

UPDATE

Summary of Jersey Funds Updater (26 September 2019)

Update prepared by Geoff Cook (Consultant), Alistair Horn (Mourant LP Partner), Felicia de Laat (Mourant LP Partner) Alex Henderson (Senior Associate) and John MacFeeters (Senior Associate)

Consultant Geoff Cook gave his assessment of asset management prospects in a period of heightened global geopolitical and economic uncertainty, whilst other speakers from our Funds team shared their insights on the latest legal, regulatory and tax developments, including the importance of good board governance in the new age of Economic Substance, the forthcoming COBO and Registry Law updates.

Global Perspectives: the rise and rise of private capital, covered by Geoff Cook, Consultant

Geoff Cook provided a high level review of trends in the alternative investments world, entitled 'The Rise and Rise of Private Capital'. Research undertaken by Geoff has identified a growing preference for Alternates amongst institutional investors when contrasted with the performance of public markets. This demand, led principally by pension fund managers striving to deliver on the obligations they have to members, is only going to increase, given the \$78trn shortfall in global public pension funds.

Add to this \$2.1trn of dry powder and it isn't difficult to see why asset managers are concerned about the inflationary impact of high demand on asset prices and their availability. Geoff explored the consequences of a chain reaction to these stresses building in the Alternates value chain and how firms in IFCs should position themselves to provide value to alternative fund managers. He went on to explain how firms can address these challenges and enhance their current success in the light of a complex geopolitical landscape.

To read Geoff's full article please click here: <https://www.mourant.com/news-and-views/news/2019/global-perspectives-blog.aspx>

General Trends & Substance, covered by Alistair Horn, Mourant LP Partner and Alex Henderson, Senior Associate

Almost six months since joint guidance notes on the Taxation (Companies – Economic Substance) (Jersey) Law 2019 (the **Substance Law**) (the **Guidance Notes**) were published by the Crown Dependencies, a number of 'frequently asked questions' are emerging as industry participants get to grips with the detail.

One area of focus has been the 'directed and managed' test which requires that (i) a company's board of directors meets in Jersey at an adequate frequency and (ii) there is a quorum of directors physically present in Jersey. Our experience has shown that that this requirement hasn't proven to be too difficult for the majority of Jersey companies who are already largely compliant owing to considerations of tax residency and the application of the pre-existing 'central management and control' test. Although the central management and control test used to determine tax residence is not the same as the directed and managed test, there is considerable overlap between the principles contained within them. However, the introduction of a positive obligation to show that the company is 'directed and managed' in Jersey has forced some clients to tighten some of the constraints around the holding of board meetings.

In addition to the directed and managed test, the Guidance Notes require a majority of directors to be physically present in Jersey where a decision constituting 'core-income generating activity' (CIGA) is to be taken. In a fund management context, this means that a majority of directors of a fund manager must be physically present in Jersey at any meeting convened to consider the making of an investment. This requirement can be problematic when ordinarily Jersey resident directors are, for whatever reason, not in Jersey at the time a meeting needs to be held, particularly where an urgent investment opportunity presents itself. A number of workarounds can be used to deal with such situations, including flying a non-resident director into Jersey, having a non-resident director abstain from voting/attending, or appointing an additional Jersey resident director or alternate. Although each of these options may work on a case-by-case basis, they each have disadvantages, either through additional cost and inconvenience or from undesirable governance consequences.

It is important to note that the Guidance Notes do provide some flexibility for a minority of meetings to be held without a quorum of directors physically present in Jersey on a case-by-case basis. This flexibility should be used sparingly. They also recognise, and tacitly approve, a scenario where a meeting relating to CIGA may need to be held overseas (i.e. when completing certain transactions where face to face negotiations might be vital to a successful outcome e.g. directors travelling to jurisdiction of target company to conclude negotiations prior to investment decision).

What's next?

- [Guidance Notes](#)

Revised Guidance Notes are currently expected to be published in the coming weeks. As well as more general revisions and clarifications, these revised Guidance Notes will contain guidance for relevant activities (including insurance, IP and shipping) not addressed in the current Guidance Notes.

The revised Guidance Notes are also expected to contain an express carve out for corporate funds.

- [Jersey Funds Association Paper](#)

The JFA are working with Revenue Jersey and other industry associations to develop additional guidance for the funds sector which is intended to elaborate on and sit alongside the official Guidance Notes. The JFA are inviting industry participants to communicate any areas they feel clarification would be beneficial.

