

# STATES OF JERSEY



## **DRAFT BANKING BUSINESS (AMENDMENT No. 8) (JERSEY) LAW 201-**

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**Lodged au Greffe on 14th August 2012  
by the Minister for Economic Development**

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**STATES GREFFE**





Jersey

## **DRAFT BANKING BUSINESS (AMENDMENT No. 8) (JERSEY) LAW 201-**

### **European Convention on Human Rights**

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Deputy Chief Minister, for and on behalf of the Minister for Economic Development, has made the following statement –

In the view of the Deputy Chief Minister, the provisions of the Draft Banking Business (Amendment No. 8) (Jersey) Law 201- are compatible with the Convention Rights.

(Signed) **Senator B.I. Le Marquand**



Jersey

## **DRAFT BANKING BUSINESS (AMENDMENT No. 8) (JERSEY) LAW 201-**

### **REPORT**

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1. The Jersey Bank Depositors Compensation Scheme (“DCS”) was established by the Banking Business (Depositors Compensation) (Jersey) Regulations 2009 (the “DCS Regulations”) along with the Jersey Bank Depositors Compensation Board (“the Board”), which will administer the scheme.
2. In the unlikely event of a Jersey bank failure, the DCS would pay compensation to depositors to prevent hardship resulting from lack of access to funds. Compensation is limited to £50,000 per depositor per banking group and is subject to an overall cap of £100 million in any 5 year period.
3. On the advice of the Law Officers’ Department, the DCS Regulations could not provide for offences, because the enabling power under which they were made (i.e. Article 37 of the Banking Business (Jersey) Law 1991 (“BBL”)) was not sufficiently wide.
4. Provision for offences relating to the DCS was therefore made separately in the Banking (Depositors Compensation) (Jersey) Regulations 2009 (“the Triennial Regulations”), which were made at the same time as the DCS Regulations.
5. Such Regulations only remain in force for 3 years and the Triennial Regulations therefore need to be replaced before they expire in November 2012.
6. The Banking (Depositors Compensation Supplementary Provisions) (Jersey) Regulations 201- will replace the Triennial Regulations and will remain in place for a further 3 years.
7. During that time, the Banking Business (Amendment No. 8) (Jersey) Law 201- (“the draft Law”) will amend the enabling power in Article 37 of the BBL so that provision for offences can be imported into the DCS Regulations in due course.
8. This will consolidate the 2 sets of DCS-rated Regulations and will avoid the need to keep renewing triennial Regulations.
9. In keeping with the more recent preference of the Law Draftsman’s Office and the Law Officers’ Department with regard to Regulation-making powers, once amended, Article 37 will set out in much greater detail the scope of what Regulations made under it may provide for.

10. By way of example, the draft Law will allow future Regulations to provide for the DCS Board to have extra powers that it needs to carry out its functions, such as the power to demand information (including deposit data) from banks prior to a bank failure, and the power to mandate the format in which deposit data is kept by banks, so that it is more readily accessible in the event of a bank failure.
11. It is important to note that the current draft Law is principally to amend the Regulation-making power, and does not effect the changes – it merely sets the scope of what Regulations may provide for in future.
12. The draft Law will also place a duty on the liquidator of a failed bank to co-operate with the DCS Board so as to ensure that all compensation under the DCS is paid out as soon as possible. This change will take effect when the draft Law comes into force and will not require Regulations.

#### **Financial and manpower implications**

13. There are no financial or manpower implications for the States of Jersey arising from the adoption of this draft Law.

#### **Human Rights compliance**

14. The Law Officers' Department has reviewed the draft Law and has confirmed that the provisions are compliant with the European Convention on Human Rights.

#### **European Convention on Human Rights**

Article 16 of the Human Rights (Jersey) Law 2000 requires the Minister in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). On 10th August 2012 the Deputy Chief Minister, for and on behalf of the Minister for Economic Development, made the following statement before Second Reading of this Projet in the States Assembly –

In the view of the Deputy Chief Minister, the provisions of the Draft Banking Business (Amendment No. 8) (Jersey) Law 201- are compatible with the Convention Rights.

## Explanatory Note

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This Law amends the Banking Business (Jersey) Law 1991 to clarify and extend the power to make Regulations under Article 37 of that Law in relation to the depositor compensation scheme, to provide for offences in relation to that scheme, and to impose duties on administrators of bankrupt banks to cooperate with scheme managers.

*Article 1* amends Article 37 of the Banking Business (Jersey) Law 1991, with the main changes being in paragraph (b) which substitutes Articles 37(2)(a) to (l), and paragraph (c) which adds new Articles 37(3) to (8).

The existing Article 37(2) starts by saying it is without prejudice to the generality of the power in Article 37(1) to make schemes. But the wording of some of the current sub-paragraphs of Article 37(2) might be read as implying that they nevertheless do limit the power to make Regulations. These amendments generally seek to ensure that those sub-paragraphs cannot be read as limiting the general power.

