Implementation of the 2012 FATF Recommendations on Anti-Money Laundering and Countering the Financing of Terrorism

Proposed revisions to Jersey's AML/CFT legal framework

3 June 2019

BACKGROUND

1. On 27 July 2018 the Jersey Financial Crime Strategy Group (**JFCSG**) published a Consultation Paper on proposed revisions to Jersey's anti-money laundering and countering the financing of terrorism (**AML/CFT**) legal framework (**Consultation**).

2. The Consultation covered the implementation of new international standards on AML/CFT as set out by the Financial Action Task Force (**FATF**) in the 2012 International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (**Recommendations**) which is further supplemented by the FATF Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems (**Methodology**).

3. It is the Government of Jersey's policy to pursue compliance in all respects with international standards on AML/CFT as set out primarily in the Recommendations and the Methodology. Government is taking forward law drafting proposals relating to the matters covered in the Consultation.

Further questions or comments relating to this Consultation Response and Policy Paper may be directed to:

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Recommendation 1: Assessing risks and applying a risk-based approach

Application of the National Risk Assessment (criterion 1.7)

1. At **paragraphs 1 to 6**, the Consultation explained that criterion 1.7 of the Methodology[1] provides that where countries carry out a national assessment of the risk of money laundering and terrorist financing (**NRA**), the AML/CFT regime should require relevant persons to take the NRA into account when performing their own risk assessments. It proposed that the Money Laundering (Jersey) Order 2008 (**MLO**) be amended to require relevant persons to consider the NRA when performing such risk assesments. **Question 1** asked whether respondents consider the proposal is effective and proportionate.

2. Overall, responses to Question 1 supported the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 11(2) of the MLO so that relevant persons are required to consider the outcome of the NRA when performing their own risk assessments.

Recommendation 4: Confiscation and provisional measures

Clawback of gifts made into trust (criterion 4.2(c))

3. At **paragraphs 7 to 15**, the Consultation explained that Recommendation 4 relates to measures which countries should have to confiscate the proceeds of money laundering. It explained that criterion 4.2(c) provides that countries should have measures that enable competent authorities to take steps that will prevent or void actions that prejudice the country's ability to freeze, seize or recover property that is subject to confiscation. The Consultation went on to explain concerns that were raised by moneyval on Jersey's confiscation regime and related clawback provisions.

4. The Consultation proposed that amendments be made to Article 2(9) of the Proceeds of Crime (Jersey) Law 1999 (**POCL**) (as modified by the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008) (**POCL as modified**) so that in addition to that which is already caught by Part 2 of POCL as modified, any gifts made within a period of five years ending with the criminal offence (or the earliest of the offences to which the proceedings relate) may also be caught by Part 2 of POCL as modified if the Court considers it appropriate in all the

[1] The FATF Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems: http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf

circumstances to take the gift into account. **Question 2** asked whether respondents consider that the proposal is effective and proportionate. **Question 3** asked whether respondents consider five years to be the appropriate period in which gifts made prior to criminal offending might be vulnerable.

5. Overall, respondents were in favour of, or agnostic towards, the proposals outlined above.

6. Various issues for clarification were raised in the responses, including:

    a. several responses suggested that there should be a link between the gift and criminal offending;

    b. three of the respondents queried the fairness and proportionality of the measure;

    c. two of the respondents raised the issue of whether the power is unqualified and/or what safeguards there will be;

    d. two of the respondents raised issues regarding trustee duties: one queried the interplay between trustee duties in contracts with third parties against confiscation orders and the second stated that trustees will "stringently contest any attempts to confiscate those funds so as not to fail in its fiduciary duty";

    e. one of the respondents queried when the "trigger point" would be from which to look back;

    f. another respondent expressed concern that all financial transactions entered into for a subjective price could be voidable; and

    g. two of the respondents queried the five year period and whether it should be shorter.

7. Government makes the following observations in relation to the responses received (taking each point above in turn with the same paragraph lettering):

    a. When the Court determines the defendant's benefit from criminal conduct under Part 2 of the POCL as modified, the realisation of the confiscation order is satisfied from the defendant's realisable property which includes all property held by him, any property which has been gifted away contrary to POCL as modified, and any property he is beneficially entitled to. Therefore, it is often the case that the specific property which is confiscated may have come from clean funds but the proceeds of crime or the assets they purchased are no longer in the criminal's hands. Currently under POCL as

modified, gifts made after criminal offending may be vulnerable even if the gift was made from legitimate funds and there was no link whatsoever between the criminal offending and the gift.

b. Whilst it may be reasonable to question fairness/proportionality, the same arguments could be deployed in respect of gifts made after criminal offending. The finalised proposals will consider safeguards and possibly qualifications (more below) to ensure the provisions are proportionate in accordance with Article 1, Protocol 1 of the European Convention on Human Rights.

c. It is reasonable to raise these issues. Some discussions have involved the possibility that such power only be available where the settlor defendant retains a beneficial interest.

d. Court orders take precedence but the court will in any event take into account rights of third parties. Also, there is no substantive difference from when gifts are made after criminal offending.

e. The trigger point shall remain as the criminal offending but consideration will be given to flexibility when criminal offending cannot be pinpointed.

f. The provisions would only bite if the donor was guilty of a predicate offence or money laundering and the gift was made within the preceding five years. Furthermore, additional safeguards/qualifications if adopted will mitigate this further, and of course these concerns could also validly be raised for gifts made after criminal offending (i.e. donees and trustees will not always be aware that the donor has committed a criminal offence and that the gift being made is potentially vulnerable).

g. In relation to the five year time limited, there could be possible prejudice to effectiveness of the provision if the period were limited to a shorter period. Practicalities mean that even if a five year period is available, law enforcement authorities will not always look that far back or seek to attack historic transactions and in some cases it may not be in the public interest to do so. One of the respondents made good points regarding the safeguards in the Bankruptcy (Désastre) (Jersey) Law 1990 (e.g. requirement for insolvency at the time) and adequate safeguards will be considered when the provisions are drafted.

