

## Feedback on consultation on AML/CFT scope exemptions

Feedback on consultation on aligning Jersey's AML/CFT registration regime with the 2012 FATF Recommendations

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## Glossary

<b>Amending Law</b>	draft Proceeds of Crime (Amendment No. 6) (Jersey) Law 202-
AML	Anti-Money Laundering
CFT	Countering the Financing of Terrorism
DNFBP	Designated Non-Financial Businesses and Professions
FATF	Financial Action Task Force
FATF Recommendations/FATF Standards	The International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation
FI	Financial Institution
FSB	Fund Services Business
Government	Government of Jersey
IB	Investment Business
JFSC	Jersey Financial Services Commission
MERFS	Minister for External Relations and Financial Services
ML	Money Laundering
Mutual Evaluation Report / MER	Mutual Evaluation Report, specifically the <a href="#">Report on Fourth Assessment</a>
MLO	Money Laundering (Jersey) Order 2008
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
phase 1	First phase of scope exemptions work resulting in the draft Proceed of Crime (Amendments No. 6) (Jersey) Law 202-
phase 2	Second phase of scope exemptions work commencing February 2022
PIRS	Professional Investor Regulated Schemes
Private TCB	Private Trust Company Business
POCL	Proceeds of Crime (Jersey) Law 1999
SBJL	Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008
Schedule 2	POCL's Second Schedule
Scope exemptions	Exemptions that exclude activity from the scope of activities caught by AML/CFT obligations in Jersey

TCB	Trust Company Business
TF	Terrorist Financing
VASP	Virtual Asset Service Provider
We / us	Government and the JFSC

# Table of Contents

<b>1</b>	<b>Executive Summary .....</b>	<b>6</b>
1.1	Background.....	6
1.2	Overview.....	6
1.3	Next steps.....	8
<b>2</b>	<b>Feedback on specific questions .....</b>	<b>9</b>
2.1	Question 1: Do you agree with the approach of disconnecting AML/CFT obligations from conduct and prudential obligations as outlined? .....	9
2.2	Question 2: Do you agree with the proposed approach to connected companies/persons/etc?.....	11
2.3	Question 3: Do you agree with the approach of specifying future scope exemptions within the POCL based on an assessment of risk? .....	13
2.4	Question 4: Do you agree with the approach of requiring all activities, as a minimum, to be subject to appropriate notification obligations?.....	14
2.5	Question 5: Do you agree: (i) with the approach of the JFSC being able to issue guidelines on the interpretation of any expression in Schedule 2; (ii) that regard must be had to such guidelines; and (iii) with the requirement that account must be taken of meanings in the FATF Standards, and FATF Methodology where expressions are not defined? .....	16
2.6	Question 6: Do you agree with the approach to Regulation making powers under the SBJL?.....	17
2.7	Question 7: Do you agree with the proposed approach to further consultation, consequential and transitional provisions, and the commencement of the Draft Proceeds of Crime (Miscellaneous Amendments) (Jersey) Law 202-? .....	17
2.8	Question 8: Do you agree with the approach to registration of more than one activity including AML/CFT fees being payable per-business rather than per-activity? .....	18
2.9	Question 9: Do you have any other comments regarding the proposals within this consultation? .....	19
<b>3</b>	<b>Other comments.....</b>	<b>20</b>
3.1	Banking definition .....	20
3.2	PIRS/Private TCB.....	20
3.3	Express Trusts.....	21
3.4	To, for or on behalf of .....	21
3.5	Granting Exemptions .....	21
3.6	Workshops to explain changes and assist with compliance .....	21
3.7	Directors .....	22
3.8	Definitions .....	22

3.9 Exclusion vs exemption .....	23
3.10 Virtual Currency.....	23
3.11 Advice on capital structure, industrial strategy etc .....	24
<b>Appendix A: List of Respondents.....</b>	<b>25</b>
<b>Appendix B: Proposed revised Amending Law .....</b>	<b>25</b>

# 1 Executive Summary

## 1.1 Background

- 1.1.1 On 17 December 2021, the Jersey Financial Services Commission (**JFSC**) and the Government of Jersey (**Government**) published a [consultation](#) seeking feedback on proposals to amend Jersey's AML/CFT scope exemptions regime.
- 1.1.2 13 responses were received to the consultation which closed on 17 January 2022.
- 1.1.3 There was broad support for the overall approach outlined in the consultation which will see the scope of application of AML/CFT obligations separated from the scope of conduct and prudential obligations.
- 1.1.4 Several respondents raised queries and concerns around specific questions raised in the consultation and helpfully provided examples of how certain aspects of the proposals would affect their businesses.
- 1.1.5 Responses to these queries and concerns are provided in section 2 of this feedback paper.
- 1.1.6 The JFSC and Government are grateful to all of the respondents for taking the time to review the proposals and provide responses, particularly given the relatively short window for responses over the festive period. We are also grateful to Jersey Finance Limited (**JFL**) for coordinating anonymised responses to the consultation.
- 1.1.7 The work undertaken to date forms phase 1 of the overall process that is needed to bring Jersey's AML/CFT scope exemptions in line with the FATF Standards.
- 1.1.8 Phase 2 of the overall process will commence this month and our plan is to continue working with the participants from the phase 1 working group, the respondents to the consultation, and any other interested parties. Phase 2 will feature careful consideration of consequential and miscellaneous amendments prompted by our phase 1 work, as well as the careful consideration of potential AML/CFT scope exemptions where there is demonstrably low-risk associated with certain activities.

## 1.2 Overview

- 1.2.1 The overarching aim of the proposals is to ensure that AML/CFT obligations for Jersey businesses are consistent with the FATF Standards. To achieve this the consultation proposed to separate the scope of the application of AML/CFT obligations from Jersey's conduct of business and prudential regulatory regime. This is done by "recasting" **Schedule 2** which specifies activities that, in Jersey, are within the overall scope of AML/CFT obligations (i.e. a business undertaking an activity listed in Schedule 2 may be obligated to perform certain AML/CFT activities).
- 1.2.2 To recast Schedule 2 we have removed direct links to conduct of business and prudential legislation, and included definitions from the FATF Standards for Financial Institutions (**FI**), Designated Non-Financial Businesses and Professions (**DNFBP**), and Virtual Asset Service Providers (**VASP**).
- 1.2.3 It should be noted that certain activities that are not explicitly defined in the Glossary to the FATF Standards are also included, for example those activities at paragraphs 10, 13 and 17 of the proposed recast Schedule 2. These activities are included both for consistency with the existing Schedule 2 as well as to take account of specific activities undertaken by Jersey businesses that are not demonstrably low risk for

AML/CFT purposes, without quantitative evidence to support a low risk assertion which may be secured during phase 2.