*Article 1(a)* amends the opening of Article 37(2) so that its sub-paragraphs (a) to (l) will apply in relation to each of any schemes that might be made under the Article (up to now only one scheme has been made, in the Banking Business (Depositors Compensation) (Jersey) Regulations 2009).

*Article 1(b)* amends the sub-paragraphs of Article 37(2). The new sub-paragraphs in Article 37(2)(a) to (l) will reproduce and expand on the existing sub-paragraphs (a) to (h), re-arranging their order to fit the new contents. The following references to new paragraphs and sub-paragraphs are to sub-paragraphs of Article 37(2), and subsequent new paragraphs of Article 37, as that Article would be amended by this Law.

The new sub-paragraph (a) reproduces and expands on the existing sub-paragraph (f), on the general regulation of the scheme.

The new sub-paragraphs (b) and (c) expressly provide power to set up the Jersey Depositors Compensation Board, or any other body, to manage the scheme or have any other function in relation to the scheme. They clarify that this can be done to create a standing Board with ongoing functions, in advance of any bank default. They also allow other persons to be appointed to have any of those functions, and allow any of the functions to be delegated.

The new sub-paragraph (d) expressly provides for rules on entitlement to compensation. It expands on the existing sub-paragraph (d), which allows for caps on compensation, to refer expressly to other means of capping, including for cases of multiple defaulting banks or shortfalls in funds. It also expressly allows for classes of depositor not entitled to compensation and for prioritisation between classes. It introduces a new power to postpone or cancel compensation where some other means of protecting depositors would be more appropriate, such as an orderly transfer of deposits to a healthy bank.

The new sub-paragraph (e) expressly provides for the procedure in assessing eligibility for compensation. The existing sub-paragraphs (b) to (e) might be taken to imply compensation can only be paid to a person who actively makes a claim for it (but see above on paragraph (2) being without prejudice to the generality of paragraph (1)). The new sub-paragraph (e) ensures that provision can also be made for

compensation to be assessed automatically, using information obtained from the bank in default, without requiring deposit-holders to make positive applications.

The new sub-paragraph (f) provides generally for the process for paying compensation, expanding on the existing sub-paragraphs (c), on interim payments, and (e), on payments to persons other than claimants. It provides expressly for payments by instalments. It also provides for restrictions on payments of compensation in relation to particular deposits, including where the bank's payment of the relevant deposit to the deposit-holder might have been similarly restricted (by for example a court order, or an enactment about sanctions or money-laundering).

The new sub-paragraph (g) expands on the existing sub-paragraph (g), catering for the effects of the scheme on the rights for which compensation is available. In particular it would allow depositors' rights against the bank to be subrogated to the scheme manager automatically on a bank default (under the current Regulations under this Article, the rights are only subrogated if and when the depositor chooses to accept the compensation).

The new sub-paragraph (h) reproduces and expands on the existing sub-paragraph (a), on the power to raise levies. It ensures levies can be raised to cover the ongoing administrative costs of a standing scheme manager.

The new sub-paragraph (i) expands on the existing sub-paragraph (h), allowing for rights of recovery. It ensures such rights can cover the full range of potential needs, including overpayment of compensation, underpayment of levies and so on, and allows recovery from the full range of appropriate persons rather than just from banks (as for example where overpaid compensation is to be recovered from a deposit-holder).

The new sub-paragraph (j) provides expressly for establishing and operating funds in relation to the scheme, including compensation funds.

The new sub-paragraph (k) ensures that the Regulations can make provision allowed for by the Public Finances (Jersey) Law 2005, to vary the rules on accounting and handling of funds in cases where that Law would otherwise apply (such as if the Minister had to be appointed to run the scheme and hold funds related to it, which would otherwise have to be paid into the consolidated fund). It will also allow provision to be made for how the funds and bodies are treated under that Law.

The new sub-paragraph (l) allows Regulations to make provision for appeals against decisions on any matter relating to the scheme.

*Article 1(c)* inserts new paragraphs (3) to (8) after Article 37(2).

The new paragraph (3) allows Regulations under this Article to create criminal offences. The current Article 37 was thought not to allow for offences, so separate triennial Regulations had to be enacted – the Banking (Depositors Compensation) (Jersey) Regulations 2009. Under the new paragraph (3) one set of Regulations could be used instead.

