STATES OF JERSEY

COMPANIES (JERSEY) LAW 1991: PROPOSED AMENDMENTS – GREEN PAPER

Presented to the States on 29th November 2011
by the Minister for Economic Development

STATES GREFFE

Economic Development Department

Green Paper

States of Jersey

Amendments to Companies (Jersey) Law 1991

25th November 2011

Purpose and type of consultation:

To seek views on proposed changes to the Companies (Jersey) Law 1991.

Closing date: 21st February 2012

Summary

Amendments are proposed to the Companies (Jersey) Law 1991 ("the Law").

The purpose of the proposed amendments is to confirm and strengthen the competitiveness and standing of the Jersey company, a vehicle used both for local business needs and as one of the key tools of the international finance industry.

The proposed amendments comprise a number of points of clarification and potential improvement. They have been put forward by industry practitioners and the Jersey Financial Services Commission or have otherwise been made manifest since the last set of amendments to the Law.

It is envisaged that successful proposals will be implemented both through the enactment of Regulations and through an amendment to the Law.

Your submission: *Please note that consultation responses may be made public (sent to other interested parties on request, sent to the Scrutiny Office, quoted in a published report, reported in the media, published on www.gov.je, listed on a consultation summary, etc.).*

If a respondent has a particular wish for confidentiality, such as where the response may concern an individual's private life, or matters of commercial confidentiality, please indicate this clearly when submitting a response.

Please send your comments to:

William Byrne States of Jersey Economic Development Department 3rd Floor, Liberation Place St. Helier Jersey JE1 1BB E-mail: w.byrne@gov.je	Jersey Finance Limited is co-ordinating an industry response incorporating views raised by local firms or entities. Heather Bestwick Jersey Finance Limited 48–50 Esplanade St. Helier Jersey JE2 3QB E-mail: heather.bestwick@jerseyfinance.je

Supporting documents attached:
None

A. INTRODUCTION

1. This Consultation Paper seeks to outline identified issues with the Companies (Jersey) Law 1991 ("the Law") with a view to proposing amendments which will confirm and strengthen the competitiveness and standing of the Jersey company, a vehicle used both for local business needs and as one of the key tools of the international finance industry.

2. Where possible, changes to the Law will be brought into force in an expedited timescale through the enactment of Regulations (the Companies (Amendment No. 7) (Jersey) Regulations 201-). Where this is not possible, changes will be made by amendment to the primary Law (through the Companies (Amendment No. 11) (Jersey) Law 201-).

3. The amendments, outlined in order of the relevant Article under the Law, seek both to elucidate and to develop aspects of the Law. Since the commencement of the Companies (Amendment No. 10) (Jersey) Law 2009 on 6th November 2009, a number of points of clarification and potential improvement have been suggested by industry practitioners and the Jersey Financial Services Commission, some of which look to mirror developments in other jurisdictions. All have been considered by the Economic Development Department and, where appropriate, have been incorporated into this Consultation Paper.

4. As well as a number of substantive issues outlined in this Paper (in respect of which responses are specifically invited), there are also a number of more minor drafting points aimed largely at clarifying the existing provisions of the Law. These have been included for information and completeness. Whilst they are considered non-contentious, views are nonetheless welcomed.

5. In all instances, possible solutions are provided to the identified issues (both substantive and minor). It is important to note that these are not settled solutions but merely proposals drawn from a wide provenance. The concluded views of Government over whether and how to take forward amendments to the identified issues will be drawn only upon receipt and consideration of all consultation responses.

6. In what follows, there are various references to sections of the UK Companies Act 2006. If necessary, these sections can be viewed online at:
http://www.legislation.gov.uk/ukpga/2006/46/contents

B. PROPOSED AMENDMENTS

1. **Registrar's approval for the circulation of prospectus** (Articles 1 and 29) (Article 5 of the Companies (General Provisions) (Jersey) Order 2002).

Summary of Issue

A prospectus, being an invitation to acquire or apply for securities, is defined under Article 1 of the Law.

Where a prospectus is circulated to more than 50 people, the Registrar's consent is required, regardless of the type or nature of investors to whom it is circulated (Article 5 of the Companies (General Provisions) (Jersey) Order 2002 made pursuant to Article 29(1)).

There are occasions where company securities are offered only to sophisticated or institutional investors and where the transactions have to be completed in very short timescales. Ensuring the Registrar's prior approval to the prospectus, or 'term sheet', puts considerable pressure on the Registrar.

Many jurisdictions provide specific exemptions from prospectus approval and/or content requirements where circulation is limited to, say, institutional or high net worth investors or where there is a large minimum value investment requirement.

By way of example, for the UK, section 85 of the Financial Services and Markets Act 2000 requires that a prospectus be approved by the 'competent authority of the home State' which, for the UK, is currently the Financial Services Authority. Section 86 of that Act provides for specific exemptions, e.g. where the offer is made only to qualified investors ('qualified investor' having its own lengthy definition) or to fewer than 150 persons per European Economic Area (EEA) State or where the minimum denomination for the securities on offer is €50,000 or equivalent.

These parameters are the subject of continuing review. With reference to the above example, Directive 2010/73/EU (amending the Prospectus Directive (2003/71/EC)) requires the UK before 1st July 2012 to raise the minimum denomination to €100,000.

Possible Solution

The following possible solutions are proposed –

(i) to amend the definition of prospectus in the Law to allow the Registrar to issue a derogation (e.g. allowing the Registrar to determine whether a particular class of term sheet should or should not be classified as a prospectus);

(ii) to amend the Law to allow for the definition of prospectus to be amended from time to time by Ministerial Order;

(iii) to amend the Companies (General Provisions) (Jersey) Order 2002 so that the Registrar's consent is not required in particular defined contexts; and/or

(iv) to amend the Law to provide for specific exemptions to the need for prior approval (as in section 86 of the UK Financial Services and Markets Act 2000 and Directive 2010/73/EU).

Views are sought on the identified issue and solution and, more particularly, as follows –

Q1	**Which (if any) of the identified proposals (or which combination of them) is to be preferred as a solution to the issue?**

Q2	**What definition of prospectus should be adopted or at what level should any exemption criteria be set?**

Q3	**Would the definition or applicable criteria for exemption be best set by Regulation or by Ministerial Order (whether on the advice of the Registrar or otherwise)?**

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2. Clarification of treatment as a public company (Article 17(2)(c))

Statement of Issue

Article 17(2)(c) was inserted into the Law by the Companies (Amendment No. 4) (Jersey) Regulations 2010 and came into effect on 5th April 2010.

Its purpose was to make it clear that a ‘market traded company’ (as defined in Article 102(1) of the Law) has to be treated as a public company, if it were not one already.

However, Article 102(1) also defines ‘exempt companies’ which, as the description implies, are not to be treated as market traded companies. Article 17(2)(c) does not reference ‘exempt companies’ and thereby fails to make clear that they are also exempt for the purposes of Article 17(2).

In practical terms, the current wording suggests that a private company which is an ‘exempt company’ would nevertheless have to be treated as a public company and be required to have its accounts audited when it would not otherwise have to do so.

