

STATES OF JERSEY



Jersey

DRAFT FINANCIAL SERVICES (AMENDMENT OF LAW No. 6) (INVESTMENT BUSINESS) (JERSEY) REGULATIONS 202-

**Lodged au Greffe on 7th December 2021
by the Minister for External Relations and Financial Services
Earliest date for debate: 18th January 2022**

STATES GREFFE

REPORT

Note

The Draft Financial Services (Amendment of Schedules to Law) (No. 3) (Jersey) Order 202- is included as an **Appendix** to this Report as it works together with the Draft Regulations to deliver the objective of the regulation of investment business advisory activities relating to pensions in Jersey.

1. Background and purpose of the Draft Amendments

The Government of Jersey wishes to amend the [Financial Services \(Jersey\) Law 1998](#) (the “**FS Law**”), to bring within the existing regulated investment business framework those businesses who are giving investment type advice to consumers about Jersey pension products or private employer pension arrangements.

Unlike in other jurisdictions, such as the UK and Guernsey, pension business is not regulated as a separate category of financial service business. The retail side of pension business is instead regulated in part through other categories of regulated financial service or insurance business which overlap into pensions business. The employer (non-retail) side of pension business is regulated typically by the employee’s employment contract, trust law, the Comptroller’s tax rules relating to pensions and, in the case of public employees, the statutory framework which applies to the public employee pension schemes.

In recent years, Government, the Jersey Financial Services Commission (the “**Regulator**”) and representatives of the Jersey Pension Association and the Jersey Branch of the Association of Professional Financial Advisers have been in discussions to introduce a comprehensive framework for pension regulation to the Island, incorporating both the retail and non-retail aspects of it. The Government issued 2 consultations on the topic in 2018 and 2019.

Following these consultations Government has pledged to introduce, with the assistance of the Regulator, a phased, proportionate approach to the introduction of pension regulation.

The proposed regulation is intended to focus on the specific risks in the Jersey market and seeks to avoid over-burdening providers so that pension provision can remain cost-effective.

The Draft Amendments represent Phase 1 of pension regulation. There will be further phases to follow which further regulate both the retail and non-retail aspects of pension provision on the Island.

Phase 1 does not represent full pension regulation. Instead, the aim of Phase 1 is to close a gap in regulation which currently exists in relation to the retail ‘sale’ type of advice given to consumers about their Jersey pension arrangements or pension products. This was considered to be a priority as it was where local consumers were potentially most exposed to harmful practices. This gap was partly closed when the Regulator introduced changes to the FS Law in 2018 in relation to advice given to consumers relating to the transfer of their defined benefit pensions. The aim of Phase 1 is to fully close this gap.

2. Consultation

The Government issued 2 consultations on the broader topic of Jersey introducing a comprehensive framework for pension regulation in 2018 and 2019. A month-long

legislative consultation on the Draft Amendments was issued in September 2021. The Draft Amendments were worked on by a group of regulatory and pension experts drawn from Industry (the “**Working Group**”). No significant issues were raised by the public or Industry following the legislative consultation in September.

The Regulator has been fully engaged throughout the process and is a member of the Working Group. The Regulator is content that it is adequately resourced to take on this additional activity. Presently, it does not consider additional guidance or changes to the Investment Codes of Business are required.

3. Details of Draft Amendments

The Draft Amendments will introduce into the existing investment business regime regulation of retail advice given to consumers in relation to their Jersey pension arrangements or the establishment of such arrangements.

They will also remove the existing exemption relating to defined benefit schemes in Schedule 2 of the FS Law to avoid any confusion that an investment business provider acting as an investment manager or dealing on behalf of a defined benefit pension scheme must be licensed for this activity.

The Draft Amendments will amend the FS Law and its Schedules and are to be made by way of Regulation and Order.

