# Companies (Amendment No.9) (Jersey) Law 1991

## Proposed Amendments

POSITION PAPER

States of Jersey

**RESPONSES**

**The Minister for Economic Development invites comments on the matters set out in this Position Paper. The closing date for responses is 12 May 2006.**

**Responses should be sent to**

**Paul de Gruchy**
**Director – Finance Industry Development**
**Economic Development Department**
**c/o 5th Floor**
**Cyril Le Marquand House**
**The Parade**
**St Helier**
**JE4 8QT**

**Telephone:** **01534 440413**
**Facsimile:** **01534 440409**
**e-mail:** **pa.degruchy@gov.je**

**David Wild at Jersey Finance Limited is co-ordinating an industry response that will incorporate any matters raised by local firms or entities. His contact details are:**

**David Wild**
**Jersey Finance Limited**
**27 Hill Street**
**St Helier**
**Jersey**
**JE2 4UA**
**Telephone:** **01534 836004**
**Facsimile:** **01534 836001**
**e-mail:** **David.Wild@jerseyfinance.je**

**It is the policy of Jersey Finance to make individual responses it receives available to the Economic Development Department upon request, unless a respondent specifically requests otherwise.**

**The contents of any response may form the subject of discussions with industry bodies and other interested parties.**

## 1. INTRODUCTION

In 2003, a consultation paper was issued by the Jersey Financial Services Commission (the "**Commission**") in relation to proposed amendments to the Companies (Jersey) Law (the "**Law**").

As a result of the response to that consultation, a number of the proposals made by the Commission were refined. In addition, since the Companies (Amendment No.8) (Jersey) Law was approved by the States in June 2005, a number of suggestions have been made by industry practitioners to the Economic Development Department in relation to potential improvements to the Law.

This position paper sets out a number of proposed amendments to the Law. Where possible, changes to the Law will be implemented through Regulations, as they can be brought into force in an expedited timescale. Where this is not possible, changes will be made by Amendment to the Law. It is hoped that this Amendment would be in a position to be approved by the States early in the autumn of 2006.

It should be noted that the proposed changes set out in this paper are not comprehensive. There will be a small number of changes aimed primarily at clarifying the existing provisions of the Law, which are unlikely to be contentious and upon which it would not be sensible to consult.

This position paper differs from a consultation paper. The majority of matters set out in this paper have already been the subject of consultation, a number arise directly from further consideration of Amendment No.8, with the remainder responding to developments in other jurisdictions and which are expected to be widely welcomed by those affected by the Law.

The purpose of this paper therefore is to inform the wider community of the results of previous consultations and of the proposed amendments to the Law. It is anticipated that this paper will form the basis of law drafting instructions, and that the proposals set out in this paper are only likely to be materially altered in the face of compelling argument.

## 2. THE PROPOSED CHANGES

### Solvency Tests (Articles 55(9), 115)

Amendment No.8 introduced a new form of "solvency test" for Jersey companies considering making a distribution of assets (in whatever manner) to its members. The test requires the directors of the company who authorise the corporate action to make a statement in a prescribed form:

> *The statement shall state that the directors of the company authorising the redemption, having made full enquiry into the affairs and prospects of the company, have formed the opinion –*
>
> *(a) that, immediately following the date on which the payment is proposed to be made, the company will be able to discharge its liabilities as they fall due; and*
>
> *(b) that, having regard to the prospects of the company and to the intentions of the directors with respect to the management of the company's business and to the amount and character of the financial resources that will in their view be available to the company, the company will be able to continue to carry on business and will be able to discharge its liabilities as they fall due until the expiry of the period of one year immediately following the date on which the payment is proposed to be made or until the company is dissolved under Article 150, whichever first occurs.*

Two problems have been identified with this test. Firstly, the new test was designed to avoid the need to have accounts prepared prior to making a decision as to whether assets existed sufficient to justify making a distribution. However, "having made full enquiry" is unclear and in most cases legal advice would recommend that directors prepare accounts in order to satisfy that requirement. Secondly, as it is an absolute requirement that the directors make full enquiry prior to making the statement, if it subsequently comes to light that full enquiry was not made, an argument could be made that the distribution itself was not validly made, and therefore those who received a distribution in good faith could be compelled to repay it.

It is proposed that a better way of incorporating this type of solvency test into the Law is to remove the words "having made full enquiry into the affairs and prospects of the company" from Articles 55 and 115 and to introduce into Article 115 an offence the equivalent of Article 55(10):

> *A director who makes a statement [under.paragraph (8)] without having reasonable grounds for the opinion expressed in the statement is guilty of an offence.*

The end position would then be that it is a question of fact whether the solvency statement has been made and the distribution is valid, but it

would then be a question for the court to decide whether the director had reasonable grounds for making that statement and therefore whether the director committed an offence. In determining whether the director had reasonable grounds it is likely that the court would consider the degree of enquiry that the directors made into the company's affairs and prospects.

**Financial Assistance (Article 58)**

It is proposed that this article should be deleted. Financial assistance provisions have become a complex set of requirements that have to be satisfied in a wide range of circumstances for little clear end. Practically, this has caused a significant burden to those contemplating takeovers of Jersey companies for many years.