Possible Solution

The clear solution is for Article 17(2)(c) to be amended to exclude any company which is an exempt company as defined by Article 102(1).

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3. Calculation of number of members for change of status to public company (Article 17A)

Summary of Issue

Articles 16 and 17 deal with the change in status of a company from public to private and vice versa, with a key factor being the number of members. Article 17A provides that, in determining whether a company has more than 30 members for the purposes of Articles 16 and 17(2), no account is to be taken of certain members – generally those who are (or have in the past been) directors or employees of the company.

Article 17A does not currently extend to directors and employees of subsidiaries of the company concerned. Corporate groups will often have directors and employees of subsidiaries who are members of their parent company. It is considered that these members, too, should be excluded from the count. The rationale is the same as for the existing provision; namely, that members who are only members by dint of their direct involvement in the business (whether that business is carried on through a single company or a group of companies) should not be counted when assessing the transition requirements for a private company becoming a public company.

Possible Solution

Article 17A could be amended so that, when determining whether a company has more than 30 members for the purposes of Articles 16 and 17(2), no account is to be taken of –

(i) a member who is a director or is in the employment of the company or any subsidiary of the company, or

(ii) a member who, having been a director or in the employment of the company or any subsidiary of the company,

   (a) was at the same time a member of the company or that subsidiary of the company, and

   (b) has continued to be a member of the company or that subsidiary of the company since ceasing to be a director or in the employment of the company or that subsidiary of the company.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q4	**Does the identified solution give rise to any potential concerns and, if so, how would they best be dealt with?**

Q5	**Should consideration be given, in the alternative, to raising (or abolishing) the threshold membership level or, indeed, replacing it with a different test? What implications would arise in each circumstance and what extra considerations and/or protections would be needed?**

4. Date of company status change (Article 17B)

Summary of Issue

Articles 16 and 17 provide a mechanism for companies voluntarily to change their status from private to public and vice versa. Article 17B provides for the Registrar, upon being notified and provided with a copy of the necessary special resolution, to issue an altered certificate of incorporation. However, it remains unclear from Articles 9, 16 and 17 as to precisely when the change of status takes effect, i.e. whether it is the date of the special resolution, the date of the notification to the Registrar, the issue date of the altered certificate of incorporation or another date.

Possible Solution

One obvious solution would be to import into Article 17B language similar to that used for changes of name at the end of Article 14(2). This would confirm that the change of status takes effect from the date upon which the altered certificate of incorporation is issued.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q6 Is there a preferred alternative to the date of the change being linked with the issue of the altered certificate and, if so, on what basis is it to be preferred?

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5. Prohibition on commissions and discounts (Article 35(1))

Summary of Issues

There are 3 issues with Article 35, which bars the issue of shares at a discount and the application of the company’s shares or capital in payment of a commission.

First, the term ‘discount’ when applied to a share, is nowhere defined in the Law though is widely understood to mean a discount to a share’s nominal value.

Second, there is an unnecessary duplication in that Article 35(1)(a) prohibits discounts for par value companies and Article 35(1)(b) – which applies to both par value and no par value companies – also prohibits discounts (a prohibition which makes no sense for no par value companies).

The third issue is that the term ‘capital money’ appears only in Article 35(1)(b) and is also nowhere defined in the Law. (It is thought that the term derived originally from section 552 of the Companies Act 2006.)

Possible Solutions

On the first point, it could be made express that the discount referred to is a discount to the nominal value of a par value share. For clarity, there could be an express prohibition in Article 35(1)(a) against the application of a company's shares or capital, whether directly or indirectly, in the provision such a discount.

On the second point, the reference to discount in Article 35(1)(b) could be removed.

On the third point, the term 'capital money' could be replaced with a phrase such as 'any sum standing to the credit of its capital accounts'. Alternatively, if a separate definition of 'capital' is adopted (as per amendment 26 below relating to the characterisation of distributions), then the term 'capital money' in Article 35(1)(b) could simply be replaced with the term 'capital'.

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6. Removal of vestigial provisions on commissions (Article 36)

Summary of Issue

A common feature of company legislation around the world has been the restriction on a company to use its capital funds to pay commission on the purchase of its own shares. Without such rules, the concern was that the amount actually received by a company from an investor in exchange for its shares could be substantially less than might appear. This, in turn, might give a misleading impression to creditors and to other investors concerning the size of the company's capital base.

Existing provisions in the Law permit the payment of commissions but only if –

(i) the company's articles authorise such payment (Article 36(1)(a)),

(ii) commission payments do not exceed 10% of the allotted share value (or such lesser percentage as is specified in the articles) (Article 36(1)(b)); and

(iii) for a public company, various disclosure obligations are met (Article 36(1)(c)).

A failure to comply with certain of the disclosure obligations at Article 36(1)(c) is an offence (Article 36(2)).

Given the move towards increased flexibility on rules surrounding distributions and other "maintenance of capital" provisions in the Law (to which see amendments 13, 24, 25 and 26 below, for example) the restrictions in the Law on the payment of commissions are now considered by some to be outdated and unnecessary.

Possible Solution

One proposal is to retain the obligation for any payment of commissions to be expressly authorised in the company's articles, but to abolish both the 10% cap on the rate of commission and the extra disclosure requirements for a public company (together with the associated offence).

Such changes would bring the Law into line with Guernsey Law, i.e. s.294 Companies (Guernsey) Law 2008. At the same time, it might be noted that the UK law (at s.553 of the UK Companies Act 2006) retains the 10% cap on commission payments.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q7	**Is there any compelling argument for retaining the 10% cap on commissions?**

Q8	**Should the rules on payment of commission be relaxed for both private and public companies or should public companies retain both some form of 'cap' and disclosure obligation?**

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7. Enabling transfers to capital accounts (Article 39 and 39A)

Summary of Issue

The maintenance of share capital is a longstanding principle of company law across many jurisdictions. Nominal share capital of a limited company is traditionally ring-fenced as an ultimate security for creditors and a quid pro quo for the limited liability status enjoyed by the company.

For Jersey companies, this principle is reflected through the provisions (some of which were recently amended) relating to the maintenance of capital accounts.

The Law allows for the creation of par value companies (whose shares are expressed to have a nominal value) and no par value companies (whose shares carry no nominal value).

For **par value companies**, sums representing the aggregate nominal value for the issued shares are to be retained in a share capital account.

If shares are allotted and issued by a par value company for a premium above the nominal value, the extra amount and value of the premium raised (over and above the nominal value) is to be retained in a share premium account.

Another account, a capital redemption reserve account, was also utilised in the past to maintain the capital base of a company when shares were repurchased or redeemed.

These 3 accounts are defined in Article 1 of the Law as the capital accounts for a par value company.

For **no par value companies** Article 39A requires that a 'stated capital account' be maintained for each class of issued share. As shares in a no par value company do not by definition have a nominal value, there is a requirement that the directors transfer into the stated capital account 'the amount and value' of the issued share capital together with '*every amount which the company, by special resolution, resolves to transfer into the account from a profit and loss account or from any capital or revenue reserve*' (Article 39A(3)(c)).

There is felt to be an imbalance between no par value companies and par value companies, with this ability of a no par value company to transfer monies into the stated capital account not being mirrored by any parallel ability of a par value company to transfer monies into its share premium account.