- 1.2.4 While Schedule 2 sets the overall scope for activities that may be subject to AML/CFT obligations, it is important to note that the following factors will determine whether a person carrying on a Schedule 2 activity is ultimately subject to JFSC supervision for compliance with those obligations:
- 1.2.4.1 Whether an AML/CFT scope exemption is provided for a specific activity;
  - 1.2.4.2 Whether registration is required under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 (**SBJL**).
- 1.2.5 In recasting Schedule 2, we have conducted a review of all AML/CFT exemptions and the criteria applied to granting those exemptions.
- 1.2.6 In respect of 1.2.4.1, the key factor that will determine the availability of an AML/CFT scope exemption is whether there is a demonstrably low risk of money-laundering or the financing of terrorism in line with FATF criteria (see 2.1.5). The proposed amendments to the POCL provide for the Minister for External Relations and Financial Services (**MERFS**) to designate such activities by Order – see Article 1 of the draft Proceeds of Crime (Amendment No. 6) (Jersey) Law 202- (**Amending Law**) which amends Article 36 of the Proceeds of Crime (Jersey) Law 2008 (**POCL**)).
- 1.2.7 Our phase 2 work (a timeline for this work is provided at 1.3.6) will leverage Jersey’s ongoing national risk assessment work. The National Risk Assessment of Legal Persons and Arrangements will be key to determining if there is a clear justification to designate an operation or activity as a low risk financial services business.
- 1.2.8 In respect of 1.2.4.2, the requirements that determine whether a business will be subject to AML/CFT registration include the following criteria:
- 1.2.8.1 the activity is within scope by being specified within Schedule 2 (and not excluded by an exemption);
  - 1.2.8.2 the activity is carried on as a business (Article 36(1) of the proposed revised POCL); and
  - 1.2.8.3 the activity is undertaken in or from within Jersey (Article 10 of SBJL).
- 1.2.9 These criteria are important to flag. For example, 1.2.8.2 means that an activity, even if it falls within the overall scope of the proposed recast Schedule 2, will not be subject to AML/CFT obligations if the activity is not carried on “as a business”. This could be a person dealing in investments exclusively on their own account, as they are technically performing an activity specified within Schedule 2, but it is highly unlikely they are doing so as a business. This person is not to be caught by either the AML/CFT obligations of the MLO or the registration requirements of the SBJL.
- 1.2.10 Currently, where an activity is exempt from either the whole, or at least the registration requirement, of the conduct of business and prudential regulatory regime, the direct link with the AML/CFT regulatory regime means that many of the businesses carrying on these activities are often exempt from the AML/CFT regulatory regime. This position is not based on an evidenced analysis of ML/TF risk and is not compatible with the FATF Standards.
- 1.2.11 Removal of the direct links in the proposed recast Schedule 2 does not mean that businesses that previously benefited from an AML/CFT scope exemption will be automatically subject to AML/CFT obligations, however, it does mean that for any future AML/CFT exemptions there will be a clearly demonstrable rationale in line

with the FATF Standards. Careful consideration will need to be given to the businesses' operations or activities through risk assessment processes such as that highlighted in paragraph 1.2.7.

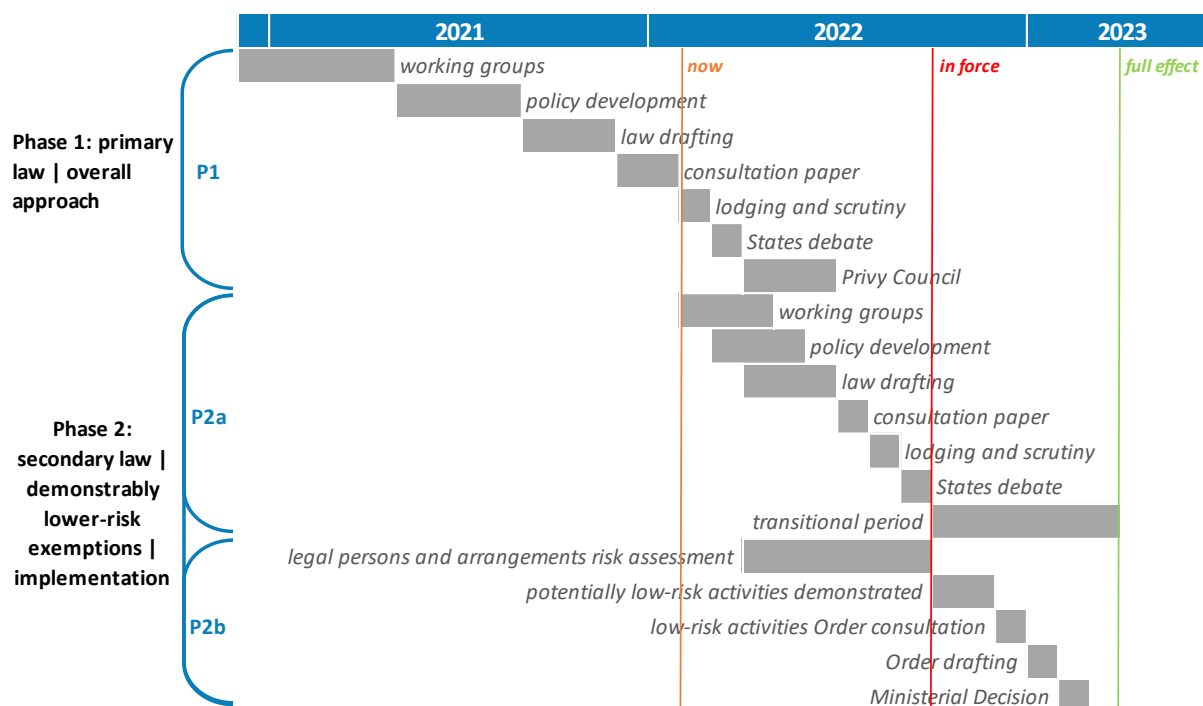
- 1.2.12 Several respondents raised particular concerns around the way in which “as a business” may be interpreted. This will be a particular focus during phase 2 as we develop certain consequential provisions by way of Regulations as provided for in the proposed Article 44A of the POCL, set out in Article 1 of the Amending Law.
- 1.2.13 Article 44A also provides for the development of transitional provisions which is another area of focus for our phase 2 work, in particular so that we can ensure continuity for existing businesses impacted by these scope exemption amendments.

