB

THE COMPANIES (ACQUISITION OF OWN SHARES) (TREASURY SHARES) REGULATIONS 2003 (SI 2003/1116)

GUIDANCE NOTE FOR BUSINESS

The purpose of this note is to explain the principal changes that the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003 (SI 2003/1116) make to the Companies Act 1985. It is beyond the scope of this note to set out all of the provisions of the regulations (the majority of which are consequential changes to various provisions of the Companies Act 1985 to take account of treasury shares) and any company intending to take advantage of the regulations is recommended to consider them in detail with its legal advisers. The regulations come into effect on 1 December 2003.

Background

2 Under the Companies Act 1985, companies may purchase their own shares but only in the circumstances and under the conditions laid down in the Act. The company must be authorised to purchase its own shares under its articles and the purchase must be approved by resolution of the shareholders. The shares must be fully paid up and, after the purchase, must be cancelled. In general, shares may only be purchased out of distributable profits or from the proceeds of a fresh share issue.

Effect of the regulations

3 The regulations relax the requirement that a company that purchases its own shares must subsequently cancel them. The regulations allow companies that purchase their own shares out of distributable profits the option of holding them "in treasury" for sale at a later date or of transferring them for the purposes of, or pursuant to, an employees' share scheme. The regulations are deregulatory and companies only need to consider them if they decide to take advantage of the new treasury shares facility. Only "qualifying shares" may be held in treasury: "qualifying shares" are defined in the regulations as shares which:-

i) are included in the official list (ie listed on the London Stock Exchange); or

ii) are traded on the market known as the Alternative Investment Market; or

iii) are officially listed in another EEA State; or

iv) are traded on a market established in an EEA State which is a regulated market for the purposes of Article 16 of Council Directive 93/22/EEC on investment services in the securities field.

Private companies, and public companies with shares which are not listed or traded on one of the above markets, will continue to be required to cancel any of their own shares which they purchase.

Requirements in the regulations which apply to companies that hold treasury shares

4 Companies are subject to the requirement that the aggregate nominal value of shares held in treasury must not at any time exceed 10% of the nominal value of the issued share capital of the company (or 10% of the nominal value of each class where a company holds more than one class of shares). If that limit is exceeded, the company must dispose of or cancel the excess shares within 12 months.

5 A company may not exercise any rights in respect of any treasury shares that it holds (including the right to vote at meetings) and any purported exercise of such a right is void. No dividend may be paid, and no other distribution of the company's assets may be made, to the company in respect of any treasury shares. However, these restrictions do not prevent the allotment of shares as fully paid bonus shares in respect of any treasury shares nor to the payment of any amount payable on the redemption of any treasury shares if they are redeemable shares.

6 If the treasury shares cease to be qualifying shares, eg if the shares cease to be listed, the company is required to cancel the shares forthwith. However, this does not apply in respect of shares which are only suspended from listing.

7 The holding of treasury shares by nominees is not permitted and the company is obliged to make the appropriate entries in the register of members in respect of the treasury shares. Accordingly, it will be apparent from an inspection of the register that the shares are held by the company and therefore constitute treasury shares.

8 Treasury shares may be sold; or transferred for the purposes of, or pursuant to, an employees' share scheme; or cancelled. However, they may only be sold for cash (which includes the release of a liability for a liquidated sum or an undertaking to pay cash within 90 days).

9 The regulations require that the proceeds from a sale of treasury shares be dealt with as follows:-

i) where the proceeds of a sale are equal to or less than the purchase price paid by the company for the shares, the proceeds shall be treated as a realised profit of the company; and

ii) where the proceeds of a sale exceed the purchase price paid by the company for the shares, the part of the proceeds of the sale that is equal to the purchase price paid shall be treated as a realised profit of

the company and a sum equal to the excess shall be transferred to the company's share premium account.

10 The regulations provide that the pre-emption rights that apply to the allotment of new shares apply to the sale of treasury shares but may also be similarly disapplied with the agreement of shareholders. The requirements applying to the returns that a company makes to Companies House (section 169 notices) following a purchase of its own shares have been amended. Companies which purchase their own shares have to indicate any shares that are to be held in treasury and, subsequently, details of those treasury shares that are sold, transferred or cancelled. The regulations also provide that investors making disclosures (under section 198 of the 1985 Act) of an interest in shares to a company need to exclude any treasury shares held by the company when calculating the percentage of the company's issued share capital that they hold. Such disclosures have to be made when investors hold 3% or more of a company's issued share capital.

11 Officers of a company are liable to a fine for any contravention of the regulations.

12 Consequential changes to tax law following the introduction of the regulations were included in the Finance Bill 2003. Changes to the Listing Rules, the AIM Rules for Companies, and the City Code on Takeovers and Mergers administered by the Financial Services Authority, the London Stock Exchange, and the Panel on Takeovers and Mergers respectively are also to be made.

13 Copies of this note are available from the Department of Trade and Industry, Company Law and Investigations Directorate, Room 507,1 Victoria Street, London SW1H OET.

Company Law and Investigations Directorate
Department of Trade and Industry
15 April 2003

Alan Heard comments.

DRAFT CONSULTATION PAPER
COMPANIES (JERSEY) LAW – AMENDMENT No. 9

1 I am not sure what the last sentence of paragraph 1.4 means.

2 Paragraph 1.7 refers to the Registry User's group. Is some explanation needed of what this is, possible even who are the members?

3 Under the heading "Consultation" (paragraph 1.12 on), will there be a further period of consultation after the amending law has been drafted?

4 The paper generally seems to consider the issues almost exclusively from the perspective of the finance industry. For example, in the Background (Section 2).