- [Tax Forms](#)

The revised form corporate tax return is available from the Tax Office on request. Industry participants are encouraged to obtain a copy of the tax return and consider any areas which could be difficult to complete. The form will require reporting for the period from 1 January 2019 and we've been looking at a number of alternative solutions for those looking to calculate sensible full time employee numbers in the absence of timesheets or similar.

Update in respect of Register of Entities (Jersey) Law 201- (the Registry Law), Control of Borrowing (Jersey) Law 1947 and Control of Borrowing (Jersey) Order 1958 (COBO), covered by John MacFeeters, Senior Associate

It is anticipated that both the Registry Law and amendments to COBO will be introduced to the Jersey legislative and regulatory framework in 2020. The consultation papers in respect of COBO and the Registry Law are due to be released to industry during Q4 2019 and Q1/Q2 2020, respectively, with the amended COBO anticipated to go live during Q1 / Q2 next year, followed by Registry Law by the start of Q4.

The amendments to COBO primarily focus on updating the Jersey Financial Services Commission's (the **Commission's**) supervisory and enforcement powers in order to align them with the Commission's existing supervisory and enforcement powers under the Collective Investment Funds (Jersey) Law 1988, the Financial Services (Jersey) Law 1998 (the **FS Law**) and the Alternative Investment Funds (Jersey) Regulations 2012. Due to the success of the Jersey Private Funds regime, which derives consents pursuant to COBO, it is unsurprising that the Commission is seeking the revisions to COBO, which may also benefit Jersey as a jurisdiction by emphasising to international standard-setters the effectiveness of the Commission's regulatory and supervisory framework for all Jersey-regulated fund structures. The opportunity is also being taken to tidy-up a number of legacy issues within and around COBO, including clarifying the circumstances within which certain private and public non-Jersey offers can be marketed within Jersey, together with

extending the *professional investor regulated scheme* partial exemption under the FS Law to limited liability partnerships and limited liability companies.

The introduction of the Registry Law is an important development for Jersey as it will assist with Jersey's ongoing ability to comply with global standards and initiatives in relation to the collection and sharing of beneficial ownership information.

The Registry Law is an evolutionary step from the commitments made between the UK and Jersey Governments in respect of the Exchange of Notes entered into during 2016 in connection with the sharing of beneficial ownership information in relation to certain Jersey entities.

The original use of COBO to comply with the Exchange of Notes was a temporary work-around and the BOC 17 and beneficial ownership requirements will now be housed within the framework of the Registry Law.

The Registry Law will also incorporate the recent commitment from Jersey Government to implement the Fifth Anti Money Laundering Directive, including the publicised commitment to eventually making information maintained on the registers publically accessible.

Whilst there is a working draft of the Registry Law there is much still to be agreed, including the vital definition of what is and what is not a "beneficial owner". All forms of Jersey companies, limited partnerships and foundations will be subject to the Registry Law, as will financial and non-financial entities. Finally, the Registry Law will create a central registry of directors and officers of Jersey entities, which has been on the agenda since the Exchange of Notes.

We would advise keeping a close eye on these developments over the next few months, as there are numerous moving parts to be settled. The Commission's latest insight in respect of the upcoming Registry Law can be found at the following link: <https://beta.jerseyfsc.org/media/2333/jfsc-registry-industry-seminar-sept2019.pdf>

A general funds 'round-up', covered by Felicia de Laat, Mourant LP Partner

Global Developments

OECD/G20 proposals for a minimum corporate income tax rate

The OECD /G20 Inclusive Framework on BEPS have published a paper titled '*A programme of work to develop a consensus solution to the tax challenges arising from the digitalisation of the Economy*'. The aim of the paper is to agree proposals for a minimum corporate income tax (CIT) rate across member jurisdictions.

The OECD proposals are divided into two pillars;

1. Revised nexus and profit allocation rules; and
2. Global anti-base erosion proposals (GLOBE).

The proposals of most relevance for Jersey are the GLOBE proposals, which are intended to address what the OECD perceives as the remaining BEPS risks of profit shifting from their jurisdictions into jurisdictions with no or very low CIT rates. This project originally started as a series of proposals to address perceived tax leakage in the context of global digital business, then recognised it as a solution which could be extended to the broader economy, to ensure that all businesses everywhere pay a minimum level of CIT.