This imbalance is particularly noticeable in light of the changes brought about by Companies (Amendment No. 9) (Jersey) Law 2008 both to Article 39 and to Part 17 of the Law (being the Part dealing with distributions). These changes confirmed that a distribution can be debited to a par value company's share premium account or a no par value company's stated capital account respectively.

Industry practitioners have identified benefits in balancing the position in relation to the two types of companies and further increasing flexibility by allowing the transfer of funds into a par value company's share premium account.

Possible Solution

This could be achieved by mirroring in Article 39 (for share premium accounts of par value companies) the transfer provisions which currently subsist in Article 39A(3)(c) (for stated capital accounts of no par value companies).

Such a change would ensure a greater degree of symmetry in the operation of a par value company's share premium account and a no par value company's stated capital account, permitting the directors to transfer company funds into identified capital accounts for both par value and no par value companies, from which they can then be distributed accordingly.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q9	**Are there any identifiable downsides or risks presented through the suggested extension to a par value company of what might be considered a 'capitalisation mechanism'?**

Q10	**Given that the Law typically requires shareholder approval (e.g. through a special resolution) only in cases where there is likely to be an impact on shareholders' legal or contractual rights, should the requirement for a special resolution be retained in relation to transfers from profit and loss accounts or from any capital or revenue reserve accounts into stated capital accounts and (dependent on the above) transfers into share premium accounts respectively?**

8. Branch Registers (Article 49)

Summary of Issue

Under Article 49 of the Law, a public company which transacts business in an overseas jurisdiction is permitted to keep a branch register of members in that jurisdiction.

The Law is unclear as to whether a shareholder who is not resident in the same jurisdiction as the branch register can be placed on that register, whether upon the issue or transfer of shares.

Possible Solution

The Law could be clarified to confirm that it is possible to place non-resident shareholders on a branch register. One suggested method of doing so would be to add the words "including those" after the word "members" in Article 49(1).

Views are sought on the identified issue and solution and, more particularly, as follows –

Q11	**Are there any contingent issues which might arise from non-resident shareholders being able to be placed on branch registers?**

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9. Redemption and repurchase of shares in specie (Articles 55 and 62)

Summary of Issue

The prevailing view is that Articles 55 and 57 permit a redemption or repurchase of shares in cash or 'in specie'. The UK decision often cited as authority for this view is *BDG Roof-Bond Limited (in liquidation) -v- Douglas* [2000] 1 BCLC 401.

In this case, a former director and shareholder of a company sold 50% of his shares in that company back to the company itself in exchange for money and certain assets belonging to the company. He then resigned from the company which subsequently went into liquidation.

The liquidator brought an action claiming several breaches of statutory requirements including the former director having been paid both in cash and in property when "payment" under s.159(3) UK Companies Act 1985 Act allowed only monetary consideration to be given for share repurchases. The High Court disagreed with the liquidator and held that "payment on redemption" under s.159(3) was not restricted to a monetary consideration.

Some leading UK practitioners continue to have reservations about this decision and, given this uncertainty, it is proposed to amend the Law to put the matter beyond doubt.

Possible Solution

The following alternatives have been proposed by way of clarificatory wording –

(i) after the word “payment” in Articles 55(9)(a), 55(12)(c), 62(2)(b) and 62(6), the following words are added “(for the avoidance of doubt in cash or otherwise)”; or

(ii) a separate definition of “payment” is included in Parts 11 and 12 (only) of the Law, the effect of which would be to countenance payments in cash or in specie.

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10. Repurchase of shares represented by depositary receipts (Article 57)

Summary of Issue

Until the mid-1990s, all registered shares were issued in what is now called ‘certificated form’. This meant that, in addition to having his or her name notified on the shareholder register, every shareholder also received a paper certificate evidencing the shareholding. Transfers were completed by signing a transfer form and delivering this, together with the paper share certificate, to the buyer.

This paper-based transfer process still applies to non-listed shares i.e. those in private or non-listed companies. However, shares listed on a stock exchange will often be (and in some circumstances have to be) issued in uncertificated form.

Currently, Jersey companies can issue uncertificated shares if they are settled by a settlement system recognised by the Companies (Uncertificated Securities) (Jersey) Order 1999. At the time of writing, the only settlement system which has applied and been granted the necessary recognition is CREST.

In consequence, a Jersey company can only list its shares in uncertificated form directly on the London Stock Exchange, AIM (the Alternative Investment Market, a sub-market of the London Stock Exchange), PLUS and the Channel Islands Stock Exchange (CISX) (these being the only markets where a Jersey company can avail itself of CREST settlement).

Should a Jersey company wish to list its shares on any other market it will have to list depositary receipts instead. In very basic terms, this involves a depositary bank in the relevant jurisdiction taking the shares in the Jersey company and issuing to investors depositary receipts representing those shares which can then be listed and traded in their place.

Article 57 of the Law provides 2 mechanisms by which a company can repurchase its own shares: an on-market repurchase and an off-market repurchase.

Where depositary receipts representing shares in a Jersey company are listed rather than the shares themselves, it is not clear how the company can follow the repurchasing requirements contained in Article 57.

As the shares are not listed and are not, therefore, being purchased on-market, the on-market repurchase mechanism appears to be ruled out.

Under Article 57(3)(b), the off-market repurchase option bars those shares which are to be repurchased from voting on the initiating special resolution required to sanction or approve the repurchase. However, at the time of the resolution, it may not be possible to identify which shares are to be repurchased. As a result, it is not possible to identify which shareholders are eligible and which are not eligible to vote on the proposed repurchase.

Possible Solution

One proposal is for Article 57 to be amended to provide that, where shares are represented by listed depositary receipts (including depositary shares or interests in shares), the on-market repurchasing mechanism will apply to those shares. A listed company would then be able to enter the market to buy the depositary receipts subject to an obligation then to procure the cancellation of those depositary receipts and the underlying shares.

Such a proposal would not be intended in any way to affect or displace existing mechanisms for a company to repurchase its own shares, including the ability to repurchase shares by way of contingent purchase contract.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q12	**Are there likely to be any practical issues or undesirable consequences with assuming this approach?**

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11. Authority to undertake on-market share repurchases (Article 57(4)(c))

Summary of Issue

Article 57(4)(c) states that a shareholder resolution authorising a purchase by a company of its own shares on a stock exchange may only confer such authority for a maximum of 18 months.

As of 1st October 2009, the UK has amended its legislation for public companies, replacing the previous 18 month period with a new 5 year period (the maximum permitted by Article 1(4)(a) of Directive 2006/68/EC).

There would not appear to be any reason why the Law should not seek parity with the UK and with Europe on this point.

Possible Solution

Parity could be achieved through a simple amendment to Article 57(4)(c) to refer to a 5 year period rather than an 18 month period.

12. Surrender of shares (Article 60)

Summary of Issue

Article 60 enables shares to be forfeited or surrendered for failure to pay an amount due on the shares. However, there is no express provision in the Law which permits fully paid up limited shares to be cancelled for no consideration should both the company and the relevant shareholder agree.