8. Having considered the responses the JFCSG has resolved to proceed with the policy of creating a clawback provision in the POCL as modified, but limiting the clawback to gifts made in trust where the settlor retains a beneficial interest, where there is a power to add the settlor as a beneficiary, or where the letter of wishes anticipates the

settlor benefitting from the trust assets. Law drafting instructions have been submitted requesting an amendment be prepared to Article 2(9) of the POCL as modified. Furthermore, amendments are being drafted to enable the confiscation of property which has a corresponding value to instrumentalities used or intended for use in money laundering or predicate offences, and the confiscation of property which has a corresponding value to property used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations.

Recommendation 8: Non-profit organisations (NPOs)

Requirements for NPOs at a higher risk of terrorist financing (Interpretive Note to Recommendation 8)

9. At **paragraphs 16 to 23**, the Consultation explained some of the requirements of Recommendation 8 and proposed that new legislation would be introduced to achieve compliance with Recommendation 8. It proposed that new requirements impose obligations on a sub-sector of NPOs that may be vulnerable to terrorist financing abuse. Such sub-sector would need to be designated by Ministerial Order. **Question 4** of the Consultation asked whether the proposal is effective and proportionate. The Consultation also set out measures which could be introduced to a sub-sector of NPOs that may be vulnerable to terrorist financing, and **Question 5** asked which of those measures respondents consider appropriate.

10. Overall, respondents were in favour of the proposals and generally indicated that each of the proposed obligations are workable and should be implemented. Government has therefore proceeded with the submission of instructions to the law draftsman to draft new provisions as indicated in the Consultation. Such provisions will apply to a sub-section of NPOs which are at risk for terrorist financing and designated as such by Ministerial Order.

Recommendation 10: Customer Due Diligence (CDD)

Verification of authority to act on behalf of another person (criterion 10.4)

11. At **paragraphs 24 to 28**, the Consultation explained the requirements of criterion 10.4 and noted a gap in the MLO. It proposed that Article 3 of the MLO be amended so that relevant persons be required to verify that any person purporting to act on behalf of any customer is so authorised, and identify and verify the identity of that person. **Question 6** of the Consultation asked whether respondents consider that the proposal is effective and proportionate.

12. Overall, respondents were in favour of the proposals. As such, Government has submitted instructions to the law draftsman to amend Article 3 of the MLO so that relevant persons are required to verify that any person purporting to act on behalf of any customer is so authorised, and verify the identity of that person.

Higher risk customers (criterion 10.7(b))

13. At **paragraphs 29 to 32**, the Consultation explained that criterion 10.7(b) of the Recommendations contains provisions relating to the ongoing due diligence of higher risk customers, although "higher risk customers" are not specifically referenced in the MLO in this respect. The Consultation therefore proposed that Article 3(3)(b) of the MLO be amended to include specific reference to higher risk customers, as set out in the sub-criterion. **Question 7** asked respondents whether they consider the proposal is effective and proportionate.

14. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 3(3)(b) of the MLO to add specific reference to "higher risk customers".

ML/TF risks are effectively managed if verification after the establishment of a business relationship (criterion 10.14(c))

15. At **paragraphs 33 to 36**, the Consultation explained that criterion 10.14(c) of the Recommendations deals with circumstances in which customer and beneficial owner identity verification are completed after the establishment of a business relationship, and the difference between the wording in the criterion which refers to risks being "effectively managed", and the wording in the MLO which refers to there being "little risk". It proposed that Article 13(4) of the MLO be amended to include the specific terminology in the sub-criterion. **Question 8** asked respondents whether they consider the proposal is effective and proportionate.

16. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 13(4) of the MLO to include, as a condition, the specific wording from the Recommendation: "the ML/TF risks are effectively managed".

Risk management procedures if verification after the establishment of a business relationship (criterion 10.15)

17. At **paragraphs 37 to 40**, the Consultation explained that criterion 10.15 of the Methodology provides that financial institutions must adopt risk management procedures concerning the conditions under which a business relationship may be established before identity verification is completed. Article 11 of the MLO deals with policies and procedures of relevant persons, but does include specific reference to the conditions under which verification can be delayed. It proposed that Article 11 of

the MLO be amended to include the specific requirement in criterion 10.15. **Question 9** asked respondents whether they consider the proposal is effective and proportionate.

18. Overall, respondents were in favour of the proposals. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 11 of the MLO to require relevant persons to adopt risk management procedures concerning the conditions under which a customer may utilise a business relationship prior to verification of the identity of the customer.

Simplified measures and exemptions (criterion 10.18)

19. At **paragraphs 41 to 51**, the Consultation looked at the simplified due diligence measures regime contained in Articles 17 and 18 of the MLO as compared with the provisions of criterion 10.18. Recent mutual evaluations have viewed provisions such as those in Articles 17 and 18 of the MLO to be exemptions rather than simplifications. It was proposed that the MLO be amended to remove the simplified measures regime contained in Articles 17 and 18, re-introducing them as statutory exemptions with existing scenarios "grandfathered" into the exemptions regime pending the results of the NRA. **Question 10** asked whether respondents considered the proposal effective and proportionate.

20. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare amendments to the MLO removing the simplified measures regime set out in Articles 17 and 18, and re-introducing them as statutory exemptions from CDD obligations, retaining the current conditions and exclusions. The exception to this is that the conditions currently set down in Article 17(9A) of the MLO will be removed from the statutory exemption that will replace Article 17 of the MLO.

CDD exemption to avoid tipping-off (criterion 10.20)

21. At **paragraphs 52 to 55**, the Consultation noted that under criterion 10.20, where a financial institution forms a suspicion of money laundering or terrorist financing, and the financial institution reasonably believes that performing the CDD process will tip-off the customer, the financial institution should be permitted not to pursue the CDD process, and instead should be required to file a suspicious activity report. The Consultation also noted that, while Article 14(6) of the MLO provides that a relevant person need not apply identification measures where it has filed a suspicious activity report and terminated the transaction or relationship, this "carve-out" is not specfically linked to the belief that the CDD process will tip-off the customer. It was therefore proposed that this exemption be added. **Question 11** asked whether respondents considered the proposal to be effective and proportionate.

22. Overall, respondents were in favour of the proposal. As such, the Government has submitted instructions to the law draftsman to prepare an amendment to Article 14(6) of the MLO to link the carve-out to the suspion of money laundering or terrorist financing.

Recommendation 11: Record-keeping

Retention of analysis undertaken (criterion 11.2)

23. At **paragraphs 56 to 60**, the Consultation explained that criterion 11.2 provides that financial institutions should be required to retain records of the analysis undertaken on a business relationship or occasional transaction (in addition to the usual copies or records of documents which were gathered during the onboarding process). Whilst such a requirement is contained in section 10.4.3 of the JFSC AML Handbooks, it is considered appropriate to place the requirement on a statutory footing so that it captures the full range of financial institutions and designated non-financial businesses and professions. **Question 12** asked whether respondents consider that the proposal is effective and proportionate.

24. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 19(2) of the MLO to provide that retained records should include the "results of any analysis undertaken (e.g. inquiries to establish the background and purpose of complex, unusual large transactions)".

CDD and transaction records available to authorities swiftly (criterion 11.4)

25. At **paragraphs 61 to 67**, the Consultation noted that criterion 11.4 requires CDD information and transaction records to be available to authorities "swiftly", whereas Jersey law currently requires such records to be available "on a timely basis". It was proposed that the word "swiftly" be adopted in Jersey law as other terminology has been criticised in recent mutual evaluation reports of other jurisdictions. **Question 13** asked whether respondents consider that the proposal is effective and proportionate.

26. Overall, respondents were in favour of the proposal. As such, the Government has submitted instructions to the law draftsman to prepare an amendment to Article 19(2) of the MLO to provide that retained records should be available "swiftly".

Recommendation 12: Politically Exposed Persons

Enhanced ongoing monitoring (criterion 12.1(d))

27. At **paragraphs 68 to 71**, the Consultation explained that criterion 12.1 sets various requirements for financial institutions in relation to PEPs of which one, the requirement to conduct enhanced ongoing monitoring on the relationship, is not reflected in Jersey law. It proposed that Article 15(5A) of the MLO be amended to add this requirement. **Question 14** asked whether respondents consider that the proposal is effective and proportionate.

28. Respondents were overall in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 15(5A) to introduce the requirement "to conduct enhanced ongoing monitoring on that relationship".

29. Clarification was sought in one response as to whether the requirement will apply to all PEPs or only domestic PEPs. In line with criterion 12, the requirement will apply to foreign PEPs and high risk domestic PEPs.

Domestic PEPs and international organisations (criterion 12.2)

30. At **paragraphs 72 to 79**, the Consultation explained that criterion 12 draws a distinction between domestic PEPs and foreign PEPs and places different requirements on each group. It also noted that there are no distinct requirements for domestic PEPs in Jersey law. The Consultation proposed that Article 15 of the MLO be amended to include the requirements relating to domestic PEPs (including family members and associates, and persons entrusted with a prominent function by an international organisation) as set out in criterion 12.2. **Question 15** asked whether respondents consider that the proposal is effective and proportionate. **Question 16** asked respondents about their preferred method of guidance in relation to domestic PEPs.

31. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 15 of the MLO to reflect the addition of domestic PEPs. Further guidance will be given at the time of the amendment coming into force.

32. One respondent sought further guidance on the definition of "international organisation", asking, in particular, if a firm with branches in other jurisdictions, or STEP, would be an "international organisation" as a prerequisite to giving responses on these questions. The same respondent also sought clarification as to what would be considered a "prominent function". The JFCSG notes that these terms are already employed in the current Article 15(6)(a) of the MLO and would expect the

interpretation of such terms to remain consistent with their current interpretation, which is a matter for legal advice.

PEPs and life insurance policies (criterion 12.4)

33. At **paragraphs 80 to 82**, the Consultation explained that criterion 12.4 contains specific requirements to inform senior management, conduct enhanced scrutiny on the whole business relationship with a policyholder, and consider making a suspicious activity report, before paying out on a life insurance policy. It was noted that this specific requirement is not contained in Jersey law. Correspondingly, it was proposed that such a requirement be added. **Question 17** asked respondents whether they consider that the proposal is effective and proportionate.

34. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 15 of the MLO introducing the requirement described above.