### 1.3 Next steps

- 1.3.1 In light of the feedback received, the Amending Law is significantly different from the legislation consulted upon. The Amending Law is to be lodged in February 2022 such that Scrutiny can consider it, the States Assembly can debate it and, assuming it passes both Scrutiny and the State Assembly, it can progress to the Privy Council within the first quarter of 2022.
- 1.3.2 As highlighted in the consultation this is the end of the first phase of work. Phase 2 will commence later this month and will involve close collaboration with local practitioners as we:
  - 1.3.2.1 carefully consider those aspects of the consultation that cause concern to Industry which have not been resolved during the phase 1 work;
  - 1.3.2.2 develop appropriate secondary legislation (which may include AML/CFT scope exemptions for certain activities where they meet the FATF criteria);
  - 1.3.2.3 undertake further detailed work on assessing risk associated with activities with a view to identifying potential future AML/CFT scope exemptions;
  - 1.3.2.4 produce and publish relevant guidelines; and
  - 1.3.2.5 develop and communicate information regarding the transitional period, including JFSC operational matters.
- 1.3.3 As we move to phase 2, we actively encourage the involvement in the forthcoming working group of all respondents to the consultation, including those who may not have participated in the phase 1 working group, as well as any other interested parties.
- 1.3.4 Assuming the Amending Law is adopted by the States Assembly and Sanctioned by Order of Her Majesty in Council, the amendments to primary legislation will not come into force until our phase 2 work has been completed, in particular the work on the consequential and transitional Regulations.
- 1.3.5 The full effect of these amendments is not expected to be felt until the end of Q2 2023, as set out in the legislation timeline set out at 1.3.6.



1.3.6 Legislation Timeline:



## 2 Feedback on specific questions

### 2.1 Question 1: Do you agree with the approach of disconnecting AML/CFT obligations from conduct and prudential obligations as outlined?

- 2.1.1 The majority of respondents were supportive of the approach to disconnecting the scope of application of AML/CFT obligations from the scope of conduct and prudential obligations as outlined in the consultation.
- 2.1.2 Respondents noted that key work remains to be done in relation to:
  - 2.1.2.1 The guidelines on interpretation that the JFSC will be able to issue under the proposed draft legislation (see 2.5);
  - 2.1.2.2 The development of future scope exemptions in line with the FATF criteria (where activities can be proven to be low risk); and
  - 2.1.2.3 Supporting Industry such that it is clear where there will be different definitions for activities in the AML/CFT legislation vs the conduct and prudential legislation.
- 2.1.3 One respondent felt that the consultation had not demonstrated how the recast Schedule 2 met the recommendations contained in the 2016 Mutual Evaluation Report.
- 2.1.4 We acknowledge the need to work carefully through guidelines, potential future scope exemptions and the need to work closely with Industry to ensure they have clarity. This work, which we describe as phase 2 throughout this feedback paper, will commence later this month.
- 2.1.5 In respect of the way in which the proposals address the 2016 MER recommendations, we would highlight that for any future scope exemptions to be

acceptable they must meet the following FATF criteria, set out in Recommendation 1 of the FATF Standards:

- 2.1.5.1 “there is a proven low risk of money laundering and terrorist financing; this occurs in strictly limited and justified circumstances; and it relates to a particular type of financial institution or activity, or DNFBP”; or
- 2.1.5.2 “a financial activity (other than the transferring of money or value) is carried out by a natural or legal person on an occasional or very limited basis (having regard to quantitative and absolute criteria), such that there is low risk of money laundering and terrorist financing.”
- 2.1.6 The MER specifically highlighted concern about the rationale for certain scope exemptions that mean businesses are not required to comply with AML/CFT obligations.
- 2.1.7 The overall approach to our scope exemptions work is to align the activities subject to AML/CFT obligations, and which require notification or registration, with the FATF definitions. As such, we are confident that our approach achieves the intended outcome.
- 2.1.8 A vital part of our AML/CFT work is that Jersey assesses activities based on its own assessment of ML/TF risk present in the Industry’s products and services. This means that certain activities in the proposed recast Schedule 2 do not correspond precisely to the FATF definitions. For example, those activities at paragraphs 10, 13 and 17 of the proposed recast Schedule 2 are included both for consistency with the existing Schedule 2, as well as to take account of specific activities undertaken by Jersey businesses that are not currently demonstrably low risk. Phase 2 of our work may provide quantitative evidence to support a low risk assertion and appropriate action can be taken through the Regulations and Ministerial Order provided for in the Amending Law.
- 2.1.9 An example of a definition difference between the AML/CFT legislation as proposed, and Jersey’s conduct of business and prudential legislation is in the trust company sector. From a practical perspective, the definitions remain broadly consistent, however, the direct links to the conduct and prudential definition have been removed.
  - 2.1.9.1 *Trust Company Business* is defined at Article 2(3) of the Financial Services (Jersey) Law 1998, whereas
  - 2.1.9.2 *Trust and Company Service Providers* is defined at paragraph 23 in Part 3 of the proposed recast Schedule 2.
- 2.1.10 Our phase 2 work will include supporting Industry in identifying such differences and providing clarity where uncertainty arises. The issuance of guidelines pursuant to the proposed Article 36(2) of the POCL will be key to ensuring this process of providing clarity adequately supports Industry.
- 2.1.11 In conjunction with the phase 1 working group, we conducted a review of all scope exemptions. This review highlighted that by disconnecting the scope of application of AML/CFT obligations from the conduct of business and prudential legislation a number of existing scope exemptions are not necessary, as the activity is not caught by the FATF Standards and so are not within the proposed recast Schedule 2. Our approach was then to review the current AML/CFT scope exemptions available in respect of an FATF activity and where these exemptions cannot be shown, based on

supporting evidence, to meet the criteria at 2.1.5 we have removed these exemptions in the recast Schedule 2.

- 2.1.12 Our continuing work, with Industry, through phase 2 may identify activities which can be evidentially shown to meet the exemptions criteria at 2.1.5. Should this be the case we will recommend the MERFS make an appropriate Order using the power proposed as part of the Amending Law (Article 36(7) of the POCL).