In transactions involving groups of companies, preparing the various resolutions that are required to "whitewash" assistance can be a voluminous task. This adds to the costs and risks of doing business in Jersey without bringing any clear benefit to the Island. Australia and New Zealand have already abolished their provisions relating to financial assistance and the UK is expected to do the same.

The emphasis of the Law is moving to provide as much flexibility as possible, provided that the company remains solvent and there is no fraud on minority shareholders. Sufficient remedies already exist if financial assistance results in insolvency or a fraud on a minority of shareholders and, this being the case, it is felt that the protection that the article purports to provide is no longer necessary.

**Registered Office Provisions (Articles 67, 71 & 205)**

Under the current Law, every Jersey company must have a registered office in Jersey. There is, however, no penalty for a breach of this requirement, though a penalty does exist, under Article 44, if the Registrar of Companies is not told of any change to the location of the register of members, which would usually, though not necessarily, be the registered office.

The current requirement is simply that the company has a registered office. There is, however, no requirement for the person who provides the registered office to agree to this: in other words, a company can give any address in Jersey as its registered office and there is no mechanism for ensuring that the registered office has any relationship with the company in question.

This poses significant risks to the Island. To provide a registered office is a regulated activity, and the Commission relies upon regulated corporate service providers to carry out ongoing due diligence against the owners of Jersey companies. It is therefore vital that a mechanism exists which ensures that the address given as the registered office

address is bona fide: in other words, that the owner of a registered office address is willing to accept communications addressed to the company. The best practical way of achieving this is requiring all formal correspondence from the Registry to be sent to the company's registered office address: if the person providing the address does not wish to provide the registered office for the company he will then be put on notice that his address is being used and will be able to inform the Registrar that this should not be the case. The Registrar will then be able to take steps to wind up the company.

It is proposed that the Law be amended to provide that:

- A company has a duty to give notice to the Registrar of any change in its registered office: failure to do so will constitute an offence.
- Any document sent to the company by the Registrar shall be sent to the registered office address, and this shall be the only address to which the Registrar sends documents to a company.
- The Registrar should have the power to strike off a company that he believes does not have a valid registered office address. This power probably most appropriately belongs in Article 205 and the following procedure should apply:
    - Firstly, if the Registrar has reason to believe that the address given as the company's registered office is not valid for that purpose, the Registrar should write a letter of enquiry to that office asking for confirmation that the address is the registered office address for that company; and
    - If there is no response to the letter of enquiry within 28 days, or if the response is that the address is not the registered office of the company and the company fails to notify the Registrar of a valid registered office address within a period of 28 days from the date the first letter was sent to the previous address, the Registrar would have the power to strike off the company. Thus the requirement in Article 205(1)(a) of the Law should be amended to clarify that the Registrar's letter of enquiry shall be sent to the registered office address or the last known registered office address of the company.
    - In order to simplify the restoration of a company to the public register in cases where they should not have been removed the Registry can do this by administrative means where cases are straightforward or follow the statutory court procedures in other circumstances.

**Regulated Directors (Article 73)**

At present, Article 73(2)(d) of the Law provides that, "*No person shall be a director who is a body corporate*". Jersey has to date shied away

from permitting corporate directors of Jersey companies. One of the key reasons for doing so was the risk that a corporate director may be less accountable than an individual director.

However, there is a strong argument that trust company businesses regulated under the Financial Services (Jersey) Law, which are currently permitted to act as corporate directors of non-Jersey companies, should be permitted to be directors of Jersey companies. For a substantial number – if not the majority - of Jersey companies at least one of the directors will be appointed as part of the service provided by the trust company business that provides corporate services to the company. It is therefore more transparent to allow that business to be appointed as director of a company, rather than its officers.

Such a change would bring significant savings to regulated businesses. The need to appoint alternates to cover staff absences, or to prepare large numbers of resignation and appointment documents upon a change of personnel will be removed. In addition, the owners of the company will be assured that a regulated entity which has satisfied the Island's high regulatory standards will be fulfilling this vital role. Further, with the introduction of a register of directors (see below), it is sensible to reduce the number of changes to the register by permitting corporate directors.

It is therefore proposed that Article 73(2)(d) be changed by Regulation, to provide that no director shall be a body corporate other than a body corporate that is a registered person carrying out trust company business under Article 2(4)(b) of the Financial Services (Jersey) Law 1998.

Consideration has been given to whether further amendments should be made to hold the directors of a corporate director personally accountable for the actions they commit as directors of a corporate director in relation to the administered company. However, no examples have been put forward of such provisions existing in other jurisdictions, and there is no reason to believe that existing protections offered to creditors and shareholders under the Bankruptcy and Companies Laws are insufficient in light of the proposed change.

**Meetings and Resolutions (Articles 90-95)**

A number of proposals were set out in the 2003 consultation in relation to simplifying the manner in which Jersey companies hold meetings and pass resolutions. It is proposed that the basic minimum notice period in relation to any meeting held by a Jersey company should be 14 days (though of course the articles of association could increase this).

