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Our ref: RAC

18 April 2011

Strategy Manager  
Economic Development Department  
3<sup>rd</sup> Floor, Liberation Place  
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Dear Sir

### Consultation on Financial Services Ombudsman

I am responding on behalf of Volaw Trust Company to the consultation document (the "Document") on the proposal to establish a Financial Services Ombudsman for Jersey and Guernsey. I note that the document invites responses by Friday 11<sup>th</sup> March 2011 but I understand that the deadline for responses has been extended to 21<sup>st</sup> April 2011; I hope that this letter is received in time for its contents to be considered, but I also note that I did not receive the document until roughly a week ago, indirectly rather than from your offices.

Whilst various specific questions are posed in various sections of the Document, as summarised in section 16 of the Document, I start by addressing some more general issues, before addressing those specific questions. For ease of future reference, I shall number each of the issues that I address:

- 1. Cost of the scheme:** § 15.1.1 of the Document suggests, using the Isle of Man as a guide, that the number of complaints that the Ombudsman might expect to have to consider each year is in the range 250 to 400. Assuming that (i) the costs of the FSO scheme are in the region of £750,000 (based upon the States of Jersey's own report in relation to the scheme), and (ii) the number of complaints actually considered by the FSO each year is in the region of 800 (I've used the highest point of the range referred to above and then doubled that for complaints from Guernsey); the cost of hearing each complaint will be on average in the region of £1,000. Bearing in mind the fact that the average award agreed by the Isle of Man Ombudsman is roughly £600 (and I see no reason to believe that in Jersey this would be any different), the cost is far too high in relation to the likely awards; frankly, complainants will most likely be incensed if / when they learn that the cost of hearing their complaint has been far higher than the award they receive. I suggest, therefore, that if the FSO scheme is established, efforts must be made to reduce the costs to a more acceptable level. This might be achieved by seeking to outsource the entire scheme to the UK FOS; or by partnering with not just Guernsey but also the Isle of Man.
- 2. Regulatory differences between Jersey and Guernsey:** there are, as you will know, differences between the Jersey and the Guernsey regulatory regimes and my colleagues and I are concerned that unless the law implementing the scheme is identical between both Islands, there will be a significant risk that businesses that in one Island are required to participate in the scheme, will be exempt from participation in the other. This will create an unfair advantage. It follows that, in our opinion, the two Islands must cooperate to remove the risk of such inequity.
- 3. Application of the scheme to non-regulated service providers:** it is suggested in § 3.2 and § 4.1 of the Document that the FSO scheme will apply to "all areas of financial services provided in or from Jersey, both regulated and non-regulated". My colleagues and I are not sure how to interpret this statement: for example, will lawyers and

accountants be treated as financial services providers, because from time to time they advise on financial services issues? Will estate agents and others who are required to adopt anti-money laundering procedures be covered, because they can be subject to inspection by the JFSC? We believe that there needs to be much greater clarity over how to interpret this statement.

4. **Impact upon Jersey as an offshore finance centre:** I believe that if the scheme imposes a significant extra cost on the Island's financial services sector (the cost of running the scheme will, in effect, be an extra tax on the industry), it will reduce the Island's competitiveness as a finance centre. This again argues in favour of finding a way to reduce the costs of the scheme, perhaps by outsourcing it.
5. **Application of the scheme to trusts and trustees:** you will be aware that the relationship between trustees and trust beneficiaries is not a simple customer / service provider relationship. The rights of beneficiaries in relation to trust assets; their rights to receive information on a trust; the trustee's rights to exercise discretion as to how to apply the trust fund or how to invest it; all these will vary, depending upon the nature of the trust. These are issues that have frequently been considered in the courts of Jersey and other jurisdictions and the courts have a clear understanding of what are often complex rules in relation to such issues. My colleagues and I do wonder, however, whether an Ombudsman would have the knowledge or expertise to consider these issues in the thorough way that would be required to arrive at a decision that doesn't conflict with the law as interpreted by the courts. There is, I believe, a significant risk that if the scheme is applied without exemption to all trusts, there would be inconsistency between the court's interpretation of trust matters and the Ombudsman's interpretation. For that reason, we believe that complaints relating to trusts should fall outside the scope of the scheme; it follows that we suggest that the fifth bullet point of § 7.5 of the Document should be deleted, or at the very least the significant limitations be placed on the application of the scheme to beneficiaries of a trust.
6. **Costs borne by complainants:** § 2.1 of the Document envisages that the scheme will be free to complainants. We believe that it would be appropriate for the Ombudsman to be able to recover costs from complainants in cases where the complaint is obviously frivolous or vexatious.
7. **Complaints by trustees:** § 7.2 of the Document refers to complaints by (rather than in respect of) trustees and suggests that professional trustees should not be able to use the ombudsman scheme. I find this incongruous: for example, if a professional trustee has a complaint about a banker or an investment manager to a trust that the trustee is unable to resolve to the trustee's satisfaction through direct contact with the service provider, why should the trustee have to go to the courts rather than use the ombudsman's services? Moreover, I don't believe that there should be any upper limit upon the size of the trust fund in relation to such complaints, but the maximum award that the ombudsman may make may serve to prevent disputes relating to very large trusts coming to the FSO.
8. **Categories of complainant:** other than as set out in 5 above, we have no comments on § 7.5 of the Document.
9. **Funding & Budget:** for emphasis, I repeat the points that I made in (1) above, in relation to the costs of the scheme. My colleagues and I believe that it is likely that the cheapest way of operating the FSO scheme for Jersey and Guernsey would be to outsource the running of the scheme to the UK FOS. We therefore urge the States of Jersey to explore that option. In the event that this is not possible, we believe that efforts should be made to run it together with the Isle of Man. As regards funding, I repeat my comment in 6 above that frivolous or vexatious complainants should be made to bear costs relating to their complaint. As regards funding by the industry, my colleagues and I believe that there should be a split between the annual levy and case fees and that industry members should not be required to contribute the costs of the first two or three complaints each year. We also believe that different levies should be applied to different sectors of the industry.
10. **Other issues:** briefly dealing with some of the other issues raised in the Document:
  - Notwithstanding the ten year prescription period that applies in Jersey in relation to contractual disputes, we believe that a six year period should apply to any complaints made to the FSO.



- We believe that the three month proposed time limit for services providers to respond to complaints, as referred to in § 9.4 of the Document, is appropriate.
- We accept that the starting date of 1 January 2010 referred to in § 10.1 is appropriate.

Yours sincerely  
For and on behalf of

**VOLAW TRUST & CORPORATE SERVICES LIMITED**

A handwritten signature in black ink, appearing to be "R Christensen", enclosed in a hand-drawn oval.

**Robert Christensen**  
**Managing Director**

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