## 2.2 Question 2: Do you agree with the proposed approach to connected companies/persons/etc?

- 2.2.1 These proposals were the most contentious within the consultation. Respondents suggested that the proposals:
- 2.2.1.1 Might place Jersey at a competitive disadvantage compared to other jurisdictions;
  - 2.2.1.2 Would have a high impact on groups with non-Jersey members;
  - 2.2.1.3 Should consider intra-group activity as not being by way of business;
  - 2.2.1.4 Should consider intra-group activity as not forming a customer relationship;
  - 2.2.1.5 Should be based solely on being connected not by reference to geographical location;
  - 2.2.1.6 Might tie geography to higher-risk jurisdictions rather than geographical considerations being solely Jersey vs non-Jersey (which might include AML/CFT equivalent jurisdictions);
  - 2.2.1.7 Are inconsistent with the stated aims of the project;
  - 2.2.1.8 Should clarify application to Jersey branches of foreign incorporated entities;
  - 2.2.1.9 Should clarify if Articles 36(5)(a) and 36(5)(b) of the draft legislation, as consulted on, are alternatives; and
  - 2.2.1.10 The Article 36(5) test, as consulted on, should relate to carrying on a business such that purely administrative intra-group activities are not caught.
- 2.2.2 The overarching aim of the proposals is to align Jersey's AML/CFT regime to the FATF Standards which are clear that where an activity is captured by the definitions of FI, DNFBP, or VASP the activity must be subject to risk-based AML/CFT oversight.
- 2.2.3 We acknowledge that the arguments that intra-group activities (i) do not form customer relationships, and (ii) are not by way of business, seem, prima-facie, compelling, with decisions being made by a single mind and management to establish a group of entities acting as a collective. Respondents gave several examples of the kinds of intra-group activities that are undertaken, and the ways in which groups of entities are arranged which could support the argument that they are low risk in line with the FATF criteria.
- 2.2.4 If these examples are able to be supported by quantitative evidence it may be that our phase 2 work will be able to develop appropriate scope exemptions. Yet, without evidence to prove what goes on within groups of entities, the argument that intra-group activities are not by way of business, and do not form customer relationships is

not demonstrable. We are faced with a significant challenge in supporting this argument even if the prima-facie logic seems sound.

- 2.2.5 At this stage of our phase 1 work, we acknowledge that even if the intra-group activity is considered, based on evidence, to be by way of business, and to form a customer relationship, it may be argued that intra-group activity is low risk. This is particularly the case where such relationships are solely restricted to groups of entities that are individually regulated in Jersey or equivalent jurisdictions, for example Trust Company Business affiliations.
- 2.2.6 However, this argument is currently articulated without evidence to support the low risk assertion. Without such evidence, it is not possible to justify an exemption within the FATF's criteria for exemptions:
- 2.2.6.1 "that there is a proven low risk of money laundering and terrorist financing; this occurs in strictly limited and justified circumstances; and it relates to a particular type of financial institution or activity, or DNFBP";  
or
- 2.2.6.2 "a financial activity (other than the transferring of money or value) is carried out by a natural or legal person on an occasional or very limited basis (having regard to quantitative and absolute criteria), such that there is low risk of money laundering and terrorist financing."
- 2.2.7 In light of this, we consider that there is a need for us to be aware of the activities being undertaken within groups (including where any or all of the connected parties are natural or legal persons that are resident/registered in Jersey). This will assist in the clear articulation of the scale of such activities, demonstrate a clear understanding of the risk-profile of these activities, and enable determination of the appropriateness of potential scope exemptions.
- 2.2.8 During our consideration of the proposed approach to connected entities we have considered mutual evaluation reports of other comparable jurisdictions. Ireland's report provides insight, being a jurisdiction that has a mature financial services industry featuring complex structures as a regular feature of business arrangements. Ireland's report is clear that a thorough understanding of risk must underpin the approach to exempting intra-group activities, particularly where there are complex features.
- 2.2.9 In light of the feedback received, and our consideration of recent mutual evaluations of comparable jurisdictions, the Amending Law does not contain any reference to connected entities within the proposed Article 36 of the POCL.
- 2.2.10 Throughout phase 2 we will seek to identify ways in which we are able to collect the necessary evidence that might establish, for connected entities, whether there is:
- 2.2.10.1 A justifiable rationale for the exclusion of certain connected entities based on the fact that there is not a business relationship established with a customer;
- 2.2.10.2 A proven low risk of ML/TF; this occurs in strictly limited and justified circumstances; and it relates to a particular type of financial institution or activity, DNFBP, or VASP;
- 2.2.10.3 A financial activity (other than the transferring of money or value) is carried out on an occasional or very limited basis (having regard to quantitative and absolute criteria), such that there is low risk of ML/TF.

- 2.2.11 We will also continue to consider ways in which appropriate scope exemptions may be developed in order that there is continuity for businesses currently undertaking these activities. This work will be done in collaboration with the working group (extended to other interested parties including those respondents who did not participate in the phase 1 working group).
- 2.2.12 We are aware that it may not be possible to make a full determination on all of these matters in advance of the introduction of the proposed changes at the start of Q4 2022. As noted at 1.2.7, our phase 2 work will leverage Jersey's ongoing national risk assessment work, with the National Risk Assessment of Legal Persons and Arrangements being key to determining if there is a clear justification to designate an operation or activity as a low risk financial services business. This will include careful consideration of the connected entities issue.
- 2.2.13 Depending on the timing of completion of the necessary risk assessment work to determine these matters, it may be the case that the transitional period will be extended for certain connected entities in tandem with the completion of the risk-assessment work. In respect of this risk-assessment work, we are considering ways to make the process of providing information to the JFSC as easy as possible including via consolidated returns and the JFSC's online portals.
- 2.2.14 We are clear that while our proposals must place AML/CFT obligations on the right business (i.e. those undertaking activities, as a business, within the proposed recast Schedule 2), we would stress that the fulfilment of these obligations on a practical basis may be achieved with the support of other businesses. Typically, we see the fulfilment of such obligations through reliance and contractual arrangements (including with the support of regulated administrators or group members). We anticipate that within groups of companies this would be the approach generally taken.
- 2.2.15 In line with the FATF Standards, duplication of effort, is not a reason that two separate businesses should not have to satisfy themselves that they have fully discharged their AML/CFT obligations. Where there are cross-jurisdictional relationships, even within groups, if specified FI, DNFBP or VASP activities are undertaken, as a business, then it is vital that Jersey's AML/CFT regime places obligation on the business undertaking the activity.

### **2.3 Question 3: Do you agree with the approach of specifying future scope exemptions within the POCL based on an assessment of risk?**

- 2.3.1 The majority of respondents supported the approach to specifying future scope exemptions within the POCL based on an assessment of risk. Respondents made comments and observations regarding:
- 2.3.1.1 The wide scope of defined activities which could lead to:
- › Businesses potentially being exempted from scope at a future date;
  - › The potential to repeat the process of exempting activities that was required when the Trust Company Business (TCB) regime was introduced.
- 2.3.1.2 The use of existing information (for example from the Companies Registry) to justify scope exemptions;
- 2.3.1.3 The scale of data collection exercises placing a burden on the JFSC; and