It is proposed that GLOBE will effect this through two inter-related rules:

1. The Income Inclusion rule – if income of a company is not subject to an effective rate of CIT above a certain minimum rate, then that income would be brought into the taxable income of its shareholder or parent company. This is intended to ensure that the income of multinational groups as a whole is subject to tax at a minimum rate, regardless of where the group is headquartered and to protect the tax base of parent jurisdictions by reducing the incentives to allocate group returns to low taxed entities. This minimum rate is intended to operate as a floor on CIT rates and also as a top up so that only untaxed income is brought into tax. The authors of the proposal prefer a fixed percentage CIT rate as simpler and more efficient to implement from a design perspective.

2. Tax on base eroding payments - complements the income inclusion rule by allowing jurisdictions to apply the following two rules which would dis-incentivise base eroding payments:
 - (a) an "under-taxed payments" rule: if a payment between related parties is not subject to tax at a minimum rate, then the source jurisdiction could impose taxes such as withholding taxes or alternatively deny deductions;
 - (b) a 'subject to tax' rule, by which certain treaty benefits would only be available if the item of income was subject to tax at a minimum rate.

Recommendations from the BEPS working groups on core elements of these proposals are expected by the beginning of 2020 with a final report to be delivered by the end of 2020. Then comes the arduous task of getting all relevant member jurisdictions, many of whom have pressing domestic issues to resolve, to agree on the proposals, including the applicable minimum rate. Despite the inherent difficulties, this project already has significant momentum and the early expectations are that the US will participate as they recognise the benefit of one agreed multilateral approach on this issue over a series of unilateral or bilateral approaches to the taxation of their globally expansive digital industry.

From the perspective of the funds industry, there is no reference to funds in the programme of work, although it recognises the need to consider the "appropriateness of carve-outs for specific sectors or industries". Given the current and future importance of returns from collective investment funds to meeting global pension fund liabilities, it is essential to preserve the tax neutrality of fund vehicles and continue to ensure that they are tax transparent. Industry bodies should therefore be encouraged to lobby without delay to have funds excluded from these proposals.

No deal Brexit – potential complications for UK fund managers marketing into the EU?

While it is true that Jersey is a 'third country' with respect to the EU, both before and after Brexit, and that Jersey funds will be able to continue to market into the EU under the National Private Placement Regimes of EU Member States, you should be aware that managers of Jersey funds with UK-based investor relations teams may no longer be able to rely on their pre-Brexit MiFID passports for deals and marketing into the EU – this may have an operational impact on the marketing of Jersey funds into the EU via UK agents. UK advisers are currently considering potential solutions.

New UK professional investor fund structure

The Association of Real Estate Funds (AREF) has been consulting with its members on a new UK fund product for professional investors. AREF is proposing to make a submission to the UK HMRC and Government proposing a new fund product to be known as a professional investor fund (a **PIF**).

Based on current proposals, a UK PIF would be:

- based on the legislation and regulation for UK authorised contractual schemes but adapted for closed ended funds;
- tax transparent and aim to match the tax treatment for offshore collective investment funds;
- open to all asset classes;
- eligible to investors who are professional investors or who have £1 million as a minimum investment.

One to watch.....

Jersey legal and regulatory updates

Three updates on the Jersey legal and regulatory front:

1. The Revenue Administration (Jersey) Law 20- which was adopted in May 2019 will change the Comptroller's title to the 'Comptroller of Revenue' and give him or her responsibility for collecting income tax, GST, land transaction tax and the long term contributions under the social security law.
2. In the autumn, we expect a regulation amending the Electronic Communications (Jersey) Law to be adopted. The amendment will clarify that all contracts (other than those with State Entities) may be made electronically and will also permit e-signature platforms. A welcome amendment...
3. Regulatory fees have increased from 1 July 2019. FSB, AIF, CIF, QSMA and CoBO fees have all increased by 7% except for JPF annual fees which have increased by 3.6%. A new fee (£180) to amend existing COBO consent for non-fund unit trusts and non-domiciled schemes has also been introduced.

Contacts

To find out more about any of the topics mentioned above, please get in touch with your usual Mourant contact, or, alternatively, contact one of the specific contacts named below:



Felicia de Laet
Partner, Mourant LP
Jersey
+44 1534 676 137
felicia.delaat@mourant.com



Alistair Horn
Partner, Mourant LP
Jersey
+44 1534 676 947
alistair.horn@mourant.com



Geoff Cook
Consultant
Jersey
+44 1534 676 558
geoff.cook@mourant.com



Alex Henderson
Senior Associate
Jersey
+44 1534 676 037
alex.henderson@mourant.com



John MacFeeters
Senior Associate
Jersey
+44 1534 676 004
John.macfeeters@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2019 MOURANT OZANNES ALL RIGHTS RESERVED