

Financial Services Ombudsman (Jersey) Law 201-

Secondary legislation

Purpose of consultation

The draft Financial Services Ombudsman (Jersey) Law 201- has been lodged and is set to be debated in the States Assembly on 1 April 2014. It establishes an Ombudsman with powers to investigate and determine individual customer complaints regarding financial services provided in Jersey.

If the draft legislation is adopted by the States Assembly and sanctioned by the Privy Council, the Minister of Economic Development will consult on an order to exempt certain financial services from the scope of the Ombudsman. The States will also issue Regulations to provide for fees and levies to be payable to the Office of the Financial Services Ombudsman (OFSO). OFSO will consult on any recommendation to the Minister to specify further categories of eligible complainants by Order and, as required, on its scheme of fees and levies. This paper seeks to perform an early consultation on the financial services exempting Order and a proposed Order for the further complainant categories. The Economic Development Department would welcome views. The Economic Development Department in Jersey and Commerce & Employment Department in Guernsey have developed a potential funding model for the joint Financial Services Ombudsman that would cover both jurisdictions; a further consultation is planned on this in due course. Once the primary Law is registered, the further consultations as required by the Law are intended to be short, refreshing exercises as the issues will have been considered under these earlier consultations.

The closing date for submissions is **Thursday 8th May 2014**.

Summary

This consultation relates to two separate pieces of secondary legislation that relate to defining further the scope of what can be referred to the Office of the Financial Services Ombudsman (OFSO).

A complaint may be referred to the Ombudsman if it relates to an act in the course of relevant financial services business provided in or from within Jersey. The legislation defines relevant financial services business widely in Article 9 (1) of the draft Law and then provides that the Minister of Economic Development must by Order exempt classes of business that are not appropriate to be covered by the Ombudsman, after consultation. This consultation seeks views on the proposed scope of financial services covered by the Ombudsman and the areas exempted in the draft Order. The proposed draft Order exempts:

- broadly the same areas as currently given exclusions/exemptions under financial services legislation with some exceptions;
- the provision of occupational pensions by employers;

- certain types of fund business;
- trust company business, unless it also related to separately described financial services (for example, relevant pensions business);
- informal store credit;
- debt advice in certain circumstances, for example from the Citizens Advice Bureau;
- brokerage of financial services, carried on as incidental business where the primary business is not financial services.

Under Article 8 of the draft Financial Services Ombudsman (Jersey) Law 201-, categories of persons eligible to refer a complaint to the Ombudsman are:

- Individuals;
- Small businesses; and
- Charities, trusts, foundations and other bodies as specified by Order (Article 8 (3)).

This consultation seeks views on a proposed further category specified in a draft Order.

The Economic Development Department requests views from financial services providers; individuals; small businesses; and charities, trusts and foundations or groups representing any of these. Officers will be available to discuss issues further if respondents would find it useful.

How to comment

Comments should be sent by the closing date of **Thursday 8th May 2014** to:

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Alternatively, comments can be directed through Jersey Finance Limited and should be sent to:

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Section 1: Introduction

The draft Financial Services Ombudsman (Jersey) Law 201- has been lodged and is set to be debated in the States Assembly on 1 April 2014. It establishes an Ombudsman with powers to investigate and determine individual customer complaints regarding financial services provided in Jersey and that can be operated jointly in partnership with the States of Guernsey.

The Ombudsman will be set up by similar legislation in both Jersey and Guernsey and it is intended that it is operated as a joint venture with shared staff, resources and premises; funded by the financial services industries in both jurisdictions. Guernsey published a States report on the Ombudsman in September 2013 seeking approval in principle for the establishment of a joint Financial Services Ombudsman and for the necessary legislation to be drafted. This was approved in debate on 27 November 2013.¹ The legislation for Guernsey is being drafted, using the Jersey legislation as a reference.

Section 2: Establishment of the Financial Services Ombudsman

A pan-Channel Island Ombudsman service to consider complaints about financial services is a logical collaboration but setting it up is a complex matter providing logistical challenges. As well as the practical arrangements for the handling of complaints, it also requires the necessary legislation to be in place in both jurisdictions, continuing political co-operation between the two islands and fair, effective systems for the raising of funds. An oversight group has been set up to monitor the effective implementation of the Ombudsman scheme, with a membership drawn from the Economic Development Department, States of Jersey; Commerce & Employment Department, States of Guernsey; the Guernsey International Business Association; and Jersey Finance. Effective communication with stakeholders is important and efforts will be made to keep the Commissions, industry and consumer groups updated on developments as the establishment of the OFSO progresses.