- 2.3.1.4 The activities of “trading” and “means of payment” not being explored in consultation.
- 2.3.2 The work outlined for phase 2 that will commence later this month will identify activities that are demonstrably low risk and appropriate secondary legislation will be developed (see 2.6) that will address the concern that activities might be caught then rapidly subject to scope exemptions.
- 2.3.3 It is not anticipated that additional AML/CFT scope exemptions would be introduced for some time subsequent to the phase 2 work. However, as highlighted at 2.2.12 there may be an extended transitional period for a limited number of activities brought within the ambit of the proposed recast Schedule 2 in order that risk-assessment work can be completed where it directly relates to the potential inclusion of connected entities. Rather, the ongoing work assessing risks at a national level will support the careful development of future scope exemptions.
- 2.3.4 This national level work utilises data and information collected by all Island agencies to support Jersey’s robust approach to combatting financial crime and includes information held by the JFSC, for example, data and information held by the Companies Registry which relates to legal persons and arrangements.
- 2.3.5 Industry’s expertise is actively sought as part of the national level work and this will continue.
- 2.3.6 We acknowledge the comments regarding “trading” and “means of payment” which will be included in our phase 2 work and may be definitions for which guidelines are issued (see 2.5).
- 2.3.7 We also acknowledge the reference to the historic issue encountered when TCBs were brought into the regulatory framework. We consider this to be adequately addressed through our approach to further work in phase 2, yet note the importance of the contribution of the working group to make sure this work is successful.

## **2.4 Question 4: Do you agree with the approach of requiring all activities, as a minimum, to be subject to appropriate notification obligations?**

- 2.4.1 The majority of respondents supported the proposed approach of requiring all activities, as a minimum, to be subject to appropriate notification obligations. Respondents made comments regarding the following matters:
- 2.4.1.1 The notification obligations seem very wide, and:
- › It was not clear to one respondent whether, where an activity was not being carried on as a business, it would be excluded;
  - › Potentially capture activities that are not relevant to the FATF;
  - › Potentially have an extra-territorial scope due to the lack of inclusion of “in or from within Jersey” in the proposed recast Schedule 2;
- 2.4.1.2 The need for clarity on the specifics of the notification process;
- 2.4.1.3 The potential for duplication of existing data collection and submission obligations and the need to be proportionate with data collection;
- 2.4.1.4 That businesses outside of scope of current AML/CFT obligations are not aware of the proposals; and



- 2.4.1.5 Our understanding of the proposed recast Schedule 2's effect on the wider Jersey population, not just the finance industry.
- 2.4.2 Further details regarding the registration and notification process will be developed during phase 2 (see 2.8) which will include further dialogue with Industry and public consultation.
- 2.4.3 Businesses already undertaking activities that become subject to registration or notification will be expected to register and/or notify the JFSC during the transitional period. While applications must be made during the transitional period, the JFSC may not decide on them all in this period. Provided that the application is made during the transitional period, where it remains undecided after the transitional period ends, the business would be able to continue until the application has been decided and only if the application were refused would the activity need to cease.
- 2.4.4 During phase 2, we will work to identify businesses that may not be aware of their future registration/notification obligations and ensure that we undertake targeted outreach to these businesses. Subject to the relevant approval being granted there will be continuity for such businesses.
- 2.4.5 The high-level "filtering" of activities in the proposed recast Schedule 2 that are conducted "as a business" (see Article 36(1) of the Amending Law) means that our proposals exclude these activities where they are not conducted "as a business". As stated at 1.2.12 our phase 2 work will include particular focus on clarifying uncertainty around the meaning of "as a business".
- 2.4.6 The overall approach to our work in phase 1 (which will continue during phase 2) has been to align the activities that require notification or registration to definitions within the FATF literature (see 2.1.7). As such, we are confident that this approach achieves the intended outcome. It is vital through our work that Jersey assesses activities based on its own assessment of risk meaning that certain activities do not correspond precisely to the FATF definitions.
- 2.4.7 We would highlight that Part 3 of the SBJL provides that a person shall not carry on a specified Schedule 2 business in or from within Jersey without being registered with the JFSC and consider that this addresses the concerns raised about the potential extra-territorial scope of our proposals. Through the proposed Regulations-making power (proposed Article 44A of the POCL) which covers consequential and transitional matters and our phase 2 work, we will work to ensure that there is clarity in this area.
- 2.4.8 We are clear that while our proposals must place AML/CFT obligations on the right business (i.e. those undertaking activities within the proposed recast Schedule 2 as a business), the fulfilment of these obligations on a practical basis may be achieved with the support of other businesses. Typically, we see the fulfilment of such obligations through reliance arrangements and we are considering a potential new class of business with a view to achieving similar outcomes (see 2.4.10 – 2.4.12).
- 2.4.9 As described at 2.2.15, duplication of effort, is not a reason that two separate businesses should not have to satisfy themselves that they have fully discharged their AML/CFT obligations. However, we are sensitive to the existence of some circumstances when there is a need to effectively leverage the work of others in a way that ensures each individual business is able to fully discharge its obligations.
- 2.4.10 During phase 2, we intend to explore the creation of a new class of financial service business activity that would be available to registrants under the Financial Services

(Jersey) Law 1998. This might, for example, be a “Designated Service Provider”. The thinking behind creating this class of business is to formalise the provision of services to client entities such as those that currently benefit from the Professional Investor Regulated Scheme AML/CFT scope exemptions.

- 2.4.11 The extent to which the Designated Service Provider might provide support to an obligated business needs detailed consideration during phase 2, including through the working groups and public consultation.
- 2.4.12 Our initial consideration of the Designated Service Provider class of business, should this progress during phase 2, is that it would couple with a requirement for registration with appropriate classes of Fund Services Business or Trust Company Business. This consideration is partially driven by the anticipated continuity in relationships between obligated businesses and their existing service providers as well as the relevant competencies that would be required to undertake this kind of activity on behalf of another business.

## **2.5 Question 5: Do you agree: (i) with the approach of the JFSC being able to issue guidelines on the interpretation of any expression in Schedule 2; (ii) that regard must be had to such guidelines; and (iii) with the requirement that account must be taken of meanings in the FATF Standards, and FATF Methodology where expressions are not defined?**

- 2.5.1 The majority of respondents supported the proposals in respect of JFSC-issued guidelines and the approach that account must be taken of the meanings within the FATF Standards. Clarifications were requested in respect of:
  - 2.5.1.1 What the legal form of guidelines would be;
  - 2.5.1.2 Whether guidelines would be issued in writing;
  - 2.5.1.3 Whether guidelines would bear reference to case law including English cases;
  - 2.5.1.4 The application to limited partnerships; and
  - 2.5.1.5 The source of FATF references – for example whether from the FATF’s Glossary or in wider FATF publications.
- 2.5.2 One respondent requested that the guidelines be issued immediately, rather than through the further work, and process of consultation, proposed during phase 2.
- 2.5.3 We will continue to develop our approach to guidelines over the course of phase 2, but will not be issuing the guidelines in advance of this work commencing.
- 2.5.4 It seemed that some respondents considered that the guidelines would be equivalent to Codes of Practice, for example those issued by the JFSC pursuant to Article 22 of the SBJL. While there is an approximation to the issuance of Codes of Practice the fundamental difference is that Codes of Practice set out the principles and detailed requirements that must be complied with in order to meet certain obligations, where the guidelines are “on the interpretation of any provision in Schedule 2, including any expression used in Schedule 2”.
- 2.5.5 We can confirm that the guidelines will be in written form and anticipate that, where guidelines are necessary, they will feature within the AML/CFT Handbook such that they are clearly presented and readily accessible in a manner which the JFSC considers will bring them to the attention of those most likely to be affected. We are



currently considering the presentation of the relevant pages on our website but can confirm that the guidelines will be clearly identifiable.