If the shares are fully paid up and no money would be paid on a cancellation, such a cancellation of shares is thought unlikely to cause any prejudice to the company or its members.

Possible Solution

Article 60 could be amended to provide that fully paid shares may be surrendered to the company by a member on condition that no cash or other cause, benefit or consideration is received by the member from the company in respect of such surrender.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q13	**Would a surrender of shares be likely to have any practical impact on the issued or authorised share capital of a company and, thereby, on the company's creditors. If so, how should this be dealt with (cf. Article 55(17) on redemption of shares)?**

Q14	**Should the Law provide for the accounting treatment occasioned by the surrender and, if so, what should that treatment be?**

13. Abolition of the court sanction for reduction of capital (Articles 61 – 63)

Summary of Issue

As mentioned above, one of the guiding precepts of company law across jurisdictions is the maintenance of capital.

At present, if a Jersey company wishes to reduce its share capital it must adopt a formal procedure and seek the approval of the Royal Court (Part 12 of the Law).

Some industry practitioners consider that the official sanction of the Royal Court is a useful mechanism whether to obtain official approval or to ensure that minority interests are not being compromised.

Others consider the procedure to be unnecessary, cumbersome and outdated, particularly given that other parts of the Law (such as those relating to the sanction for distributions at Article 115) now seek to protect creditors through the use of solvency statements rather than through more traditional ‘maintenance of capital’ requirements.

In the UK, the necessity of a court procedure has been removed for private companies, largely on the basis that, more often than not, they had only minimal paid up share capital which provided no real protection for creditors in any case.

Possible Solution

It is suggested that reductions of share capital by Jersey private companies should be freed from the requirement for court sanction (although it may be retained as an option). In substitution (or as an alternative) private companies could be allowed to reduce their capital by special resolution supported by a solvency statement of directors. This option would require additional provisions being made to replace requirements which currently form part of a court order under the existing regime.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q15	**Are there clear benefits in retaining the court procedure as the only (or an optional) route for reduction of capital in private companies e.g. in providing protection for minority shareholders, comfort and certainty to directors, foreign courts, financial authorities, etc.?**

Q16	**Were the court procedure to be abolished or rendered discretionary –** **(i) would the combination of a special resolution and directors’ solvency statement stand as a sufficient replacement for the existing court procedure or should further safeguards or conditions be considered?** **(ii) what additional provisions would be necessary in order to replicate the requirements of existing court orders?**

Q17	**Should an out-of-court share capital reduction procedure be provided for public companies as well as private companies?**

Q18	**Would an out-of-court procedure for either type of company make Jersey a more attractive jurisdiction for incorporation or risk having an adverse effect on the reputation of Jersey companies?**

14. Ratification of breach of director's duty (Article 74(2))

Statement of Issue

Article 74(1) enshrines into the Law the fiduciary and general duties of company directors to their company. These duties are a key constituent of the Jersey corporate governance regime.

Article 74(2) contains a ratification process for any breach of a director's duty which, reflecting the fundamental importance of these duties, requires the obtaining of authorisation from "all of the members of the company".

As currently drafted, this would include members who have no entitlement to vote, e.g. holders of deferred shares. (In some cases, articles of association contain provisions whereby shares are automatically converted to deferred shares if the holder becomes a 'bad leaver', for example; in such an instance, the holder of the deferred share is intended no longer to be involved with the company and holds a 'worthless share'.) Such circumstances might preclude a company from ever being able to use the Article 74(2) procedure. Alternatively, the holder of a deferred (or similar) share might be encouraged to use what amounts to a power of veto as a negotiating tool.

The unanimous consent principle in UK common law, often known as the *Duomatic* rule (though *Re: Duomatic Ltd.* (1969) was not the first case to formulate it), specifically allows for certain decisions to be made through the unanimous consent of members. In such circumstances, the members concerned are specifically those 'with an entitlement to vote' and would not, therefore, include a member who holds a deferred share. As currently drafted, Article 74(2) appears at odds with this principle.

As to the 'unanimous consent' threshold set for ratification, it is noted by some that s.239 of the UK Companies Act 2006 provides for a parallel ratification process for a director's negligence, default, breach of duty or breach of trust. The default position under this section is for ratification to be carried by ordinary resolution of a company's members (though individual company articles can raise the threshold, e.g. to require special resolution or unanimous consent).

Possible Solution

Article 74(2) could be amended to clarify that an act or omission of the directors can be authorised or ratified by all those members who enjoy an entitlement to vote.

Views are sought on the identified issue and solution and, more particularly, as following associated points –

Q19	**Is there a case for introducing an express ability in the articles to adjust the resolution requirements for ratification of director's default? If so, is there an equal a case for adjusting the Law to mirror s.239 of the UK Act in providing for a lower default requirement e.g. ordinary resolution?**

Q20 In any event, should specific provision be made in the Law (as in s.239(3) and (4) of the UK Act) to disregard the vote not only of any director whose default is being ratified (should that director also be a member) but also any member connected with him?

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15. Annual general meetings (Article 87)

Summary of Issue

Article 87 requires every company to hold an annual general meeting but Article 87(4) permits this to be dispensed with by agreement between all the members.

In practice, it is often administratively inconvenient to arrange for such an agreement to be entered into following the incorporation of a company.

In reality, very few private companies hold annual general meetings and some will not have a valid dispensing agreement between members. As a result, it may become necessary, following procedural reviews, for ratification meetings to be held.

Possible Solution

Article 87 could be amended so that an agreement to dispense with annual general meetings can, in the case of private companies only, be included in the articles of association of the company.

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16. Thresholds for special resolutions (Article 90)

Summary of Issue

Article 90 provides that a resolution is a special resolution when it is passed by a two-thirds majority or, if the company's articles of association specify, a greater than two-thirds majority. 'Majority' in this context means the majority of persons who (being entitled to do so) vote in person, or by proxy, at a general meeting (or a separate meeting of a class of members of the company, as the case may be).

There is a view amongst some practitioners that these provisions already give a company sufficient flexibility through its articles of association to specify particular thresholds for particular special resolutions i.e. allowing one threshold to differ from another (subject always to the requirement that the requisite majority be at least two-thirds). However, it is felt that Article 90 would benefit from greater clarity on this point and should be amended to provide expressly that this is the case.

Equally, and despite it being commonly understood that "greater majority" in Article 90(1A) could extend to a requirement for unanimity, some consider that it would be beneficial for this also to be more expressly stated.

There would be identifiable advantages in practice to retaining and confirming this flexibility. Article 11(1) allows a company to alter its memorandum and articles through special resolution. A company wishing to entrench particular provisions within its articles of association, e.g. to protect or empower a minority shareholder, could specify a suitably increased majority or a requirement of unanimity for those articles whilst at the same time retaining a lower (though not lower than two-thirds) majority in respect of alterations to the remaining articles.

Possible Solution

Article 90 could be amended –

(i) to clarify that a company may, in its articles of association, specify different general or specific thresholds in respect of special resolutions (subject always to the requirement that the requisite majority be at least two-thirds); and

(ii) to confirm expressly that the relevant "greater majority" could extend to a requirement for unanimity (whether of all members, all members entitled to vote, or all such entitled members who attend and vote (in person or by proxy) at the relevant meeting, as might be specified in the company's articles).