Recommendation 13: Correspondent Banking

Understanding respective AML/CFT responsibilities (criterion 13.1(d))

35. At **paragraphs 83 to 89**, the Consultation noted that criterion 13.1(d) provides, in relation to correspondent banking or similar relationships, that financial institutions should be required to "clearly understand the respective AML/CFT responsibilities of each institution", where the financial institution enters into a relationship which resembles "cross-border banking and other similar relationships". The MLO is deficient in this regard, as Article 15(4A) only applies to banks. Under criterion 13.1, the requirements of 13.1(d) apply to any financial institution where the relationship it forms resembles correspondent banking or a similar relationship, not only banking institutions which form correspondent banking (or similar) relationships. It was therefore proposed that Article 15 of the MLO be amended to apply the 13.1(d) requirements to all financial institutions which form a correspondent banking relationship. It was also noted that currently the correspondent banking requirements in Articles 15(4) to (4B) require financial institutions to "record" the respective AML/CFT responsibilities. It was further proposed that Article 15 of the MLO be amended to include the obligation to "clearly understand the respective AML/CFT responsibilities of each institution" in addition to recording those responsibilities. **Question 18** asked respondents to consider whether the first proposal relating to "similar relationships" is effective and proportionate. **Question 19** asked whether guidance on the meaning of the term "similar relationships" should be given. **Question 20** asked whether the proposal to introduce a requirement for the financial institution and correspondent bank to each "clearly understand" their respective responsibilities is effective and proportionate.

36. Overall, respondents were in favour of the proposals. As such, Government has submitted instructions to the law draftsman to prepare amendments to Article 15 of the MLO as set out above.

Recommendation 14: Money or Value Transfer Services (MVTS)

Definition of MVTS (criterion 14.1)

37. At **paragraphs 90 to 95**, the Consultation noted that criterion 14.1 relates to MVTS and went on to note the new definition of MVTS. Whilst the definition of money services business in the Financial Services (Jersey) Law 1998 (being the locally equivalent term to MVTS) goes a long way towards complying with the definition in the Recommendations, it was proposed that the statutory definition of money services business be amended to include the new definition of MVTS, as set out in criterion 14.1. **Question 21** asked respondents whether they consider the proposal to be effective and proportionate.

38. Overall, respondents were in favour of the proposal. However, concerns were raised about whether the proposals would inadvertently capture virtual asset service providers (**VASPs**) where that had not been the stated intention. Further consideration was encouraged as to the position of VASPs prior to bringing forward such an amendment. The regulation of VASPs is to be considered as a separate project by Government within the next year. With this is mind, Government intends to bring forward a proposal which excludes VASPs until separate consideration can be given to the position and regulation of VASPs.

Recommendation 15: New Technologies

Risk assessing new products and technologies (criterion 15.2)

39. At **paragraphs 96 to 99**, the Consultation explained that criterion 15.2 requires financial institutions to carry out risk assessments prior to the launch of new products and technologies, and to take appropriate risk management measures in relation to such risks. Whilst a similar requirement is contained in Article 11(3)(ba) and (bb) of the MLO, the Jersey requirement is not time-bound in the same way as the criterion, and does not specifically refer to appropriate measures that must be taken to mitigate the identified risks. It was proposed that Article 11(3) of the MLO be amended to include the wording in criterion 15.2. **Question 22** asked respondents whether they consider that the proposal is effective and proportionate.

40. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 11(3) of the MLO so that there will be a requirement to assess the risks of new products and technologies before launching them, and to put in place risk management measures.

Recommendation 17: Reliance on Third Parties

41. At **paragraphs 100 to 103**, the Consultation noted the provisions of criterion 17.3, relating to reliance on third parties within the same financial group, and went on to compare them with the equivalent provisions in Article 16A of the MLO. It noted that the requirement in criterion 17.3(c) that "any higher country risk is adequately mitigated by the group's AML/CFT policies" is not reflected in the MLO. It was therefore proposed that this requirement be introduced. **Question 23** asked respondents whether they consider the proposal is effective and proportionate.

42. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 16A adding the requirement described above.

Recommendation 18: Internal Controls and Foreign Branches and Subsidiaries

Information sharing within financial groups (criterion 18.2)

43. At **paragraphs 104 to 107**, the Consultation noted the provisions of criterion 18.2 and that the requirement to have "policies and procedures for sharing information" relating to AML/CFT across a financial group is absent from Article 11 of the MLO. It proposed that Article 11 of the MLO be amended to clearly include the requirements of criterion 18.2, particularly relating to information sharing. **Question 24** asked respondents whether they consider that the proposal is effective and proportionate.

44. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare an amendment to Article 11 in the terms described above. It is noted that such provisions will need to comply with GDPR and proposals are being considered to ensure this is the case.

Management of risks where host countries do not permit proper implementation of AML/CFT measures (criterion 18.3)

45. At **paragraphs 108 to 110**, the Consultation noted that criterion 18.3 provides that where a host country does not permit the proper implementation of AML/CFT measures consistent with the home country requirements, financial groups should be required to apply appropriate additional measures to manage the ML/TF risks, and inform their home supervisors. It also noted this requirement is absent from the MLO. It proposed that Article 11 of the MLO be amended to include this requirement. **Question 25** asked respondents whether they consider the proposal is effective and proportionate.

46. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare a corresponding amendment to Article 11 of the MLO.

Recommendation 22: Designated Non-Financial Businesses and Professions (DNFBPs) and Customer Due Diligence

Casinos (criterion 22.1(a))

47. At **paragraphs 111 to 117**, the Consultation explained that most requirements relating to DNFBPs are met in Jersey as CDD obligations relating to financial institutions and DNFBPs are, on the whole, the same. However, some DNFBP-specific actions are required. In particular, criterion 22.1(a) sets a requirement relating to casinos, that they be able to link CDD information for a particular customer to the transactions that the customer undertakes in the casino. It was proposed that, as there is currently no AML/CFT Handbook for casinos in Jersey, such requirement would be introduced to the MLO. **Question 26** asked respondents whether they consider that the proposal is effective and proportionate.

