

UPDATE

# Jersey Regulator publishes guidance note on Initial Coin Offerings

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## Introduction

In a positive move for Jersey's growing FinTech sector, the Jersey Financial Services Commission (the JFSC) has published a Guidance Note in relation to its regulation of "initial coin offerings" (ICOs) in Jersey.

The Guidance Note, which follows consultation by the JFSC with government, industry and local legal practitioners (including Mourant) sets out, amongst other things, the minimum requirements that the JFSC will expect from any ICO issuers based in Jersey (ICO Issuers) and provides much needed clarity for ICO promoters hoping to take advantage of Jersey's status as a well-regulated and reputable international finance centre.

This briefing aims to highlight the key parts of the Guidance Note. To access the Guidance Note in full, please click "[here](#)"

## Requirements for Jersey ICO Issuer

All Jersey based ICO Issuers must:

- (a) be incorporated as a Jersey company;
- (b) receive the JFSC's consent under the Control of borrowing (Jersey) Order 1958 (COBO) before undertaking any activity;
- (c) comply with the JFSC's Sound Business Practice Policy;
- (d) apply relevant AML/CFT requirements to persons that either purchase tokens from, or sell tokens back to, the ICO Issuer;
- (e) appoint a trust company service provider (TCSP) licenced by the JFSC under the Financial Services (Jersey) Law 1998;
- (f) appoint and maintain a Jersey resident director who is a natural person and also a principal person of the TCSP appointed by the ICO Issuer;
- (g) be subject to an ongoing audit requirement;
- (h) have procedures and processes in place to (i) mitigate and manage the risk of retail investors investing inappropriately in the ICO, and (ii) to ensure retail investors understand the risks involved;
- (i) prepare and submit to the JFSC an "information memorandum" relating to the ICO; and
- (j) ensure that any marketing material is clear, fair and not misleading.

## Application Process

All Jersey based ICO Issuers will need to apply to the JFSC for a COBO consent, which is applied for in the usual way, save that such application will need to be accompanied by analysis prepared by the ICO Issuer's legal advisers outlining:

- (a) the proposed activity including relevant timelines;
- (b) details of the ICO Issuer and the ICO;

- (c) the rationale for the ICO, amount to be raised and use of proceeds;
- (d) a summary of the features of the tokens issued under the ICO (including the purchase and redemption processes);
- (e) the service providers to the ICO Issuer;
- (f) the relationship between ICO Issuer and holder of tokens;
- (g) management of underlying assets and any security rights over such assets for holders of the tokens;
- (h) how the activity will be wound up/dissolved and assets distributed to the holders of the tokens; and
- (i) Jersey legal and regulatory analysis (including consideration of relevant legislation or other regulatory laws).

### Marketing of Jersey ICOs

1. One of the principal drivers underpinning the JFSC's approach to the regulation of ICO issuers is its desire to manage the risk to retail investors.
2. To achieve this goal the JFSC requires, as part of the application for consent, all ICO Issuers to prepare and submit to the JFSC an Information Memorandum (which may be in the form of a White Paper) containing:
  - 2.1. the information required under the Schedule to the Companies (General Provisions) (Jersey) Order 2002; and
  - 2.2. clear risk warnings, highlighting that the ICO is unregulated and that it may result in substantial risks for investor, including the following specific warnings:
    - 2.2.1. ICOs are typically a highly speculative form of investment;
    - 2.2.2. investors should be prepared for the possibility of losing their investment completely; and
    - 2.2.3. investment in token sales or coin offerings is not subject to existing capital market regulations and protections.
3. In addition to the above, all ICO Issuers are required to ensure that any marketing material (including the Information Memorandum) is clear, fair and not misleading and that where such marketing material refers to the regulatory treatment of the ICO Issuer or the tokens offered such material must explain the regulatory treatment in the following manner:
 

*"Anyone issuing an ICO through a Jersey company will require a specific consent from the Jersey Company Registry, part of the Jersey Financial Services Commission. Whilst this consent does not give the ICO or the issuer a 'regulated' status, it mandates a set of conditions designed to ensure that the issuer meets specific standards in terms of governance, investor disclosure and AML/CFT compliance."*
4. This risk warning may be considered as particularly useful to ICO Issuers, as whilst it does not amount to a "regulatory badge" per se it does allow the ICO Issuer to demonstrate and highlight that it has met the standards expected of a recognised financial services regulator.

### Classification of Tokens

1. One issue that has generated a large amount of debate in relation to ICO's is the classification of the tokens or coins issued under the ICO and crucially whether or not these should be treated as securities and therefore subject to existing securities rules.
2. In its Guidance Note the JFSC recognises two types of token:
  - 2.1. a **Security Token**; a token which would typically have characteristics usually associated with an equity or debt security in the traditional capital markets sense, including one or more of the following such characteristics (whether contractual or implied):
    - 2.1.1. a right to participate in the profits/earnings of the ICO Issuer or a related entity,
    - 2.1.2. a claim on the issuer or a related party's assets,
    - 2.1.3. a general commitment from the ICO Issuer to redeem tokens in the future,
    - 2.1.4. a right to participate in the operation or management of the ICO Issuer or a related party; and

- 2.1.5. a **Non-Security Token**; tokens which are deemed not to be securities, such as a utility tokens, conferring on the holder merely a usage right or the right to access a product or service and cryptocurrency tokens, designed to behave like a currency, being a store of value and medium of exchange and referred to in some jurisdictions as a payment token.
3. Furthermore, the JFSC has helpfully confirmed that a utility token will not be regarded a "security" solely by reason of being traded on a secondary market (e.g. via a cryptocurrency exchange).
4. Whilst this distinction does not impact on the core requirements for an ICO Issuer in Jersey (i.e. all the requirements outlined above apply regardless of whether the token is classified as a "Security Token" or "Non-Security Token"), it will help ICO promoters to determine whether or not they also need to comply with Jersey rules relating to the issue of securities.

### Additional Requirements

It may be that in undertaking its activities the ICO Issuer or its promoters will be undertaking other forms of regulated activity in Jersey. ICO promoters should therefore be careful to ensure that the ICO Issuer complies with all relevant regulatory rules and laws applicable to the activities it proposes to undertake and seek legal advice where appropriate.

### Summary

Activity across all our jurisdictions suggests that ICOs are proving to be an increasingly popular way for businesses both in and outside of the FinTech sector to raise funds, with latest figures showing that internationally ICOs have raised in excess of £12 billion this year alone.

The Guidance Note clearly illustrates that the JFSC recognises the innovative potential of blockchain technology such as ICOs and is willing to accommodate ICO Issuers hoping to take advantage of Jersey's position as a well-regulated and sophisticated international finance centre, whilst at the same time ensuring that the risk to investors (particularly retail investors) is minimised.

### Contacts

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