Views are sought on the identified issue and solution and, more particularly, as follows –

Q21 Is there any argument for restricting the ability to apply different thresholds in respect of different special resolutions?

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17. Consent to short notice of general meetings (Article 91)

Summary of Issue

Article 91 of the Law requires 14 days' written notice to be given in advance of meetings of a company unless a company's articles expressly state otherwise.

Article 91(3)(b) allows for a shorter notice period if certain requirements are met. Specifically, for meetings other than the annual general meeting, a majority of members who together hold not less than 95% of the total voting rights can agree a 'short notice' meeting to have been duly called.

For private companies, this threshold for consent to a short notice general meeting is higher than the 90% currently required by section 307(6)(a) of the UK Companies Act 2006.

The language of the existing Law also creates some uncertainty over whether the test has 2 limbs, i.e. (i) a majority in number; and (ii) holdings of not less than 95%.

Possible Solution

Amendments could be made to Article 91 both to mirror s.307(6)(a) of the UK Act (reducing the threshold to the lower 90% level for private companies) and to make it clear that there is no '2 limb' test.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q22	**Is there any basis for reducing the short notice threshold to 90% for Jersey public companies?**

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18. **Corporate representatives** (Article 93)

Summary of Issue

It is not clear under Article 93 of the Law whether more than one corporate representative can be appointed by a corporate member of a company to attend at a meeting of the company, a class of shareholders or a meeting of creditors.

Sub-section 323(1) of the UK Companies Act 2006 has clarified this point for UK companies, specifically allowing for more than one such representative. Sub-section 323(4) further provides for what happens when representatives of the same corporate member vote in the same way and in opposite ways.

Possible Solution

It is proposed that Article 93 be amended to mirror s.323 of the UK Companies Act 2006 and specifically provide for multiple corporate representatives and to determine how concurring and conflicting exercise of their voting powers is to be treated.

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19. **Resolutions in writing** (Article 95)

Summary of Issue

Article 95 permits resolutions (other than a resolution to remove an auditor) to be passed by way of written resolution rather than at a general meeting of the company's members (or class of members).

This Article is considered by some practitioners to allow a company, in its articles of association, to provide that a written resolution can be passed by fewer than all of the members entitled to vote, adopting whatever threshold is set out in the articles (subject, in the case of a special resolution, to a two-thirds requirement).

It is felt that Article 95 should be amended to confirm this position in more express terms.

Possible Solution

Article 95 could be amended to allow articles of association to make provision for the thresholds required to pass written resolutions (subject, in the case of a special resolution being passed by way of written resolution, to a requirement that the requisite majority be at least two-thirds of all members entitled to attend and vote on that special resolution).

If the suggested amendments to Article 90 (see above) are taken forward, it is also proposed to provide the same flexibility to specify in the company's articles different thresholds for different resolutions, including special resolutions, if passed by way of written resolution.

Subject to the views of respondents, there is no current inclination to adopt the very detailed procedural provisions set out at sections 288 – 300 of the UK Companies Act 2006 which also allow private (though not public) companies to pass written resolutions (other than those removing directors and auditors) by majority rather than unanimous voting. Instead, amendments will seek to allow Jersey companies to retain the flexibility in their articles of association to adopt whatever procedural or other requirements they consider appropriate in connection with such written resolutions. The prohibition on removal of an auditor by written resolution is, however, intended to be retained.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q23 Which, if any, of the more detailed procedures present in the UK Act should be adopted (e.g. circulation requirements) and on what basis?

Q24 Do these proposals otherwise give rise to any potential concerns and, if so, how would they best be dealt with?

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20. Delivery of Proxies (Article 96(4))
(Article 40(1) of the Companies (Uncertificated Securities) (Jersey) Order 1999)

Summary of Issue

Article 96 confirms that a member of a company can appoint another person as that member's 'proxy' to attend and vote at company meetings. Article 96(4) confirms that a company cannot through its articles require more than 48 hours' notice of such appointments.

Section 327(3), being the equivalent provision in the UK Companies Act 2006, has been amended to provide that in calculating the 48 hour period no account shall be taken of any part of a day that is not a working day. This is to prevent weekends or Bank Holidays rendering invalid the deadline given for proxy notification. Article 96 of the Law contains no such clarification.

The same potential problem arises for companies whose shares are held by CREST. Article 40(1) of the Companies (Uncertificated Securities) (Jersey) Order 1999 contains provisions similar to those in Article 96 of the Law as regards the notification of proxies prior to meetings.

Possible Solution

Amendments could be made to Article 96 of the Law and to Article 40(1) of the 1999 Order to reflect the changes made in the UK Act.

To facilitate both these amendments, a definition of ‘working day’ would need to be inserted into both the Law and the 1999 Order.

The UK Companies Act 2006 defines a working day as a day which is not a Saturday or Sunday, Christmas Day, Good Friday or any day that is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the UK where the company is registered (section 1173(1)).

A similar ‘working day’ definition in both the Law and the Order would likely make reference to the Public Holidays and Bank Holidays (Jersey) Law 1952.

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21. Auditors and the exercise of discretion by the Commission (Article 102)

Summary of Issue

Article 113D(6) of the Law gives a discretion to the Jersey Financial Services Commission to authorise an individual or a firm who would not otherwise qualify as an auditor under the Law, to carry out an audit for a non-market-traded company.

Article 102 of the Law (as amended by the Companies (Amendment No. 4) (Jersey) Regulations 2009) includes a wide definition of ‘firm’ as meaning *“an entity, whether or not a legal person, that is not an individual and includes a body corporate, a corporation sole, a partnership, and an unincorporated association”*.

Ownership and control provisions in Article 102 of the Law are designed to cover companies, customary law partnerships and limited liability partnerships. The Law does not give any guidance over what would constitute equivalent ownership and control provisions in the case of other types of incorporated or unincorporated person e.g. corporations sole, unincorporated associations, limited partnerships and (most recently) incorporated limited partnerships or separate limited partnerships.

In the absence of such guidance, the Commission does not consider it appropriate that it should have discretion under Article 113D(6) to authorise firms other than companies, customary law partnerships or limited liability partnerships.

The Companies (Amendment No. 6) (Jersey) Regulations 2011 inserted Article 102(1A), which clarified that in Part 16, unless the context otherwise required, a ‘partnership’ did not include an incorporated limited partnership or a separate limited partnership. This amendment did not, however, deal with the other potentially problematic categories of applicant auditor.

Possible Solution

One solution would be to amend the definition of ‘firm’ in Article 102 of the Law to exclude corporations sole, unincorporated associations and limited partnerships (whether in Jersey or elsewhere).

Another solution would be to amend Article 113D(6) by providing a positive list of types of entity which can qualify as a ‘firm’ for these particular purposes, i.e. companies, customary law partnerships and limited liability partnerships.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q25 Is there any perceived need or requirement to continue to allow all forms of entity, including corporations sole, unincorporated associations and limited partnerships, to be able to seek authorisation to audit non-market-traded companies?