It was also proposed in that consultation that the process by which a meeting could be called at short notice should be relaxed by reducing the current requirement that 95% of members consent to such a

meeting, and that the manner in which a written resolution is passed be relaxed by reducing the requirement that the resolution be unanimous to that it be signed by the majority required to pass the resolution.

Comments received in relation to these proposals varied. While a majority welcomed the proposals, a significant minority felt that the existing regime helped to protect minority shareholders and, in particular, gave minority shareholders the ability to put forward arguments in relation to proposals affecting the company. The argument was put that to change the law to effectively allow parties owning 50.1% of a company's voting rights to call a meeting and pass a resolution at short notice or to pass a resolution in writing would be detrimental to the attractiveness of Jersey companies without bringing any commensurate benefit. On balance, therefore, it is recommended that these provisions should not be changed at present.

**Accounts (Article 104)**

It has been suggested by a number of accountants that this article should be expanded to include a requirement that the accounts state which accounting principles have been adopted in their preparation. This is now a general international requirement, and seems a sensible suggestion.

**Filing of Accounts for Public Companies (Article 106)**

Although it is clear that public companies must file accounts with the Registrar, there is a current lack of clarity concerning the obligation where a company changes from being a public company to a private company.

It is recommended that a company changing its status should be given two options in relation to the accounts it files:

- prepare public accounts up to the date that it ceased to be a public company and file these accounts with Registrar or
- prepare public accounts for the company's normal financial period that covers the company being both a public and then a private entity.

**Auditor's Report (Article 110)**

Currently this article requires the auditors to confirm "whether a true and fair view is given" in the auditor's report. It is proposed that as an alternative, or in addition to this requirement, an auditor can adopt the US wording that the report "presents fairly, in all material respects", the company's position. This will give greater flexibility when Jersey companies are used in international transactions.

**Appointment of Auditors (Articles 113A/113B)**

A proposed amendment will allow a partnership or body corporate to be qualified for appointment under Article 109 if a simple majority of the partners/controllers is fully qualified. This is a departure from the current 75 per cent requirement and mirrors the current UK position. Thus in both Articles 113A and 113B all references to 75 per cent will be replaced by words to the effect of a simple majority.

**Takeover oversight (new Article 116A)**

The Takeover Panel has to date supervised takeovers of listed Jersey companies. However, the Takeover Panel currently has no statutory authority, whether in relation to Jersey or UK companies. In order to comply with EU directives on the subject, however, the Takeover Panel is in the process of being placed on a statutory footing in the UK, through the addition of a new section 22 to the UK Companies Act.

A number of Island lawyers have been argued that it would be helpful if the Takeover Panel continued to supervise the takeover of listed Jersey companies. There are commercial and practical benefits in knowing that, in the event that a takeover bid was to be made for such a company, clear and widely known rules would govern the progress of the bid.

It is therefore proposed that the Law be amended to give the Minister for Economic Development the power to appoint a body to supervise takeovers of listed Jersey companies. The Minister will then (by Order) appoint the Takeover Panel to fulfil this function and empower the panel to issue such rules as it thinks fit. This appointment will be on materially identical terms to the appointment of the Panel under the proposed UK Companies Act.

**Mergers (Article 127C(2))**

This provision of the law allows two or more wholly owned subsidiaries of the same holding company to merge. However, the definition of "company" in the Law is limited to Jersey companies. If a non-Jersey company has three wholly owned Jersey subsidiaries, these subsidiaries cannot merge under the procedure set out in 127C(2), though there is no clear reason for the prohibition. It is proposed that this be remedied by replacing "same holding company" with "same holding body".

**Solvency statement in respect of continuance (127W(1))**

Amendment No.8 to the Law replaced "balance sheet" based solvency tests with a requirement that the directors consider the position of creditors and the future prospects of the company. There remains a

"balance sheet" type solvency test in Article 127W(1) and it is proposed that this that should be replaced by the "look forward" test generally used in the Law..

**References to the Court (Article 186)**

This article could helpfully be extended to provide that, if in the course of a creditors' winding up the directors/liquidator are satisfied that the company's assets will be sufficient to satisfy in full all creditors, it will be permissible to make interim distributions to members. This is believed to be the current position but it is not certain.

**Register of Directors (new)**

Public companies are already required to include in their annual return certain details in respect of their directors under Article 71(1)(e) of the Law. It is proposed to extend this obligation to all Jersey companies.

However, rather than simply being a requirement to file such information with each annual return it is intended to amend such a requirement to then be an ongoing duty in order to keep the Register of Directors up to date. The requirement should be to file details (that being the information set out in Article 83) of changes of directors to the Registrar within 14 days of the change taking place, with failure to do so constituting an offence.

Consequential amendments would also have to be made to the Data Protection (Jersey) Law 2005 in order to enable the Registrar to publish details of directors on the internet without infringing the laws concerning data protection. It is acknowledged that there may be circumstances where it is not appropriate for the identity of the directors of a Jersey company to be a matter of public record, and so the Registrar will in due course publish a policy statement in relation to this aspect of the new regime.