The new paragraphs (4) and (5) allow the Regulations to apply in relation to the scheme manager some of the information-related and other provisions (including offences) that the Law already provides in relation to the Jersey Financial Services Commission under the following Articles. Article 7 relates to limiting, to cases of bad faith, liability for acts done in discharge of functions under the Regulations. Article 22

relates to false statements given under the Regulations. Article 26 relates to powers to obtain information from banks, where reasonably required for statutory functions. Paragraphs (5)(b)(i) and (iii) ensure this can be applied to allow the scheme manager, in advance of any problem, to require banks to hold deposit information in a particular format so that it can be quickly passed to the scheme manager in the event of any future problem. Article 27 relates to powers to enter premises to obtain such information. In combination with paragraph (5)(b)(iv), it would allow the Regulations to add a power, subject to whatever restrictions would be set out in the Regulations, for the scheme manager to change the format in which a bank's information is currently held, to meet the requirements imposed under (5)(b)(iii). Paragraph (5)(c) enables Articles 42 to 45, which deal with disclosure of information, to be amended to make specific provision about disclosure of information held under the scheme (if that would be more convenient than applying them subject to modifications).

The new paragraphs (6) and (7) apply when a bank is bankrupt. Paragraph (6) gives the liquidator a new duty to co-operate with any scheme manager to ensure prompt payment of any compensation due under the scheme. That duty includes complying with reasonable requirements of the scheme manager. The co-operation also takes precedence over the winding up, although work on both must be started immediately. Paragraph (7) ensures that the liquidator could be appointed to manage the scheme, or have any particular function in the scheme, which might ease the administration of the scheme (but it does not alter the position of any scheme manager who is not qualified to be a liquidator).

The new paragraph (8) defines terms only for the purpose of this Article. In particular it extends the meaning of bankruptcy and related expressions (defined by Article 8 of the Interpretation (Jersey) Law 1954 as covering *désastre* and other customary law procedures, and creditors' winding up of companies), to include winding up of a company under the court's power on just and equitable grounds, as well as similar procedures outside Jersey.

*Article 2* names this Law and brings it into force 7 days after registration.

The unamended paragraph (1), and the amended introductory words of paragraph (2) of Article 37 (headed "Compensation schemes") read as follows –

- “(1) The States may by Regulations establish in relation to any deposit-taking business schemes for compensating depositors in cases where registered persons or former registered persons are unable, or are likely to be unable, to satisfy claims in respect of any description of civil liability incurred by them in connection with their deposit-taking business.
- (2) Without prejudice to the generality of paragraph (1), Regulations may in particular make provision in respect of any scheme so established –”.





Jersey

## **DRAFT BANKING BUSINESS (AMENDMENT No. 8) (JERSEY) LAW 201-**

**A LAW** to amend further the Banking Business (Jersey) Law 1991.

*Adopted by the States* [date to be inserted]

*Sanctioned by Order of Her Majesty in Council* [date to be inserted]

*Registered by the Royal Court* [date to be inserted]

**THE STATES**, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

### **1 Article 37 of Banking Business (Jersey) Law 1991 amended**

In Article 37 of the Banking Business (Jersey) Law 1991<sup>1</sup> –

- (a) in paragraph (2) after the words “Regulations may in particular make provision” there are inserted the words “in respect of any scheme so established”;
- (b) for paragraphs (2)(a) to (h) there are substituted the following subparagraphs –
  - “(a) for the determination and regulation of matters relating to the scheme, whether by any specified person or otherwise;
  - (b) for appointing or constituting a person who is to have any function in relation to the scheme, whether or not any bank is insolvent, or any other event has occurred, or is expected to occur, that would give rise to any right to compensation;
  - (c) conferring on a person so appointed or constituted, or on any other person, any function in relation to the scheme, including the power to delegate any such function to any other person;
  - (d) for determining entitlement to compensation, including provision as to –

- (i) classes of depositor entitled or not entitled to compensation, and priorities in entitlement as between entitled classes,
  - (ii) postponement or cancellation of all compensation rights in relation to a particular bank, if an alternative means of protecting its depositors appears more effective in the circumstances, and
  - (iii) limits on the amount payable, whether by reference to a specified maximum amount or to a maximum amount calculated in a specified manner, or by reference to the effects of the number of banks involved or to the effects of any shortfall in funds available for compensation, or otherwise;
- (e) for the procedure for assessing eligibility for compensation, whether requiring the making of an application or providing for the processing of compensation without application or otherwise;
- (f) for the procedure for paying compensation, including –
- (i) interim payment before entitlement is finally determined,
  - (ii) payment by instalments or otherwise,
  - (iii) payment to or through a person other than the depositor, and
  - (iv) the application, to payment of compensation in respect of a deposit, of any prohibition, restriction or postponement applying to payment of the deposit to the depositor;
  - (v) postponement, restriction or cancellation of payment of compensation in respect of a deposit, on any grounds related to the particular deposit or depositor, including whether a solvent bank might postpone, restrict or refuse payment of that deposit to a person claiming to be entitled to it;
- (g) as to the effect of the scheme in relation to rights or obligations arising out of a deposit in respect of which compensation is payable –
- (i) whether by way of subrogation of those rights or obligations or otherwise, and
  - (ii) whether on the occurrence of any event in relation to a bank or on an application for compensation being made or accepted or on payment of compensation being made or otherwise;
- (h) for levies to be imposed on registered persons for the purpose of meeting expenses incurred, or expected to be incurred in relation to the scheme, whether related to establishing the scheme, to maintaining it, to any person having any function under the scheme, to payment of compensation, or otherwise;