48. Overall, respondents were in favour of the proposal. As such, Government has submitted instructions to the law draftsman to prepare a corresponding amendment to the MLO.

Real estate agents (criterion 22.1(b))

49. **At paragraphs 118 to 122**, the Consultation explained that criterion 22.1(b) concerns the application of CDD by real estate agents to their customers. It noted that the interpretive note, along with developing practice in other jurisdictions, increasingly points towards a requirement for real estate agents to apply CDD measures to both parties to a real estate transaction. It proposed that such a requirement be introduced in Jersey. **Question 27** asked whether respondents

consider the proposal to be effective and proportionate. **Question 28** asked whether respondents consider that the proposal should be achieved by amending the MLO, or adding a footnote to the Real Estate Agents' AML/CFT Handbook.

50. Overall, respondents were in favour of the proposal. Respondents favoured adding a note to the Real Estate Agents' AML/CFT Handbook. As such, the JFSC will amend the Real Estate Agents' AML/CFT Handbook accordingly.

Recommendation 24: Transparency of Legal Persons

51. At **paragraph 124 to 150**, the Consultation explained that Recommendation 24 relates to measures that should be taken to prevent the misuse of legal persons for ML/TF. In particular, Recommendation 24 provides minimum standards in respect of basic information about legal persons which should be required to be provided to the Companies Registry and made publicly available. Such basic information includes the basic regulating powers of each legal person, and a list of the directors of each legal person.

52. The Government is developing a new Register of Entities (Jersey) Law 201- (**Registry Law**), designed to provide clarity around the roles and responsibilities of the Companies Registry, ensuring that Jersey law is demonstrably in line with Recommendation 24, and providing a clear statutory basis on which to collect basic information and beneficial ownership information on Jersey entities. Each of the proposals examined in the Consultation in relation to Recommendation 24 will be taken forward as part of the Registry Law project.

Regulations of a foundation

53. One of the gaps identified at **paragraph 130** of the Consultation is that under Recommendation 24 the regulations of a foundation would need to be filed with the Companies Registry and made publicly available in order for Jersey to full comply with the requirement that the "basic regulating powers" of a foundation be made available. As such, it was proposed that the regulations of Jersey foundations (referred to as the "Foundation Rules" in the Consultation) would have to be filed with the Companies Registry and made publicly available. **Question 29** asked respondents to consider whether the proposal is effective and proportionate.

54. Whilst a majority of respondents were in favour of the proposal (noting, for example, that the regulations of a foundation are important for understanding the control of a foundation), respondents did raise concerns, principally:

    a. that the treatment of foundations should be consistent with the treatment of trusts and partnerships, and the public disclosure of the regulations of

foundations might set a precedent which could then be applied to trusts and partnerships; and

b. that business would be lost to the Island because of the loss of privacy.

55. These responses are noted. Having studied the issues in more depth and further considered the FATF Recommendations, the following is noted by the Government:

a. The FATF Recommendations do not, unfortunately, set out bespoke requirements in relation to foundations. Instead the Recommendations provide that, "In relation to foundations, Anstalt, and limited liability partnerships, countries should take similar measures and impose similar requirements, as those required for companies, taking into account their different forms and structures."[2] And, "At a minimum, countries should ensure that similar types of basic information should be recorded and kept accurate and current by such legal persons, and that such information is accessible in a timely way by competent authorities."[3] In relation to companies, the Recommendations simply provide that the basic information (which should be required to be submitted to the companies register) should include, "basic regulating powers (e.g. memorandum & articles of association)"[4].

b. When transferring the principle of "memorandum & articles of association" to foundations, the Government would find it difficult to interpret the Recommendations other than suggesting that the charter (analogous to the memorandum) and the regulations of the foundation (analogous to the articles of association) are required, by the Recommendations, to be submitted to the Companies Registry and made publicly available.

c. It is noted that under current practice in Jersey, the regulations of a foundation include a significant body of information which is rightfully private to the beneficiaries of a foundation and that the intention of the FATF Recommendations, by setting common requirements for foundations as for companies, do not appear to include the publication of such private information. (In particular, such private information would not, in relation to companies under Jersey law, be made publicly available.)

[2] Interpretive Note to Recommendation 24, Part E, paragraph 16.
[3] Interpretive Note to Recommendation 24, Part E, paragraph 17.
[4] Interpretive Note to Recommendation 24, Part A, paragraph 4(a).

56. Given the interpretation of the FATF Recommendations outlined above, the Government is minded to proceed with proposing the introduction of a requirement for the regulations of a foundation to be filed with the Registrar of Companies and made publicly available. But in doing so it is acknowledged that such a requirement, and the transitional provisions relating to it, will need to be carefully considered and framed so that practitioners and clients will have a clear mechanism and sufficient opportunity of time to extract private information from the regulations of each foundation and maintain such information on a private footing. The intention is that after the provision is introduced, the regulations of foundations appearing on the Register of Companies will be analogous and comparable to the articles of association of a company in terms of the level of constitutional vs. private information they contain. Legislative proposals designed to achieve the foregoing will be brought forward as part of the Registry Law project.

Register of directors

57. Another gap identified in the Consultation at **paragraphs 132 to 135** is that the Recommendations require that a central register of directors be maintained, whereas such a register does not exist in Jersey. The Consultation suggested that a central register of directors be created in line with previous consultations. **Question 30** asked whether the information on the register of directors should be made publicly available.