A key factor influencing when the OFSO will be ready to open its doors is the timely progress of the primary and secondary legislation in both jurisdictions. Part of this process, namely the consideration of the primary legislation by the Privy Council in the UK, is not under island control. Other key factors are the timely appointment of the Board of the OFSO, which will in turn appoint the Ombudsman, and having the necessary practical arrangements in place. A shadow Board will be appointed after the Law is approved in Jersey to establish OFSO and the Board will consider the opening date, which is unlikely to be before December 2014.

¹ Commerce and Employment press release dated 19 September 2013

Section 3: Funding

OFSO will secure its funding through two mechanisms: levies on entities providing financial services within scope and case fees on providers in respect of complaints against them. The draft Law gives the States powers to make Regulations to provide for case fees and levies (Schedule 2 paragraph 3 and 4) and also, under Article 6, to unite the finances of the Ombudsman with the equivalent in Guernsey. A joint funding arrangement with Guernsey is intended and **a separate consultation on the proposals will follow**, however this section gives an initial outline.

A funding model has been developed by the Economic Development Department and the Commerce and Employment Department in Guernsey, with the assistance of the regulators in each island and industry working groups, and this will be proposed to OFSO, once it is established, as a suggested funding scheme. Levies will apply to financial services providers licensed or registered with the Jersey and Guernsey Financial Services Commissions, carrying out business within the scope of the Ombudsman Scheme and with relevant customers (the funding population). Levies will be payable for each sector in which an entity operates. A one-off start-up levy (currently estimated at £590) will cover the establishment costs of the Ombudsman Scheme, estimated at around £183,000, and begin establishing reserves.

An annual levy will be charged to the funding population, this is estimated in Jersey at £4,620 for banks and £660 for other areas of financial services for the first year, as analysis of available complaints data, experience of other ombudsman schemes and the general nature of banking products indicate that the banking sector is likely to generate proportionally more complaints. Some element of 'user pays' is proposed through case fees of £200. More details, including how the levies and case fees will be applied and available exemptions, will be included in the consultation to follow.

Section 4: Exempt Business Order

Under Article 7 of the draft Financial Services Ombudsman (Jersey) Law 201- a complaint may be referred to the Ombudsman if it relates to “..an act that occurred in the course of relevant financial services business carried on in or from within Jersey..”. This mirrors equivalent wording in the regulatory Laws, but does not reproduce their reference to covering Jersey-incorporated bodies carrying on business anywhere in the world. So, it only covers business done in or from within Jersey, even if the financial services provider is a Jersey-incorporated body.

The legislation defines relevant financial services business widely in Article 9 (1) of the draft Law and then provides that the Minister of Economic Development must make an Order under Article 9(4) to exempt financial services for which it would be not be appropriate for the services of OFSO to be available, after consultation.

In making an Order under Article 9 (4) the Minister must take particular account of –

- the desirability of ensuring that the services of the OFSO are primarily available to persons appearing to the Minister to be likely to lack resources, expertise or other characteristics that would render it reasonable to expect those persons to use other means than the OFSO to resolve complaints (Article 8 (5)(a));
- the desirability of aligning the scheme under this Law with the corresponding Guernsey scheme, if any arrangement has been entered into with Guernsey (Article 8 (5)(b)); and
- any likely impact on respondents carrying on any class of business that may be carried on without being registered, or holding a permit or certificate, under any of the Laws or Regulations in Article 9 (1)(a) to (e).

The exemptions in the Order can be monitored and reviewed over time, so that the scope of financial services covered by OFSO can respond to new developments or to experience with complaints. A draft Exempt Business Order is attached.

The Order takes the approach of exempting all business except for that described in paragraph 2 of Article 2. The effect of Article 2 is that the areas that are within the scope of the Ombudsman, through not being exempt, are:

- Deposit-taking
- Money service business
- The business of a functionary relating to a recognized fund
- General insurance mediation business
- Insurance business
- Investment business
- Pension business
- Credit business and
- Ancillary business relating to the above.

Trust company business

Some types of business that are listed in Article 9(1) of the Financial Services Ombudsman (Jersey) Law 201- are not included in Article 2 of the draft Order. This means that entities carrying out those types of business are exempt from the remit of the Ombudsman unless they also carry out business that falls under one of the other descriptions in Article 2 of the Order.