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22. Ability for dormant public company to dissolve without audit (Article 108)

Summary of Issue

A public company may circulate a prospectus relating to its own securities. A private company may also circulate such a prospectus but if it does so then, under Article 17(2)(b) of the Law, it will be treated as a public company.

The core purpose of a fund company is, obviously, to attract subscriptions and it does this by publishing and circulating a prospectus. In doing so, it falls to be treated as a public company.

The Law requires public companies to appoint auditors and Article 108 of the Law requires the filing of audited accounts by all public companies. In most cases this does not cause any issues.

It does, however, prove problematic in the area of non-launched funds (as particularly highlighted during the recent economic downturn). A fund company which (for whatever reason) may never have taken in any cash and never held or owned any assets, is nevertheless required to produce audited accounts before it can be dissolved.

This requirement is regularly questioned by fund promoters particularly where other jurisdictions have statutory exceptions to this requirement.

Section 480(1)(a) of the UK Companies Act 2006 provides that companies which have been dormant since formation are exempt from the requirements relating to the audit of accounts for the financial year. For these purposes, dormancy is defined in s.1169 of the UK Companies Act 2006 as being a period during which ‘no significant accounting transaction’ has taken place (a significant accounting transaction being one which is required to be entered into the company’s accounting records).

Section 256 of the Companies (Guernsey) Law 2008 provides a mechanism which allows any company to pass a ‘waiver resolution’ exempting the company from audit (providing it is not a type or class of company specifically prohibited from doing so by the States of Guernsey Commerce and Employment Department).

Possible Solution

Two possible solutions present themselves. Article 108 of the Law could be amended to provide an exemption from audit –

(i) to public companies which have been dormant since formation (mirroring the narrower UK position), or

(ii) to public companies which have passed a waiver resolution (mirroring the wider Guernsey position and adopting a similar mechanism).

For solution (i), a definition of ‘dormant’ would need to be introduced. For solution (ii), the class of companies able to exempt themselves from audit could be those as determined from time to time by Order of the Minister for Economic Development.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q26 Is either of the two proposed solutions to be preferred over the other, and, if so, on what basis?

Q27 With regard to solution (ii), would generalised exemption provisions be likely to have any otherwise undesirable consequences for which additional provision should be made?

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23. Extending offence of providing false or misleading information to auditor (Article 113(B)(4)

Summary of Issue

Articles 113B and 113C of the Law apply to companies that are required to appoint an auditor under Article 113.

Article 113B(4) provides that the auditor of a company has right of access to that company’s records at all times and that it is entitled to require from the company’s officers and the secretary such information and explanations as the auditor thinks necessary for the performance of its duties.

Article 113C(2) provides that an officer of a company or its secretary is guilty of an offence if, knowingly or recklessly, they make a statement to the auditor which is false or misleading in a material respect.

In practice, the auditor will also collect information from employees of the company, as well as persons holding (or accountable for) any of the company's records.

From time to time, the auditor may also need to collect information from a person that was previously an officer, secretary, employee or person holding or accountable for the company's records at a relevant time.

The auditor currently has no statutory entitlement to require information and explanations from such persons.

Possible Solution

One solution would be to adopt similar provisions to those currently contained at sections 499 and 501 of the UK Companies Act 2006. This would require the amendment of Article 113B(4) to allow the auditor to require information and explanations of –

(i) any officer of the company,

(ii) the company secretary,

(iii) any employee of the company who appears to be in possession of relevant information,

(iv) any person holding (or accountable for) any of the company's records who appears to be in possession of relevant information, and

(v) any person who previously held a role as (i) – (iv) above at a time to which the information (or explanations) required by the auditor relates (or relate).

The offence outlined in Article 113C(2) would also need to be aligned with this extended list of those who can be approached.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q28 Are there any identifiable downsides or dangers presented through the proposed statutory extension of the existing provisions?

Q29 Is there any need arising in practice or law to qualify the right of access to information and explanations with reference to timing e.g. should it be expressed as a right of immediate access, a right of access as soon as reasonably practicable, etc.?

24. The scope of the term 'distribution' (Article 114(2))

Summary of Issue

The law in relation to company distributions is found in Part 17 of the Law (Articles 114 – 115B). Prior to the enactment of the Companies (Amendment No. 9) (Jersey) Law 2008, a distribution was only unlawful if it was made from a source not permitted under the Law (as it stood at that time).

The effect of Amendment No. 9, and the consequent revision of Article 115(3), was to place an active responsibility on the authorising company directors, rendering distributions lawful only if they had made (what amounted to) a solvency statement. This statement had to meet specific requirements set out in Article 115(4).

Corporate lawyers have since needed to consider much more closely what constitutes a distribution in order to avoid a transaction being inadvertently rendered unlawful through a failure to make the appropriate Article 115 statement.

This is particularly so in light of the very broad definition of distribution given in Article 114(1) of the Law as meaning "*every description of distribution of the company's assets to its members as members, whether in cash or otherwise*."

This definition arguably embraces certain types of commercial transaction, including those where value is being given by a subsidiary company either up to its parent or through 'sidestreaming' to another subsidiary (this being treated as a transaction travelling through the parent company).

An example might be an 'upstream' guarantee given to a bank by a subsidiary company to secure borrowing by its parent company. Such a transaction involves the creation of a liability for the subsidiary (albeit contingent) and the transfer of value to the subsidiary company's members, i.e. the parent company. From a legal perspective, the transaction may point towards categorisation as a distribution.

This conclusion could prove at odds, however, with the accounting treatment of the same transaction which is likely to focus on whether there is a reduction in the net assets of the company immediately after the transaction is entered into.

In the example of the upstream guarantee, therefore, the accounting treatment would involve a judgment being made as to the likelihood of the guarantee shortly being called upon. If it is judged unlikely, it is acceptable accounting practice merely to highlight its existence in the notes accompanying the subsidiary's accounts. If, on the other hand, there is thought to be a genuine and realistic prospect of the guarantee shortly being called upon, it would need to be included as a real (albeit contingent) liability within the body of the subsidiary company's accounts.

There is felt to be a need to align the legal and accounting tests for transactions of this type and confirm when they are to be treated as distributions.

Possible solution

One proposal would be to insert a new sub-paragraph (e) in Article 114(2) excluding from the definition 'any distribution the effect of which does not reduce the net assets of the company immediately after the distribution is made' (to be assessed in accordance with the generally accepted accounting principles adopted by the company pursuant to Article 104).

Views are sought on the identified issue and solution and, more particularly, as follows –

Q30	**Is this further exclusion necessary?**

Q31	**If so, are the ambit and exercise of the proposed exclusion suggested above clear and workable as a matter of practice or should they be limited further e.g. to group company guarantees?**

Q32	**Is there likely to be any adverse impact or unintended consequence in not requiring an Article 115 solvency statement for this type of transaction?**

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25. Ability to ratify a distribution (Article 115)

Summary of Issue

Under UK law, a distribution can be made from 'distributable profits' without the need to make any formal solvency statement. There is anecdotal evidence that directors of Jersey companies (perhaps with experience of the UK system and unaware of the requirement under Article 115(3)) authorise distributions without making a solvency statement, thereby rendering those distributions technically unlawful.