58. Overall, respondents were in favour of the proposal of making the register of directors publicly available. However, some respondents raised concerns, including:

a. that access to the register should be restricted to authorities as public access to the register of directors may have adverse consequences for directors' life enjoyment and security;

b. that the question of whether the register is made publicly available should be a matter of primary law and not determined by Ministerial Order;

c. that the measure may be motivated by pressure from European investigative journalists and whether such pressure is a correct basis on which to override individual rights; and

d. what the purpose and benefit of a public register of directors would be and whether such a register would conflict with GDPR and individuals' right to privacy, particularly as company directors in the UK are disproportionately victimised by identity theft.

59. Recommendation 24 includes “list of directors” within the “basic information” which must be filed with the relevant companies register. Furthermore, the Methodology provides that, “This information should be publicly available.”[5] Government would find difficulty with an interpretation of the Methodology which does not include a strict requirement for a register of directors to be made publicly available. As such, and in light of the Government of Jersey’s policy to ensure compliance with international standards, Government is minded to proceed with the creation of a public register of directors. It is intended that the Registry Law provide the basis for creating the public register of directors.

60. Government notes the concerns raised in relation to the creation of a public register of directors. Government will work with industry through informal and formal future consultation on its detailed proposals as part of the Registry Law project to ensure that sufficiently robust mitigating measures are put in place which guard against information on the register putting the privacy and security of directors at risk. Subject to further detailed consideration, such proposals may include:

    a. requiring only a “business” or “correspondence” address to be published on the register and not home addresses;

    b. publishing the minimum information which is required on the identity of directors to minimise the risk of identity theft;

    c. only providing an ability to search by company and not providing functionality to search by director on the register or click on a director’s name to view that director’s other directorships; and/or

    d. providing a legal mechanism by which directors will be able to apply to the Registrar of Companies to suppress their identities from the register where there is a credible threat to the director’s personal security as a result of publication.

Timely updating of basic information

61. At **paragraph 136**, the Consultation explained that criterion 24.5 requires countries to have mechanisms to ensure that basic information is updated on a timely basis. Having for some time required other company information (such as beneficial ownership information) to be updated within 21 days, the Consultaton proposed that the same timeframe, 21 days, should be applied to the updating of all basic

[5] Page 66, Recommendation 24, paragraph 24.3.

information (including the register of directors). **Question 31** asked respondents to consider whether the proposal is effective and proportionate.

62. Overall, the proposed requirement to update basic information within 21 days was supported by respondents. Whilst a minority of respondents did argue for a longer period, compelling supporting arguments were not presented. The Government is therefore minded to proceed with the requirement to update basic information within 21 days.

63. It is noted that the provision of API filing functionality by the Registrar of Companies which will be developed further in the future should further facilitate filings within the timescales with greater ease for professional service firms.

64. Some respondents rightly pointed out that clarity will be needed on the method of counting, e.g. 21 “clear”, “calendar” or “working” days. Government will clarify these provisions whilst consulting on the Registry Law.

Beneficial ownership information

65. At **paragraphs 137 to 140**, the Consultation explained that criterion 24.8, in relation to beneficial ownership information, requires that a natural person or designated non-financial business or profession (which, in the Jersey context, would be a regulated TCSP) should be required to provide basic information and beneficial ownership information to the authorities (and accountable to the regulator for the same). It was proposed that the Registry Law introduce a specific requirement for all legal persons to have either a natural person or regulated TCSP designated with such responsibility and notified as such to the Companies Registry. **Question 32** asked whether this proposal was effective and proportionate.

66. Overall, respondents were supportive of this proposal. A minority of respondents who were not in favour of the proposal argued that responsibility for filings should rest with the board of a company, not a nominated individual, who should act as a point of contact only. One respondent felt that the law must provide that the natural person or TCSP will not be liable for any failure to file or update information that has not been provided to them and do not have an obligation to make unlimited enquiries or carry out due diligence to obtain that information.

67. While Government is minded to proceed with the proposal, Government is conscious that careful thought will need to be given as to the allocation of liability for failure to make a relevant filing and that consideration will need to be given to the consequences (both intended and unintended) which will flow from the way this proposal is implemented. Government will continue to consult with stakeholders and subject matter experts in the development of the Registry Law, as well as conduct a public consultation, in order to ensure the outcome is workable.

68. The Consultation continued to explain that criterion 24.10 provides that competent authorities and law enforcement agencies should have all the powers necessary to obtain timely access to basic and beneficial ownership information, and that further legislative changes may be needed in order to improve information sharing gateways between relevant agencies, particularly the tax authority. Proposals relating to this requirement will be included within the Registry Law.

Bearer Shares

69. At **paragraphs 142 to 144**, the Consultation explained that criterion 24.11 sets out requirements to prevent the misuse of bearer shares and bearer share warrants. Whilst bearer instruments are currently required to be registered, the Consultation explained that Government is minded to put the position beyond doubt (in line with common practice now in other jurisdictions) by introducing a specific prohibition on bearer shares. **Question 33** asked whether respondents consider the proposal to be effective and proportionate.

70. Whilst some concerns were raised around whether the proposal would be unnecessary and impracticable, and would create unnecessary client due diligence, respondents were otherwise in favour of the proposal. Government will therefore provide for the prohibition on bearer shares as part of the Registry Law project.

71. Respondents rightly pointed out that clarification may be needed on the position of cryptoassets, some of which may share features with bearer instruments and be open to abuse for ML/TF, and on the position of bearer instruments relating to non-Jersey companies. Government will endeavour to bring forward legislative proposals which are clear in both regards.