Trust company business is not included in Article 2 so entities in this sector are generally exempt unless they are carrying out business that falls under another description in Article 2, such as pensions business.

This policy approach towards trust company business reflects the issues raised in Economic Development's 2011 consultation on the structure and funding of the Financial Services Ombudsman; such as the nature of this sector, the role and experience of the Royal Court in relation to disputes and parity with other jurisdictions. The intention is to ensure that the Ombudsman will cover individuals' pension arrangements so where these are trust-based, such as

retirement annuity trusts that are often aimed at local residents, they will be within scope.

Regulatory exclusions and exemptions

The policy intention is broadly to exempt the same areas as currently given exclusions or exemptions under the financial services regulatory laws. Some exceptions to this, however, are proposed for those areas that it would be relevant to include in order to ensure that the services of the OFSO are available to persons likely to lack resources, expertise or other characteristics that would render it reasonable to expect those persons to use other means than the OFSO to resolve complaints. Paragraph (2)(b) means complaints about the deposit-taking activities of the Channel Islands Co-operative Society Ltd (namely its Share and Loan Accounts) and Community Savings Ltd could be considered. The effect of this would also be to cover any other industrial and provident societies.

Paragraph (2)(d) means that low turnover bureaux de change (for example in hotels) and banks carrying on money service business are all within the remit of the Ombudsman scheme. Use of credit, debit and pre-loaded travel money cards as a method of payment will be within scope by virtue of being ancillary to credit provision, deposit-taking and money service business in the form of currency exchange. However entities providing money transmission services such as free-standing cash machines and supermarket cashback will not themselves be caught. This does not mean that customers using such services are unprotected but rather it follows the approach in the UK whereby problems with such services are taken up with the financial business holding the customer's account (ie. the customer's card issuer).

Paragraph (2)(h) specifies that the exemption currently given in Article 5(5)(d) of Insurance Business (Jersey) Law 1996 does not apply, so complaints about the activities of the Jersey Mutual Insurance Society could be considered. Notwithstanding the exemption for regulatory purposes, it seems relevant for OFSO to be able to consider complaints relating to Jersey Mutual.

Views are invited on the support for this approach in respect of bringing certain services currently given a regulatory exemption within the scope of the Ombudsman, namely under:

- the Banking Business (General Provisions) (Jersey) Order 2002: Article 4 and Schedule 1
- the Financial Services (Money Service Business (Exemptions)) (Jersey) Order 2007 Article 4 and Article 5.
- Article 5(5)(d) of the Insurance Business (Jersey) Law 1996.

These exemptions cover banking, money transmission, foreign exchange and insurance services that users would likely expect to be covered by a Financial Services Ombudsman. Furthermore, it is not considered that users would differ from the general public in not having the means or expertise to use other avenues of dispute resolution.

Consultation question 1a. Do respondents agree that customers of the Co-op Share and Loan Accounts, Community Savings and Jersey Mutual should have access to the Ombudsman as they do not necessarily have a greater level of expertise or resources to other users of financial services?

Consultation question 1b: Can respondents identify any issues concerning bringing any other industrial and provident societies within scope?

Consultation question 2. Do respondents agree that low turnover bureaux de change and banks carrying on money service business should be within the scope of the Ombudsman as their customers do not necessarily have a greater level of expertise or resources to other users of financial services?

Funds

Guernsey intends to exclude all fund classifications except for Class A funds from the definition of relevant financial services, as Class A funds are most clearly aimed at retail investors. This classification is the equivalent of Recognized funds in Jersey. Class A and Recognized funds comply with detailed UK rules which enable them to be promoted to the public in the United Kingdom in the same way as if they were UK authorised unit trusts but form a small part of the funds sector in both islands.

Economic Development had considered that all fund classifications within the Collective Investment Fund regime should be within the definition, as persons eligible to complain to the Ombudsman are not barred from investing in them. However, for the sake of a unified scheme, a similar exemption is proposed at the outset. The differences between the funds sectors and regulatory frameworks in Jersey and Guernsey mean that equivalent definitions are difficult but a benefit of limiting the definition in this way is that Class A and Recognized funds are equivalent. Like other exemptions this can be monitored and revised depending on the experience of complaints.

As regards the funds sector, therefore, the draft Order specifies in Article 2 (2) (e) that only the business of a functionary in relation to a recognized fund is relevant financial services for the purposes of the Ombudsman.

Consultation question 3. Views are sought on this approach to the funds sector, bearing in mind the desirability of a joint Ombudsman scheme having a similar scope in each jurisdiction and also bearing in mind that the scope can be amended in the future if justified.