- (i) conferring on a scheme manager a right of recovery in respect of levies, overpaid compensation or any other matter relating to the finances of the scheme, whether against a bank, a liquidator, a person applying for or receiving compensation or any other person having a connection with the scheme;
  - (j) for the establishment and operation of compensation funds or other funds in relation to the scheme, including provision as to what may be paid into or out of such a fund;
  - (k) for such treatment of a body, fund or other money in connection with a scheme as is provided for by any reference to an ‘enactment’ in any definition in Article 1(1) of the Public Finances (Jersey) Law 2005<sup>2</sup>, or to an ‘other enactment’ in any of Articles 3(2), 21(1), 23(1), 24(1) and 33(2) of that Law;
  - (l) for appeals against decisions on any matter relating to the scheme.”;
- (c) after paragraph (2) there are added the following paragraphs –
- “(3) Regulations under this Article may provide –
    - (a) that a person who contravenes a provision of the Regulations commits an offence, for which the person is liable, unless the Regulations provide for a lesser penalty, to imprisonment for 2 years and a fine;
    - (b) that Article 52 applies to that offence as it applies to an offence under this Law, subject to any modification provided for in the Regulations.
  - (4) Regulations under this Article may provide for any of Articles 7, 22(1), (2) and (5), 26(1) to (3), (5) and (13) to (15), 27 and 42 to 45 to apply in relation to a scheme under this Article –
    - (a) with the substitution, for references to the Commission, of references to a scheme manager; and
    - (b) with any other modification appearing to the States to be necessary or expedient for the purposes of the scheme.
  - (5) Without prejudice to the generality of paragraphs (3) and (4) the provision that may be made under those paragraphs includes provision –
    - (a) rendering any act an offence by the application of any provision in those Articles that relates to offences;
    - (b) applying to a bank any duty to provide information or give access to information relevant to the operation of the scheme –
      - (i) whether or not that bank is insolvent,
      - (ii) whether in response to a demand, at regular intervals, on the occurrence of an event, or otherwise,

- (iii) including the imposition of any requirement as to the format in which such information is to be kept by the bank in readiness for prompt provision, and
    - (iv) including a power, in exceptional cases specified in the Regulations, for a scheme manager to alter the format in which the bank is keeping such information, so that the format meets a requirement referred to in clause (iii); and
  - (c) without prejudice to paragraph (9) and to the generality of Article 45A, to amend any of Articles 42 to 45 to make provision relating to disclosure of information held by a scheme manager under the Regulations.
- (6) The liquidator of a bank shall work with any scheme manager so as to ensure that all compensation under the scheme is paid out as soon as is reasonably practicable, and in particular –
  - (a) shall comply with every reasonable requirement of the scheme manager to provide any assistance in relation to the scheme; and
  - (b) shall give precedence to the duties imposed under this paragraph over any other duties relating to the winding up of the affairs of the bank, but shall begin working towards compliance with both such classes of duty immediately upon appointment.
- (7) Nothing in this Article is to be read as preventing provision being made for a person to be a scheme manager in relation to a bank, by virtue only of that person being the liquidator of the same bank, and paragraph (6) (other than sub-paragraph (a)) applies accordingly in respect of the duties of such a person.
- (8) In this Article –
  - (a) ‘bank’ means a registered person or former registered person;
  - (b) references to bankruptcy include –
    - (i) the winding up of an insolvent bank under Article 155 of the Companies (Jersey) Law 1991<sup>3</sup>, and
    - (ii) a state equivalent or similar to bankruptcy under the law of a jurisdiction outside Jersey;
  - (c) ‘insolvent’ means unable, or likely to be unable, to satisfy claims as described in paragraph (1);
  - (d) ‘liquidator’ means the person (whether the Viscount or some other person) for the time being charged with the administration of the property of a bank by virtue of its bankruptcy;
  - (e) ‘scheme manager’ means a person on whom a function in relation to a scheme has been conferred, or to whom such a function has been delegated.”.

**2 Citation and commencement**

This Law may be cited as the Banking Business (Amendment No. 8) (Jersey) Law 201- and comes into force 7 days after it is registered.

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- <sup>1</sup> *chapter 13.075*  
<sup>2</sup> *chapter 24.900*  
<sup>3</sup> *chapter 13.125*