Nominee shareholders and directors

72. At **paragraphs 145 to 150**, the Consultation explained that the 2012 FATF Recommendations provide options for controlling situations where there is an ability to use nominee shareholders or directors. Respondents were asked to consider whether Jersey should adopt a regime where nominee shareholders are only permitted if they are licensed and regulated in Jersey (Option A); licensed and regulated in another equivalent jurisdiction (Option B); or that nominees must notify the company and the Companies Registry of the identity of any nominator (irrespective of material interest in the company) and for that information to be included on the register (Option C). Information provided to the companies register under Option C could be held either publicly or privately and respondents were asked to consider this position. **Question 34** asked respondents whether they consider that Jersey should adopt Option A, Option B or Option C.

73. Respondents were split equally between the options presented.

74. In relation to Option A, one respondent expressed difficulty in obtaining CDD on the beneficial owners of nominees and suggested that Option A would provide comfort that nominees are “approved” by the JFSC, allowing a concession to apply to CDD measures.

75. In relation to Option B, respondents noted that consideration needs to be given to listed companies who will have nominee shareholders on their registers, and also noted that most nominee companies will be regulated.

76. In relation to Option C, some respondents expressed the view that the information should be held on the register in the same way as for shareholders who are individuals. Contrastingly, multiple respondents expressed the view that Option C is only preferable if information held on the register is held privately.

77. It was also noted there are a number of circumstances under Jersey law in which nominees are permitted without being registered to conduct trust company business, in reliance on various exemptions. Respondents expressed preference that these not be changed without wider consideration. The controllers of Jersey companies who are identified by application of the three-tier test are already notified to the Registry, regardless of whether shares are held by nominees or not. Respondents felt it is difficult to see what additional value is achieved by also notifying the name of the nominators, regardless of whether their interest in the company is material or not.

78. The Consultation also explained that, whilst the view has been taken that Jersey company law does not recognise the concept of nominee directors, it is proposed that the position be put beyond doubt by amending the Companies (Jersey) Law 1991 to explicitly prohibit the concept of nominee directors. **Question 35** asked respondents whether they consider that nominee directors should be explicitly prohibited by amending the Companies (Jersey) Law 1991.

79. Overall, respondents were in favour of this proposal. Responses in favour pointed out that the proposal should work as long as the definition of “nominee director” is sufficiently narrow, so as not to prohibit functions that are currently permitted or impose additional duties in directors. For example, it should not prevent the appointment by one shareholder of a director to represent the interests of that shareholder. Clearly such a director would still owe the normal fiduciary duties to the company of which he is a director, but he should not be treated as a nominee director merely because he was appointed by a particular shareholder.

80. Respondents not in favour of the proposal noted that often companies want to use the services of fiduciaries as they have more expertise and it may be more cost effective from an administrative point of view including insurance depending on the size of the business.

81. Having considered the proposals, Government will bring forward proposals to explicitly prohibit nominee directors and tighten control of nominee shareholders as part of the Registry Law project and will consult in further detail on such proposals as part of that project.

Recommendation 25: Transparency of Legal Arrangements

Basic information on service providers to trusts (criterion 25.1(b))

82. At **paragraphs 151 and 152**, the Consultation explained that the majority of Recommendation 25 has been complied with through Jersey's longstanding TCSP regulatory regime. However, the Consultation noted at **paragraph 153** that in respect of criterion 25.1(b) there is no explicit requirement in Jersey legislation on trustees to hold basic information on other regulated agents of, and service providers to, a trust, including the investment advisers or managers, accountants, and tax advisers. Whilst in respect of the regulated community of trustees this type of record keeping would likely be imposed by regulatory requirements under current practice, this does not require all trustees to maintain such records and therefore Jersey law arguably falls short of the standard.

83. At **paragraph 154**, the Consultation proposed that an amendment be made either to the Trusts (Jersey) Law 1984 (**TJL**) and associated regulatory Codes of Practice to introduce an requirement complying with criterion 25.1(b), or place similar provisions in the POCL and/or subordinate legislation to impose such a requirement. **Question 36** asked if respondents consider the proposal to be effective and proportionate. **Question 37** asked whether such an amendment should be made to the TJL or the POCL.

84. Responding to Question 36, respondents were in favour of the proposals overall, although valuable observations were made which are discussed further below.

85. In response to Question 37, respondents were split equally on whether the provision should be placed in the TJL or the POCL. There are various other provisions discussed further below which each relate to trusts where there was a preference to place to the amendments in the POCL instead of the TJL. In the interests of consistency, therefore, Government proposes to place all such amendments in the POCL.

86. Respondents pointed out that, in relation to foreign trusts which, though governed by Jersey law, have a limited nexus with Jersey and may not have trustees resident in Jersey or regulated by the JFSC, there may be challenges around the enforceability of such provisions. Thus, the POCL may have limited traction. Alternatively, it may be that the best way to "capture" a foreign, Jersey law-governed trust, would be to

place a requirement in the TJL which would be coupled with a mechanism for "biting" on foreign trustees. Government intends to deal with the specific gap in law relating to service providers at this time and, as above, to do this in POCL. There is a wider issue around ensuring that foreign trustees of Jersey law governed trusts who have a limited nexus with Jersey are subject to Jersey-based measures to prevent money laundering. This issue will be addressed separately in the future.[6]

Disclosure of the status of a trustee (criterion 25.3)

87. At **paragraphs 156 and 157**, the Consultation explained that criterion 25.3 requires countries to take measures to ensure that trustees disclose their status to financial institutions and DNFBPs when forming a business relationship or carrying out an occasional transaction above the threshold. The Consultation proposed that an explicit provision requiring trustees to do this be introduced in either the TJL or the POCL. **Question 38** asked whether respondents consider the proposal to be effective and proportionate. **Question 39** asked respondents to indicate whether they consider such a requirement should be introduced to the TJL or the POCL.