Pensions

It has always been the intention that the Ombudsman scheme should cover complaints about individuals' personal pension planning arrangements. When drafting the Order, the policy was clear that it did not seem appropriate for the Ombudsman to consider complaints about occupational pensions brought against employers by employees. Employers could be any type of entity, not just financial services entities, and there may be a more appropriate forum for disputes between employees and employers. The original policy intention was to

include within scope only 'personal' pension products and planning and not occupational pensions. However, defining personal pensions by reference to Jersey tax definitions would not include pensions provided by Jersey financial services providers that meet pensions' definitions elsewhere. Also, there are many variants between a purely occupational pension scheme run in-house by the employer and a purely personal pension arrangement set up by an individual. An employer may use the services of a third party financial services provider for their occupational scheme or an employer may contribute into a 'personal' pension arrangement such as a retirement annuity trust that has been set up by the employee.

It would seem reasonable for the user of such financial services to expect that they should be able to complain about the activities of the financial services provider in such an arrangement. Such users do not necessarily have a greater level of expertise or resources to other users of financial services and they should therefore have access to the Ombudsman. For this reason, the draft Order exempts relevant pension business carried on by employers in relation to their occupational pension schemes, where the employer is not a financial services provider. But only the employer's business is exempt and the activities of any external financial services provider in the scheme would not be exempt. So, pensions business carried on by financial services providers such as trust company entities is relevant financial services for the Ombudsman scheme. See also Section 5 of this consultation and Article 3 of the Eligible Complainants Order which clarifies that the relationship between a complainant and the financial services provider complained of is generally sufficiently close to be eligible in cases where the complaint relates to an occupational pension scheme.

Consultation Question 4. Economic Development notes that this may be a wider scope on pensions than the industry was anticipating and would welcome comments on this approach.

Credit

The draft Financial Services Ombudsman (Jersey) Law 201- defines relevant credit business in Schedule 4. Credit is not limited to consumer credit but will be limited by the eligible complainant categories (Article 8 (3)); namely individuals, microenterprises and any other categories as may be set by further order (see section 5 of this consultation).

Store credit

The policy approach is that the actual provision of formal credit in or from within Jersey should be covered by the Ombudsman. However, Article 4 of the Order exempts store credit, ie credit provided by sellers of goods and services, if it is not specified Schedule 2 business requiring registration under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008. The intention of this is to exclude traders giving more informal credit such as extra time to pay a bill and only to capture store credit provided by stores requiring registration with the Commission.

Consultation Question 5. Economic Development welcomes views on this approach to store credit.

Debt advice

Article 5 of the draft Order exempts debt advice that is not linked to the provision of credit or the broking of credit and is provided without charge or by a charity or as an incidental business by a person whose principal business is not financial services. The aim of this is principally to exempt the activities of bodies such as the Citizens Advice Bureau but it would also extend to entities such as accountants that are not primarily financial services businesses but that may give incidental debt advice.

Consultation Question 6. Economic Development welcomes views on this approach to debt advice.

Brokerage of financial services

The original intention was that the Ombudsman Scheme should be able to consider complaints about credit intermediaries such as motor dealers offering credit on car sales. However, including these within the scope of the Ombudsman Scheme would also cover a wide range of other retailers/service providers offering credit at the point of sale (including furniture shops, bicycle shops, other retailers, health providers etc), which is a much broader jurisdiction than originally anticipated.

Looking at the experience of the UK Financial Ombudsman Service, most complaints about point-of-sale credit seem not relate to these brokers but to the actual providers of the credit and concern claims under section 75 of the UK Consumer Credit Act, which would not be relevant to credit arranged from Jersey. UK complaints about credit brokers appear to relate to intermediaries for whom it is their main business, and not to point-of-sale brokers. Economic Development is not aware of particular concerns in Jersey regarding retailers and other point-of-sale credit brokers.

To address this, Article 6 excludes non-financial services entities (such as providers of goods and services) acting as intermediaries introducing customers to other businesses providing the financial services, in areas where they are not already required to register with the Commission for these activities. So, for example, while point-of-sale credit broking would not be within scope, the Ombudsman could consider complaints about non-financial services entities carrying on general insurance mediation business, as this requires registration with the Commission. Other ombudsman schemes show greater levels of complaint relating to the selling of general insurance, such as travel or mobile phone insurance, so it is considered prudent to include these as potential respondents.