The uncertainty surrounding the legal status of an unlawful distribution leads to consequential concerns both for recipient shareholders (over the extent of their liability to repay the distribution) and for authorising directors (over the extent of any personal liability).

Possible Solution

A mechanism could be introduced (with appropriate conditions) allowing for retrospective ratification of a distribution.

The relevant provision could confirm that if a distribution (or part of a distribution) is made by a company to its members without the prior solvency statement required by Article 115(3), the company may later ratify the distribution through the appropriate directors making a statement in prescribed terms.

The prescribed terms would, in all likelihood, be similar to those set out in Article 115(4), e.g. requiring the appropriate directors to form the opinion that –

(i) immediately following the date of the ratification, the company will be able to discharge its liabilities as they fall due; and

(ii) immediately following the date of the distribution, the company was able to discharge its liabilities as they fell due; and

(iii) either (as applicable) –

(a) for the period of 12 months following the date of the distribution, the company was able to carry on business and discharge its liabilities as they fell due; or

(b) to the extent that the period of 12 months following the date of the distribution has not expired, the company was able and will continue to be able to carry on business and discharge its liabilities as they fall due until the expiry of such period or until the company is dissolved under Article 150, whichever first occurs.

It is not proposed that this option be made available to a company which was insolvent at the date of ratification, even if it had been solvent at the time of the distribution.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q33 Are there any identifiable downsides or dangers presented through the introduction of such a mechanism?

Q34 Should shareholder approval be required as part of any retrospective ratification procedure (i.e. following a directors' solvency statement) and, if so, at what level should shareholder approval be required?

Q35 If shareholder approval is not required, should the ratifying directors be subject to any other requirement or sanction, e.g. an obligation to notify members or the recipients of the formerly unlawful distribution?

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26. Characterisation of Distributions (Article 115)

Summary of Issue

Part 17 gives directors clear authority to debit permissible distributions to a share premium account, a stated capital account (both of which fall within the definition of 'capital accounts') or any other account of the company other than the capital redemption reserve or the nominal capital account (as defined by Article 115(8)).

Notwithstanding this express authority, there would not appear to be any mechanism at present by which the directors who decide to debit the distribution to a capital account can confirm that the result of this will be a return of capital.

Possible Solution

The identified issue could be resolved by provisions along the following lines –

(i) to provide a definition for 'capital' in Article 1(1), as being an amount standing to the credit of a capital account;

(ii) to amend Article 115(7)(a) to confirm that, where there are sufficient funds in a capital account (being a share premium account or the stated capital account), distributions debited to that account would be treated as a return of capital to shareholders; and

(iii) to include additional wording that distributions debited to the 'other accounts' as provided for in Article 115(7)(b) (i.e. not the stated capital, share premium, nominal capital or capital redemption reserve accounts) may result in such accounts running into negative balance.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q36	**What (if any) are the pertinent domestic or international tax repercussions flowing from the confirmatory language proposed?**

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27. Takeover Offers to Shareholders in Restricted Jurisdictions (Article 116)

Summary of Issue

Articles 116 and 117 of the Law set out the position regarding takeover offers.

For a valid takeover offer to be made, the potential purchaser must make an identical offer to every shareholder of the target company. If this offer is accepted by 90% or more of the shareholders to whom the offer is made, then the purchaser will have the statutory right compulsorily to buy out the remaining shareholders at the same price and on the same terms as previously offered.

In some cases, however, it will not be possible for the purchaser to make their offer to every shareholder. This might occur when certain shareholders are resident in a different jurisdiction, such as the United States, which has its own (different) specific regulatory requirements relating to the making of offers. On a strict interpretation of the Law, a failure by the offeror to make the offer to every existing shareholder might result in the offer not constituting a valid takeover offer.

Article 116(4) of the Law makes specific provision allowing for a variation of the rules when a shareholder is in a jurisdiction outside Jersey where the law prevents acceptance of the offer in the form given (or otherwise precludes acceptance without complying with conditions which the offeror cannot meet or which it considers unduly onerous). Importantly, however, whilst variation is permitted on matters of acceptance, the wording of Article 116(4) suggests that the offer must still be made to all of the shareholders.

The former UK Companies Act 1985 contained similar provisions to Articles 116 and 117 of the Law. In *Winpar Holdings Ltd. -v- Joseph Holt Group plc*. (2002) the UK courts interpreted these provisions as permitting an offer to be treated as having been made to registered shareholders resident in territories where it was problematic to make such an offer, so long as the offeror took sufficient alternative measures.

This common law approach was enshrined in s.978 of the UK Companies Act 2006. This provides that an offer to acquire shares in a company which has not been communicated to every shareholder is not prevented from being a valid takeover offer if –

(i) those shareholders have no registered address in the United Kingdom;

(ii) the offer was not communicated to those shareholders in order not to contravene the law of a country or territory outside the United Kingdom; and

(iii) the offer is either published in the London, Edinburgh or Belfast Gazette or a notice is published in the relevant Gazette specifying a website or place within the European Economic Area where the offer is available for inspection or where a copy of it can be obtained.

Possible Solution

Amendments could be made to the Law to bring it into line with s.978 of the UK Companies Act 2006 (replacing the requirement to publish in the London, Edinburgh or Belfast Gazette with a requirement to publish in the Jersey Gazette).

Views are sought on the identified issue and solution and, more particularly, as follows –

Q37 Are the exceptions currently offered by the UK legislation sufficient for Jersey companies or would greater (or lesser) protections and notification procedures be advisable?

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28. Merger and continuance notification periods (Articles 127FC and 127R)

Summary of Issue

Once a continuance overseas has been approved by a company, Article 127R requires the continuing company (amongst other things) to publish a public notice in a Jersey newspaper. Creditors of the continuing company are allowed to object to the continuance within 30 days of that advertisement. If that creditor’s claim is not discharged, the creditor then has a further 30 days from the date of its objection notice to apply for a court order restraining the continuance.

In addition, any company member who did not consent or vote in favour of the company applying for continuance into another jurisdiction, and who objects to it, may also apply to court for an order and must do so within 30 days of the last requisite resolution (Article 127S).

Similar provisions and time limits apply for mergers although these have recently been expanded through the Companies (Amendment No. 5) (Jersey) Regulations 2011. Under Article 127FC(1), written notice of the intended merger has to be given to creditors with claims over £5,000 and under Article 127FC(5) the notice has to be published publicly in an approved manner. The merging companies cannot apply to the Registrar to merge until such time as the relevant notices have been given and the time limits have expired (generally 28 days as specified in Article 127FJ).

The notification periods and the periods during which creditors and members may object to a proposed continuance overseas or a merger are considered too long for cases where all members and all creditors are willing to give prior consent to the continuance or merger.

Possible Solution

The periods could either be shortened or be made capable of being waived where all known creditors and all members actively consent to the continuance or merger. This should work further to streamline the continuance and merger procedures.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q38 Are the notification periods for both mergers and continuance generally considered to be too long, i.e. should they be reduced from 28/30 days to 21 days or 14 days?

Q39 Should there be an ability to curtail the statutory notification periods if the companies involved in the merger or continuance can demonstrate that all members and relevant creditors have been notified and that all have actively consented?