5 Does the term "exempt company" need to be explained? (Paragraph 2.2)

6 The word "should" at the end of the first line of paragraph 71 should read "must".

7 Suggest that the text of Article 84 be reproduced in paragraph 3.6

8 An additional question that may be asked in paragraph 3.7 is "Should the details recorded be the same for private companies as for public companies.

9 In Section 4 (Register of FICs) I found it quite difficult to determine what exactly is being proposed and this did not become apparent until almost at the end of the section. May I encourage you to consider some sub-sections along the lines of: Proposal, Background, Arguments For and Against, Questions ?

10 Paragraph 4.6.1 refers to the introduction of "further regulation". I would contend that what is proposed is registration rather than regulation and that the two are very different.

11 Some aspects that are not considered by Section 4 and which I suggest perhaps should be –

11.1 Some FICs are subject to regulation now, under COBO

11.2 Who will have the legal obligation to register the FIC – the FIC or the FSB? Is it possible for a FIC to be caught by the requirement without involving a FSB?

11.3 Why introduce this provision under the Companies Law, rather than the FSJ(L), which governs the FSBs?

11.4 Edwards suggested regulation of FICs similar to that of Jsy Co's: will COBO be applied? If not why not (see item 10 above).

12 There are some minor grammatical/typo slips in 4.7 and 4.8 that will need attention. I can give you more detail if you wish.

13 Final sentence of Paragraph 4.8 says that some items are a matter of public record in the company's place of jurisdiction. Is this invariably the case or usually?

14 Paragraph 4.11 refers to a phasing in of the requirement but gives no indication of how this might be done

15 Paragraph 4.14.2 refers to the FSJ Law in connection with the definition of a FIC. This law includes various exemptions via Orders. Will this affect the definition?

16 How will regulation of Branches be policed (paragraph 4.14.3)?

17 Suggest that the phraseology of the question in 6.3.1 should be the same as in the second paragraph on that page, from which it is derived.

18 Will the proposal at the end of paragraph 6.8 for the FSB to be liable for the late filing fee be enforceable?

Comments on Companies (Amendment No. X) Law 200- - Consultation Paper No. 3 2003.

Section Ref.	Comment
3.7.1	• It may not always be possible to advise changes, for example a change of address, in relation to a particular director within the 28 days period. The company may not always be aware of a change in circumstances within the period allowed. What is the anticipated penalty for not meeting the deadline?
3.7.2	• Perhaps in circumstances where companies are involved in areas that are sensitive to adverse public opinion and raise strong feelings and where the directors may risk being exposed to physical violence, kidnapping etc.
4.7.4	• We are concerned that there should not be an automatic exchange of information but agree that to be able to offer assistance in the event of a bona fide approach, through proper channels, can only enhance Jersey's reputation.
4.10.1	• There may be an issue with client confidentiality and this may mean that, if not already covered in an Agreement, all clients would have to be approached to obtain an appropriate form of consent prior to passing the information on. There may therefore need to be a lengthy exemption period from implementation during which time such consents can be obtained. • If the purpose of the register of FICs is purely to ensure that the Island has such information available in order to help with investigations and to enable authorities to monitor economic activity of the FICs, is this purpose not served by the JFSC maintaining such a list without publishing it on a public website. The Island needs to be careful not to be overly zealous whilst, nevertheless, cooperating fully with legitimate authorities in the fight against crime. 4.7.1 states that "other offshore jurisdictions, including Guernsey, are in the process of considering this issue" – this is not to imply that they will actually introduce such a register. The Commission gives no justification to the statement that "it does not accept that the proposal would have a significant effect on this type of business". If our competitors, such as Guernsey, do not introduce this requirement with its accompanying "one off registration fee" we fear that business could well be lost to the Island.
4.10.2	• What is the perceived benefit of having this information available to the general public? Is it not sufficient to have the information held confidentially? • See also response to 4.10.1
4.10.3	• When such an entity is involved in sensitive business. • See also response to 4.10.1
4.13.2	• Will the definition cover non Jersey group entities or only companies established for clients?
4.15.1	• Yes
4.15.2	• We agree that FICs should provide the information
4.16.1	• Discussion to be left to the User Group
4.17	• There may be an issue on the recovery of this fee from clients, especially where a management agreement is in place which may not allow the recovery of such a charge, so there may be an additional burden on the FSB.
4.18.1	• Yes
5.2.1	• Yes
5.7.1	• Concerns re online filing relate to the need to use our current IT system which populates and issues all current returns. Any online system that could not be populated directly from our current database would prove more burdensome.
6.3	• Regarding the validity of a registered office address, has the position of local trading companies and other businesses not licenced under the Financial Services (Jersey) Law been properly considered?
6.3.1	• We believe the obligation should remain on the FIC as it would be an unfair burden

Section Ref.	Comment
	to place on the FSB involving a lot of reporting to capture what is surely a very small number of cases.
6.3.2	• Yes
6.3.3	• No – other than the comment on 6.3.1 above the proposals seem reasonable for what at times can be a difficult issue for both FSBs and the regulator.
6.4.1	• Proposal welcomed
6.5.1	• Proposal welcomed
6.6.1	• No comments
6.7.1	• No comments
6.8.1	• Yes
6.8.2	• Yes
6.8.3	• No
7.1.1	• In order to merge two entities it is necessary to notify all creditors of £2,000 or more. Is there some way in which this can be avoided in certain circumstances such as obtaining an opinion from the auditors of both entities that the merge will not adversely affect in any significant way the security of such creditors? For example where a bank, which acts as a holding company, wishes to merge with a wholly owned subsidiary with little or no change in the financial position of the merged entity.