Consultation Question 7. Economic Development welcomes views on this approach to brokerage of financial services.

Finally, the Ombudsman is intended to be able to consider complaints about the range of financial services that can be provided from Jersey to those eligible to bring complaints. Views are sought as to whether any activities or areas, other than those discussed above, are considered to be missing from the scope.

Consultation Question 8. Economic Development welcomes views on whether there are any areas of financial services or particular activities that would fall outside the descriptions in Article 2(2) of the Order but that respondents consider should come within the scope of the Ombudsman.

Section 5: Eligible Complainants Order

Article 8 of the draft Financial Services Ombudsman (Jersey) Law 201- specifies the categories of complainants that are eligible to refer a complaint to OFSO. The draft law specifies as eligible categories: individuals and microenterprises. A further category relating to charities, trusts, foundations or other bodies can be specified by the Minister by Order on the recommendation of OFSO. In making an Order under Article 8 (3) (c) the Minister must take particular account of –

- the desirability of ensuring that the services of the OFSO are primarily available to persons appearing to the Minister to be likely to lack resources, expertise or other characteristics that would render it reasonable to expect those persons to use other means than the OFSO to resolve complaints (Article 8 (5)(a)); and
- the desirability of aligning the scheme under this Law with the corresponding Guernsey scheme, if any arrangement has been entered into with Guernsey(Article 8 (5)(b)).

The policy intention has been for small charities and individuals acting as trustees of family trusts and individuals acting as trustees of their own pension arrangements to be able to complain, as these are considered to lack the resources, expertise or other characteristics that would render it reasonable to expect them to use means other than the OFSO to resolve complaints. This would be in line with the approach of the UK Financial Ombudsman Service.

Once in existence, OFSO will have its own views on recommendations for any such categories to the Minister, however at this time, the Minister for Economic Development considers that the approach for any such Order should focus on specifying small Jersey charities that have an income of less than £1 million assessed as if for Income Tax. The definition would include charitable foundations or other bodies, subject to the income requirement. While the other complainant categories can be from anywhere in the world, the considerable difficulties in establishing a global definition of charity mean that this has been limited to only Jersey charities. See the attached Draft Order.

It is not considered that any further categories need to be specified at this time, as individuals acting as trustees not in the way of business would be eligible complainants under the individual category.

The Order could also perform a separate function, also related to complainants but to ensure that the provisions in the Exempt Business Order on occupational pensions work as intended. Article 3 is made under Article 8(10)(b) of the draft Law and specifies a general rule on relationships for occupational pensions, rather than leave it to the Principal Ombudsman to issue guidance in this area. It establishes that where a financial services provider is providing services to an employer for an occupational pension scheme, the relationship between the financial services provider and the employee is generally sufficiently close to bring a complaint.

Consultation Question 9. This consultation seeks views on the proposed draft Order, particularly specifying Jersey charities with an income of less than £1 million to be a further category of eligible complainants.

Summarised consultation questions

1(a) Do you agree that customers of the Co-op Share and Loan Accounts, Community Savings and Jersey Mutual should have access to the Ombudsman as they do not necessarily have a greater level of expertise or resources to other users of financial services?

1(b) Can respondents identify any issues concerning bringing any other industrial and provident societies within scope?

2. Do you agree that low turnover bureaux de change and banks carrying on money service business should be within the scope of the Ombudsman as their customers do not necessarily have a greater level of expertise or resources to other users of financial services?

3. Do you agree that for the sake of a unified scope with Guernsey, only Recognized funds should be within scope?

4. Do you agree that the Exempt Business Order should exempt relevant pension business carried on by employers in relation to their occupational pension schemes, where the employer is not a financial services provider?

5. Do you agree that the Exempt Business Order should exempt informal credit provided by sellers of goods and services if it does not require registration under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008?

6. Do you agree that the Exempt Business Order should exempt debt advice, given by bodies such as the Citizens Advice Bureau, that is not linked to the provision or broking of credit and is provided without charge or by a charity or as an incidental business by a person whose principal business is not financial services?

7. Do you agree that the Exempt Business Order should exempt non-financial services entities (such as motor dealers and furniture stores broking credit on products sold) acting as intermediaries introducing customers to other businesses providing the financial services, in areas where they are not already required to register with the Commission for these activities?

8. Are there any areas that fall outside the descriptions in Article 2(2) of the Exempt Business Order but that respondents consider should come within the scope of the Ombudsman?

9. Do you agree that Jersey charities with an income of less than £1 million should be a further category of eligible complainants?