- 2.5.6 There is no intention to change the approach to Limited Partnerships. The application of all elements of our proposals to limited partnerships would be through the general partner in line with the JFSC's general approach as outlined in detail within section 1 of the AML/CFT Handbook.
- 2.5.7 In the main, the FATF Glossary will be the first location for references within the proposed recast Schedule 2. However, as the JFSC develops guidelines we will take account of relevant text in the wider body of FATF literature and Jersey's National Risk Assessment work will also inform the approach to the interpretation of activities as they are relevant to Jersey. The scope of Schedule 2 must be compliant with the FATF Standards as well as relevant to Jersey (see also 3.11).

## **2.6 Question 6: Do you agree with the approach to Regulation making powers under the SBJL?**

- 2.6.1 The majority of respondents supported the approach to Regulation making powers under the SBJL, however, some respondents indicated that they were unclear, or uncertain, about the mechanics of this element of our proposals. For example one respondent suggested that Regulations should be issued prior to the primary legislation being progressed.
- 2.6.2 We wish to be clear that the Regulations that we referred to in the consultation were to be secondary legislation that would be subject to Industry engagement, further public consultation, and debate by the States Assembly before implementation. Regulation making powers, in this context, are not JFSC-level, or even Ministerial-level (by way of Ministerial Order).
- 2.6.3 In light of the overall feedback received the Amending Law continues to provide for Regulation making powers by way of Article 44A, however, explicit reference to the SBJL has been removed in order that the further work during phase 2 can identify necessary amendments.
- 2.6.4 It remains the case that the Amending Law lays the overarching framework for this further work and it will not come into force until the Regulations have been developed with the phase 2 working group, drafted, consulted on, scrutinised and debated.

## **2.7 Question 7: Do you agree with the proposed approach to further consultation, consequential and transitional provisions, and the commencement of the Draft Proceeds of Crime (Miscellaneous Amendments) (Jersey) Law 202-?**

- 2.7.1 The majority of respondents supported the proposed approach to further consultation, consequential and transitional provisions and commencement of the Proceeds of Crime (Miscellaneous Amendments) (Jersey) Law 202- (note: now the Proceeds of Crime (Amendment No. 6) (Jersey) Law 202-). Specific comments were raised in respect of:
- 2.7.1.1 The extension of the proposed transitional period beyond 6 months;
- 2.7.1.2 Practical matters associated with the transitional provisions and commencement such as:

- › Guidance and specifics on transitional arrangements should be issued prior to the primary legislation being progressed;
  - › The JFSC's ability to register new businesses/receive notifications;
  - › The practicalities of registration/notification including what documentation would be required to support applications.
- 2.7.2 The primary legislation that is the subject of the consultation lays the overarching framework for the further work in phase 2. The primary legislation will not come into force until the Regulations have been developed.
- 2.7.3 This means that the proposed transitional period of 6 months will not commence until after the phase 2 work in respect of the Regulations and additional guidance has been completed. During the phase 2 work we will convene working groups, formally consult on proposals for the Regulations, and these proposals will be subject to scrutiny then debate in the States Assembly.
- 2.7.4 As noted at 2.4.3, businesses already undertaking activities that become subject to registration or notification will be expected to register and/or notify the JFSC during the transitional period. While applications must be made during the transitional period, the JFSC may not decide on them all in this period. Provided that the application is made during the transitional period, where it remains undecided after the transitional period ends, the business would be able to continue until the application has been decided.
- 2.7.5 We presently anticipate that the formal transitional period will commence in Q4 2022 with the full effect of the proposed revised regime being in force at the end of Q2 2023 – approximately 14 months from now (see diagram at 1.3.6).
- 2.7.6 We also highlight our comments at 2.2.12 and 2.2.13 that phase 2 work on evidencing demonstrably low risk activities will leverage Jersey's ongoing national risk assessment work and that, depending on the timing of completion for the necessary risk assessment work, it may be the case that the transitional period will be extended for certain activities in tandem with the completion of the risk-assessment work.

## **2.8 Question 8: Do you agree with the approach to registration of more than one activity including AML/CFT fees being payable per-business rather than per-activity?**

- 2.8.1 The majority of respondents supported the approach to fees being payable per-business rather than per-activity with queries being raised on:
- 2.8.1.1 Payment for notification; and
  - 2.8.1.2 Whether approval will be required prior to the commencement of activities.
- 2.8.2 The work in phase 2, which will commence later this month, will include further consultation on fees payable for all businesses, including those required to notify the JFSC of their activities.
- 2.8.3 As described at 2.4.3 and 2.7.4, businesses already undertaking activities that become subject to registration or notification will be expected to register and/or notify the JFSC during the transitional period. While applications must be made during the transitional period, the JFSC may not decide on them all in this period.

Provided that the application is made during the transitional period, where it remains undecided after the transitional period ends, the business would be able to continue until the application has been decided

- 2.8.4 Once the transitional period has ended the approach to approval for all firms will be “business as usual”, i.e. an activity will not be able to commence without prior approval.

## 2.9 Question 9: Do you have any other comments regarding the proposals within this consultation?

- 2.9.1 There were several additional comments including many of a technical nature and we have included responses to these more technical comments in section 3. More general comments included:
- 2.9.1.1 The timing of the consultation was short and it was over the festive period;
  - 2.9.1.2 Not everyone affected may have had time to comment/be aware of proposals;
  - 2.9.1.3 The consultation was drafted without input from wider Industry, other than the larger regulated trust companies;
  - 2.9.1.4 Interest in who was involved in the Working Group;
  - 2.9.1.5 Trust Company Businesses were both given too much and not enough attention within the consultation;
  - 2.9.1.6 There is a need for more guidance, including on practical aspects of the proposals such as reliance, appointments, outsourcing, and simplified measures; and
  - 2.9.1.7 Whether a cost/benefit analysis (to the industry and the JFSC) was available.
- 2.9.2 We acknowledge that the timing of this stage of the consultation process was shorter than for some consultations and that it took place over the festive season. Because no changes to Jersey legislation can be made for a period of several months during 2022 due to Jersey’s General Election the consultation period was shorter than hoped-for.
- 2.9.3 The membership of the phase 1 working group was a cross-section of regulated and unregulated firms and included people from Industry representative bodies. We noted the different views on the perceived level of attention given to particular Industry sectors and are committed to ensuring all sectors are given adequate opportunity to continue to contribute to the work during phase 2, as during phase 1.
- 2.9.4 We decided to propose the fundamental changes to primary law in order that the subsequent changes (phase 2) can be further developed and consultation with Industry undertaken during the General Election period. Debate of further amendments by Regulations will occur after the General Election by the new States Assembly.
- 2.9.5 There may be businesses that will be affected by our proposals who are not aware of the consultation. The continuing work during phase 2 will include identifying such businesses and undertaking outreach activities such that businesses who are not yet aware of the proposals are made aware.