Q40 For mergers, should any curtailment of the statutory notification period be contingent upon a company achieving active consent not just from all members but from all known creditors (rather than merely those creditors with a claim exceeding £5,000)?

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29. Demerger and division

Summary of Issue

Currently the only way to demerge a Jersey company into 2 or more companies, with assets and liabilities transferred by operation of law, is to undertake a scheme of arrangement pursuant to Part 18A of the Law.

Possible Solution

The Law could be amended to create a separate demerger process, reflective of the merger provisions available at Part 18B of the Law.

Part 27 of the UK Companies Act 2006 might stand as a possible model for this purpose subject to 2 principal modifications; namely, that –

(i) unlike the UK provisions which involve a scheme of arrangement, any Jersey provisions would not involve the courts unless members or creditors object (as is currently the position with mergers); and

(ii) unlike the UK provisions which result in the dissolution of the dividing company, any Jersey provisions would allow the dividing company to continue in existence (so as to retain accrued tax losses).

It is likely that these provisions would, in the first instance, be restricted to the demerger of a Jersey company into 2 or more Jersey companies, though an accompanying regulation-making power could specifically provide for the future development of a more sophisticated demerger mechanism (e.g. allowing for cross-border demergers, demergers into non-company bodies corporate, etc.).

Views are sought on the identified issue and solution and, more particularly, as follows –

Q41	**What are considered to be the chief legal and tax considerations of permitting company demergers outside of the traditional 'scheme of arrangement' model?**

Q42	**Is there a market demand for demerger provisions of this type and, if so, to what degree does it extend to cross-border demergers and to demergers into non-company bodies corporate?**

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30. Definition of 'relevant supervisory body' (Article 135(3))

Summary of Issue

The current definition of a 'relevant supervisory authority' in Article 135(3) is "an authority discharging in a country or territory outside Jersey supervisory functions corresponding to those of the Commission in respect of bodies corporate.".

This definition needs to be amended to match that now contained in the more recent regulatory laws.

Possible Solution

Article 135(3) can be amended to embrace the more recent formulation and define a 'relevant supervisory authority' as, "in relation to a country or territory outside Jersey, an authority discharging in that country or territory any function that is the same as, or similar to, a function of the Commission.".

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31. Creditors' winding up (Article 169A)

Summary of Issue

There is a disparity between the Law and the Companies (General Provisions) (Jersey) Order 2002 as to procedure at creditors' meetings.

Article 169A(4) of the Law states that, for a resolution to pass at a creditors' meeting, it must be supported by creditors the value of whose votes are "at least half" the value of the votes of the creditors voting.

Article 8(5) of the Companies (General Provisions) (Jersey) Order 2002, on the other hand, requires "a majority" to pass a resolution at a creditors' meeting.

Possible Solution

This issue lends itself to a simple solution; namely, an amendment to Article 169A(4) of the Law to replace the words "at least half" with words which would require a majority.

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32. Quoracy at a creditors' meeting (Article 169A)

Summary of Issue

The quoracy provisions in Article 169A(5) of the Law have the potential to cause a deadlock in a creditors' winding up.

The requirement for 3 creditors (or their proxies) to be present at a creditors' meeting could mean that, where there are a number of creditors with small claims and a single major creditor, the smaller creditors could act to prevent a meeting being quorate frustrating the major creditor and causing inequity.

As of 6th April 2010, the equivalent UK provision (Rule 12.4A of the Insolvency Rules 1986) has been repealed and replaced with a new rule (Rule 12A.21) providing that a quorum of 'at least one creditor entitled to vote' renders a creditors meeting competent to act.

Possible Solution

This issue could be easily resolved through the mirroring in the Law of the changes which have been brought into force in the UK (as described above).

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33. Striking off a company with no valid registered office (Article 205)

Summary of Issue

Under Article 67(1) of the Law, a company is required at all times to have a registered office in Jersey, to which all communications and notices may be addressed. Article 67(2) of the Law provides that a company does not comply with that requirement unless the occupier of the premises that comprise the registered office authorises their use for that purpose.

The Registrar may refuse to incorporate a company if he or she is not satisfied that the occupier of the premises has given such authorisation.

However, if once it has been incorporated a company is subsequently without a registered office (e.g. because the Registrar is not satisfied on the question of occupier's authorisation) the company will nevertheless remain on the Companies Register (despite committing a criminal offence under Article 67(9)).

It will continue on the Register until one of the existing strike-off provisions in Article 205 of the Law can be utilised e.g. failure to file an annual return. Unless the situation is remedied, strike-off will then occur three months after notification by the Registrar. During that period, the company continues to be a Jersey company but does not have a valid registered office and, as such, no genuine local presence.

Possible Solution

A new provision could be included in Article 205 of the Law to provide the Registrar with the power to strike off a company where it has been without a registered office for a specified period.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q43	**Is it considered appropriate to be able to strike off a company where it has been without a registered office for a specified period?**

Q44	**If so, what should the specified period be?**

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34. Electronic Communications (Various)

Summary of Issue

There is no express provision in the Law for electronic communications and the only existing references in the Law to the Electronic Communications (Jersey) Law 2000 are at Articles 4(4) and 5(5).

The inability of practitioners to utilise electronic communications gives rise to unnecessary delay, expense and inconvenience.

By way of comparison with the UK, specific provisions for electronic communications are woven throughout the UK Companies Act 2006 (sections 298, 333, 360A, 1069, 1070, 1259 and Part 3 of Schedule 4).

Possible Solution

There are 2 possibilities with dealing with this issue: namely –

(i) to introduce into the Law a new generalised clarification e.g. confirming that nothing in the Law prevents the circulation of notices and equivalent documents by electronic means unless, in the case of those emanating from a company, that company's articles specifically provide otherwise; and/or

(ii) to introduce specific provisions into the Law, authorising electronic methods of communication for particular documents and/or in particular circumstances.

Views are sought on the identified issue and solution and, more particularly, as follows –

Q45 Is one or other of the identified solutions to be preferred and, if so, why?

Q46 In relation to the second solution, which types or categories of communications should be opened up to electronic methods?

For example:

- **administrative or internal notices issued or circulated by the company itself, e.g. notices to shareholders under Article 87(2) or terminating company agency under Article 23(4)?**
- **third party notices to and from the company, e.g. notices to and from the Commission under Article 16 or to and from the Registrar under Articles 42(2), 67(5), etc.?**
- **statutory or public notices, e.g. a notice of intention to merge under Article 127FC(5)(a) which is currently required to be published by a company 'in a newspaper circulating in Jersey' (with no reference to electronic publication on the web-pages of such a newspaper)?**

HOW TO RESPOND

The deadline for responses is **21st February 2012**.

All respondents should indicate the capacity in which they are responding (i.e. as an individual, company, representative body).

If you are responding as a company or representative body, please indicate the nature of your business and/or your clients' business.

Representative bodies should identify on behalf of whom they are responding and the methodology they used to gather responses.

Please send your responses and any additional comments to:

	Jersey Finance Limited is co-ordinating an industry response incorporating views raised by local firms or entities.
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It is the policy of Jersey Finance to make individual responses it receives available to the Economic Development Department upon request, unless a respondent specifically requests otherwise.