88. In response to Question 38, respondents were strongly in favour of the proposal. In response to Question 39, respondents marginally favoured placing the requirement in the POCL instead of the TJL.

89. In line with the previous proposal relating to basic information on the service providers to trusts, for consistency Government proposes to introduce such a requirement to the POCL.

Trustees not prevented by law from providing information (criterion 25.4)

90. At **paragraphs 158 to 160**, the Consultation explained that criterion 25.4 requires that, "Trustees should not be prevented by law or enforceable means from providing competent authorities with any information relating to the trust, or from providing financial institutions and DNFBPs, upon request, with information on the beneficial ownership and the assets of the trust to be held or managed under the terms of the business relationship." It proposed that amendments be made to the TJL or the POCL to ensure that trustees are not prevented by law or enforceable means from

[6] Readers may wish to note comments made in the recent mutual evaluation report of the Cayman Islands in relation to this issue, to be found on page 156 of that report: "*Ordinary trusts (as with exempted trusts) are also not obliged to use a Cayman licensed TCSPs subject to AML/CFT obligations or oversight and are not subject to any disclosure obligations. This limits competent authorities' ability to identify those trusts that may be involved in ML/TF activities or obtain BO information on these structures. This further limits competent authorities ability to obtain timely, adequate and accurate basic or BO information on these types of trusts, especially considering the amount of these structures (5,520) which are far more prevalent than other trusts in the jurisdiction lack of certainty and adequacy of information on these structures may also undermine AML/CFT measures.*"

providing competent authorities with any information relating to the trusts, and that trustees should not be prevented from providing financial institutions and DNFBPs, upon request, with information on the beneficial ownership and the assets of the trust to be held or managed under the terms of the business relationship. **Question 40** asked whether respondents consider that an amendment is required to either the TJL or the POCL to give effect to criterion 25.4. **Question 41** asked whether, if respondents did consider that an amendment is required, such amendment should be made in the TJL or the POCL.

91. In response to Question 40, a majority of respondents agreed that an amendment giving effect to criterion 25.4 is appropriate. In response to Question 41, a majority of respondents favoured placing such an amendment in the POCL over the TJL.

92. One respondent flagged that the new provisions in Article 29 of the Trusts (Jersey) Law 1984 introduced through Amendment No 7 need to be considered in this context. The focus in those amendments had been on disclosure by the trustee to the beneficiaries but the tightening up of these provisions may now give the trustee discretion to refuse to disclose any information to anyone if they think it is in the best interest of the beneficiaries.

93. Taking into account the responses summarised above the Government has submitted instructions to the law draftsman to prepare a provision in the POCL to put it beyond doubt that trustees shall not be prevented by law or enforceable means from providing competent authorities with any information relating to trusts of which they are trustee. Equally, the law will need to provide that trustees shall not be prevented from providing financial institutions and DNFBPs, on request, with information on the beneficial ownership and the assets of a trust to be held or managed under the terms of the business relationship.

Recommendation 26: Regulation and Supervision of Financial Institutions

Risk-based approach in AML/CFT supervision (criteria 26.5 and 26.6)

94. At **paragraphs 162 to 170**, the Consultation noted that one of the key changes from the 2003 Recommendations is the formal integration of the concept of a "risk-based approach" into all aspects of the AML/CFT regime. This is very clear in the Recommendations relating to supervision, particularly when viewed alongside the Interpretive Notes and the Methodology. The Consultation also noted that other jurisdictions are increasingly defining the statutory function of an AML/CFT supervisor using the terminology from criteria 26.5 and 26.6, in order to demonstrate technical compliance with the international standard. The Consultation proposed that the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 (**Supervisory Bodies Law**) be amended so that the function of an AML/CFT supervisor is clearly

defined to include the concepts and terminology in the sub-criteria set out above, clearly incorporating the risk-based approach. **Question 42** asked respondents whether they consider the proposal is effective and proportionate.

95. Overall, respondents were in favour of the proposal. Government therefore intends to proceed with introducing an amendment to the Supervisory Bodies Law as described.

Recommendation 28: Regulation and Supervision of DNFBPs

Prevention of criminals from owning or controlling DNFBPs (criterion 28.4)

96. At **paragraphs 171 to 176**, the Consultation noted that criterion 28.4 of the Recommendations requires competent authorities to take necessary measures to prevent criminals or their associates from being professionally accredited, or holding (or being the beneficial owner of) a significant or controlling interest, or holding a management function in, a DNFBP. It proposed that the Supervisory Bodies Law be amended to introduce a criminality test for all other DNFBPs similar to that which currently applies to some financial institutions and TCSPs under the Supervisory Bodies Law and the Financial Services (Jersey) Law 1998. **Question 43** asked whether respondents consider the proposal to be effective and proportionate. **Paragraph 177** went on to explain that it was proposed that the test be a "criminality" test, not a full "fit and proper" test. **Question 44** asked whether respondents consider that proposal to be effective and proportionate. **Paragraph 178** explained that the proposal would apply to existing DNFBPs. **Question 45** asked whether respondents consider that proposal to be effective and proportionate.

97. Overall, respondents were in favour of each of the three proposals outlined above. As such, the Government has submitted instructions to the law draftsman to prepare corresponding amendments.

– END –