- 2.9.6 We are fully committed to developing comprehensive guidance to support Industry over the course of our phase 2 work which will include the development of guidelines on interpretation of any provision in Schedule 2 specified by the proposed Article 36(2) of the POCL.
- 2.9.7 We have not undertaken a granular cost/benefit analysis of the proposals as the key benefit is alignment of Jersey's AML/CFT regime to the FATF Standards in line with Government's international commitments while the potential cost is an impact on the Island's GDP measured in whole percentage points.

## 3 Other comments

### 3.1 Banking definition

- 3.1.1 Two respondents identified that the approach of employing FATF terminology for the paragraph headings in the recast Schedule 2 had not been followed for "Banking" where it should be "acceptance of deposits and other repayable funds from the public".
- 3.1.2 We will amend the proposed recast Schedule 2 to ensure consistency, where appropriate, with the approach. See also 1.2.3 and 2.5.7.

### 3.2 PIRS/Private TCB

- 3.2.1 Several respondents provided helpful analysis of the proposals' effect on entities that currently utilise the PIRS/Private TCB exemptions noting:
- 3.2.1.1 Industry frequently utilise these exemptions in fund structures, trustees to JPUTs, investor vehicles, employee incentive schemes, corporate GPs, carry vehicles, etc;
  - 3.2.1.2 The removal creates obligations adding time, resource, and cost borne by the underlying clients which seem duplicative as fully regulated businesses are already in place performing AML/CFT obligations;
  - 3.2.1.3 Full compliance with the MLO and Handbook may not enhance AML/CFT if resources are diverted from critical areas; and
  - 3.2.1.4 Practical steps may help prevent overburdening the short supply of MLROs and MLCOs.
- 3.2.2 One respondent explored the potential for extending the approach to Private TCB companies (where a fully regulated TCB fulfils regulatory obligations, including regulatory reporting to the JFSC).
- 3.2.3 Duplication of effort, is not a reason that two separate businesses should not have to satisfy themselves that they have fully discharged their AML/CFT obligations. However, as articulated at 2.2, we are sensitive to the existence of some circumstances when there is a need to effectively leverage the work of others in a way that ensures each individual business is able to fully discharge its obligations.
- 3.2.4 In respect of the removal, from an AML/CFT perspective, of the PIRS/Private TCB exemptions we recognise that this is an area where existing arrangements between Jersey-regulated service providers and customer entities may be enhanced. We are clear that while our proposals must place AML/CFT obligations on the right business (i.e. those undertaking activities, as a business, within the proposed recast Schedule

2), the fulfilment of these obligations on a practical basis may be achieved with the support of other businesses.

- 3.2.5 Through our phase 2 work, we will explore enhancing guidance around the existing reliance provisions as well as the potential for a “Designated Service Provider” class of business (see 2.4.10 - 2.4.12) with the intent of formalising the provision of AML/CFT services to client entities.
- 3.2.6 We are grateful to the respondent who explored the Private TCB model in detail within their response. This has supported the initial development of the potential solution outlined at 3.2.5.
- 3.2.7 Aspects of the commentary in respect of PIRS/Private TCB scope exemptions, including the potential for appropriate future scope exemptions will be taken forward into our dialogue with Industry during phase 2.

### 3.3 Express Trusts

- 3.3.1 One respondent requested clarity on the approach to a trustee of an express trust other than by way of business (proposed recast Schedule 2, Part 5) considering that this would bring into scope a large number of people acting in a personal capacity or for charitable purposes.
- 3.3.2 We would highlight this is an identical provision to the existing Schedule 2 (Part B, paragraph 10), and, further highlight that the proposed recast Schedule 2 will not modify the approach to AML/CFT obligations for such persons.

### 3.4 To, for or on behalf of

- 3.4.1 One respondent highlighted that within the proposed Article 36 and Paragraph 24 of Schedule 2: "For or" could be read as "to or" and were concerned that we may limit the definition of financial services business, contrary to the FATF Recommendations. They proposed a small amendment to help avoid this e.g. "... person who conducts as a business to, for or on behalf of a customer [a financial service activity]".
- 3.4.2 The further development of the proposed Amending Law summarised at section 2.2 means that this comment will not apply in respect of the proposed Amending Law, however, it will be incorporated into our further work during phase 2.

### 3.5 Granting Exemptions

- 3.5.1 One respondent noted in respect of the proposed Article 44A(2)(a) that the paragraph refers to exemptions being “granted” and assumed that the exemptions will apply automatically, or upon notification where required, but without the need for any approval to be granted.
- 3.5.2 This is in line with our intentions and this is now referred to in the proposed Article 36(7).

### 3.6 Workshops to explain changes and assist with compliance

- 3.6.1 One respondent suggested that several matters of a technical nature covered by the proposals would benefit from workshops and outreach to support Industry in their understanding of the proposals as they are further developed, then come into force.
- 3.6.2 We welcome this suggestion and will take action to instigate activities such as this over the course of 2022, and during the transitional period.

### 3.7 Directors

- 3.7.1 One respondent requested that reference to directors, and arranging for another to act as a director, be removed. The respondent considered that there is a proven low risk of money laundering and/or terrorist financing in the provision of director services.
- 3.7.2 While we acknowledge the suggestion and appreciate the articulation of the rationale for developing a blanket exclusion, providing director services as a business is internationally accepted as a form of trust and company service provision. As such, we will not be amending the definitions of Trust and Company Service Providers within the proposed recast Schedule 2.
- 3.7.3 Some respondents expressed concern that the activity of acting as a director could capture many more persons than perhaps may be intended. They consider the current proposals function such that acting as a director of any type of company could be caught. Prior to implementation of the legislation they contended that guidance should be given.
- 3.7.4 Further guidance will be given and this will feature within our phase 2 work. For the avoidance of doubt, where a person is not providing director services as a business, the activity of being a director is not intended to be caught.

### 3.8 Definitions

- 3.8.1 One respondent requested additional clarification of the terms “an overall business” and “entity” within the proposed recast Schedule 2. These terms were within Articles 36(4) and 36(11), respectively, of the POCL in the original proposed Amending Legislation and have been removed in the current proposed Amending Law. We will consider these comments in detail during the phase 2 work and if the terms are employed through the phase 2 work, these may be definitions for which guidelines are issued (see 2.5).
- 3.8.2 That respondent, and two others, also explored several of the definitions within the proposed recast Schedule 2, requesting detail about certain definitions which are currently found within the existing Schedule 2. As outlined in the consultation the scheme of recasting Schedule 2 adopted the following approach:
- 3.8.2.1 The definitions from the FATF Recommendations for FIs, DNFBPs, and VASPs are replicated within the recast Schedule 2.
- 3.8.2.2 This provides a clear mapping of activities from the FATF Recommendations to activities that will be subject to AML/CFT obligations on an ongoing basis.
- 3.8.2.3 Activities detailed within the current Schedule 2 are defined within the recast Schedule 2 as follows:
- › The first (and at times only) provision follows the FATF FI, DNFBP and VASP definitions precisely. This creates a general rule.
  - › We understand that the FATF wording is often very general, and that stakeholders will be more familiar with the language in the present Schedule 2. We have therefore sought to retain the familiar provisions from the present Schedule 2, and these will be “automatically included” as activities falling within the recast Schedule 2.

- 3.8.3 One respondent requested clarity regarding independent legal professionals within employment context. The definition within the proposed recast Schedule 2 is consistent with the FATF definition and the existing Schedule 2. It also mirrors the existing provisions for “internal” professionals.

### 3.9 Exclusion vs exemption

- 3.9.1 One respondent expressed concern that the difference between exclusions (when the provisions of the legislation do not apply absolutely) and exemptions (when a business is allowed certain concessions from all obligations) had not been effectively articulated.
- 3.9.2 In our description of the mechanics of the proposed recast Schedule 2 (consultation paper 1.4.2 – 1.4.3) we describe filters which, at a high level, have the effect of excluding, or exempting persons who undertake activities specified in Schedule 2 from registration where the activities are not done in the context of carrying on a business, and/or where the activities are not services provided to third parties.
- 3.9.3 We recognise that “excluding, or exempting” in this context conflates these distinct concepts. This is not the intention, rather the summary of the “filters” and their effect is intended to illustrate the simplification of the scope exemptions regime, where previously several individual scope exemptions may have produced the same net effect.
- 3.9.4 Certain activities that previously held scope exemptions directly tied to the conduct and prudential regime (e.g. newspapers, or recruitment agents) are not within the scope of the FATF definitions of FI, DNFBP or VASP and so have not been carried forward into the proposed recast Schedule 2.
- 3.9.5 The proposed recast Schedule 2 now captures activities that are within the overall scope of AML/CFT obligations with the proposed amendments to POCL (Article 36(6) of the current proposed Amending Law) providing for further amendment to Schedule 2 by Regulations. If necessary, these amendments will occur over the course of phase 2 with the involvement of the working group in the development of that work (see legislation timeline at 1.3.6).
- 3.9.6 Article 36(1) of the proposed revised POCL specifies that the scope of Schedule 2 is for “activities and operations which when conducted as a business constitute financial services business for the purposes of this Law”. As such activities and operations which are not conducted “as a business” are excluded.
- 3.9.7 As stated at 1.2.12 and 2.4.5 our phase 2 work will include particular focus on clarifying uncertainty around the meaning of “as a business” which was a concern raised by some of the respondents to the consultation.

### 3.10 Virtual Currency

- 3.10.1 We have been working with specialists in the field of Virtual Assets and their Service Providers in the development of Jersey’s national risk assessment of the VASP sector. During the consultation period they have reviewed our proposals with a view to ensuring that our approach to including these activities within the recast Schedule 2 is fit for purpose.
- 3.10.2 They have observed that the use, and definition, of “virtual currency” at paragraph 20(4)(b) of the consulted version of the proposed recast Schedule 2 would benefit from closer alignment to the FATF definition of “virtual asset”. In light of this expert



feedback the Amending Law replaces the term “virtual currency” with “virtual asset” and defines “virtual asset” in accordance with the FATF definition:

- 3.10.2.1 “A virtual asset is a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes.”

### 3.11 Advice on capital structure, industrial strategy etc

- 3.11.1 Two respondents expressed concern that the inclusion of paragraph 10 within Part 2 of the proposed recast Schedule 2 is not a specified FATF FI, DNFBP, or VASP activity which was not compatible with the approach to aligning Schedule 2 to the FATF definitions. They noted the paragraph in question was carried over from the current Schedule 2 and that there should therefore be a justification for its inclusion based on AML/CFT risk.
- 3.11.2 The respondents also highlighted that these activities are potentially wide-ranging meaning that they might bring firms, such as professional advisory firms, within scope of AML/CFT obligations.
- 3.11.3 The inclusion of these activities in the current Schedule 2 is designed to reflect the current status quo with respect to these activities, which in the context of activities taking place in Jersey are not demonstrably low risk.
- 3.11.4 As noted at 1.2.3 and 2.5.7, while the FATF Glossary is the primary source for the activities listed in Schedule 2, the wider body of FATF literature will also be taken into account as well as activities that are identified as not being low risk through Jersey’s National Risk Assessment work. In respect of this particular definition, the FATF’s [Guidance for a risk-based approach for the securities sector](#) includes advice within the consideration of activities in the securities sector as well as the inclusion of “any natural or legal person who is, or is required to be licenced or registered by a competent authority, to provide securities products and services as a business”.
- 3.11.5 We appreciate the concerns raised in this regard, but consider that it is appropriate to include these activities within the proposed recast Schedule 2 as well as other activities such as those in paragraphs 13 and 17 of the proposed recast Schedule 2.
- 3.11.6 With respect to concerns that these may be widely drawn definitions, we can confirm that it is not intended to extend the scope of AML/CFT obligations beyond those activities that are already within the scope of the existing Schedule 2 and confirm that we will provide, through guidelines, confirmation of this to provide additional clarity in this regard.



## Appendix A: List of Respondents

- › AIFSB, FSB and TCB licence holder
- › Compliance consultancy firm
- › FSB and TCB licence holder (x3)
- › Jersey Funds Association
- › Law firm (x3)
- › Private single family office
- › Professional services firm
- › TCB and Schedule 2 licence holder
- › TCB licence holder

## Appendix B: Proposed revised Amending Law

[INSERT HYPERLINK TO PROJET]