Outlined below is a summary of the amendments made to the FS Law –

Article 1 new definition of “subscription”	A new definition of subscription has been added to ensure that this term includes the application or arrangement for a person to participate or pay into a pension scheme for the purposes of Article 2(2)(c)(i).
Pension Scheme as an Investment under Paragraph 9A of Schedule 1	This replaces the existing paragraph 9A (Defined Benefit Schemes) to widen it to include all tax approved pension arrangements in Jersey including tax approved drawdown contracts within the meaning of Article 130(1) of the Income Tax (Jersey) Law 1961 .
Introduction of Note to paragraph 9A of Schedule 1	This note is to clarify that the inclusion of Pension Schemes as an investment under Schedule 1 only extends to the activity of giving investment advice and not to the activities of dealing or undertaking discretionary investment management under Articles 2(2)(a) and (b).
Deletion of Note in paragraph 10 of Schedule 1	This note previously disapplied the rights and interests of those belonging under the trusts of an occupational scheme from being regulated as an investment under Schedule 1. These are now to be captured.
Deletion of paragraph 18 of Schedule 2	This paragraph previously sought to exclude any activity other than advice given on the conversion of defined benefit pensions from regulation. This was to limit the scope of regulation only to advice given to consumers in respect of the transfer of their defined benefits. The intention is now to extend regulation to all advice given in relation to pension schemes and their underlying interests. The scope has been limited to advice only by virtue of the Note added to

	paragraph 9A of Schedule 1. This exemption is therefore no longer required and has been deleted.
--	--

(a) New definition of subscription

The purpose of this change is to ensure that the advice given to individuals when they are looking to establish a pension scheme in Jersey or join their employer's scheme is captured. The term 'subscription' as ordinarily interpreted might not be understood to include these activities.

It is not anticipated that this new definition would capture the advice given by a provider to an employer on establishing a pension scheme for their employees. It is understood that an employer would not come within the definition of 'investor' or 'potential investor' for the purposes of Article 2(2)(c) of the FS Law: it being recognised that any sums paid into the pension scheme by the employer belong by virtue of the employment contract to the employee and not to the employer.

The new definition of subscription has been drawn so that its wider scope only applies to advice given under Article 2(2)(c)(i) in relation to pension schemes to ensure that other references to this term and the term 'subscribe' used throughout the FS Law do not unintentionally bring in other forms of business into regulation.

(b) Changes to the Schedules

The changes to the Schedules clarify the regulatory treatment of advice given in the marketplace in relation to local pension arrangements and remove any previous regulatory gaps which allowed for local providers in giving such advice to be structured so as to avoid regulation.

This has been implemented in the Draft Order by the substitution of the term Defined Benefit Schemes with the newly defined term of Pension Schemes within paragraph 9A of Schedule 1, the removal of the exemption in paragraph 18 of Schedule 2, the removal of the note in paragraph 10 of Schedule 1 and the introduction of a note to paragraph 9A of Schedule 1.

Following careful consideration, it has been determined that the term 'Pension Scheme' should only capture locally tax approved pension schemes and not equivalent foreign pension schemes or unapproved pension schemes. This is to minimise the complexity of the changes and to avoid any regulatory overlap and to ensure the protection is directed at remediating the consumer harm which was principally identified in the marketplace.

The previous definition of Defined Benefit Schemes did not expressly limit itself to locally tax approved pension schemes. This was found to have created a degree of ambiguity as to its application in the local market and greater complexity where there was a regulatory overlap.

The change has been limited to advice only as technically it is not possible to trade a pension scheme as an investment: only the underlying assets held by the pension scheme are tradable in the ordinary sense. For this reason, the activities of dealing and discretionary investment management can not apply to a pension scheme as an investment under the FS Law. The exemption previously included in paragraph 18 of Schedule 2 for these activities is therefore redundant and has been deleted for clarity.

All other exemptions in Schedule 2 relating to investment business activities remain unchanged and are not intended to be affected by these changes.

(c) **Date proposals effective**

The Draft Amendments will come into force on the day after they are made.

4. Impact of Draft Amendments on Industry participants

The impact of the Draft Amendments is that an unlicensed business offering this type of advice locally will find their regulatory and tax status is altered. These businesses will need to apply for a licence to carry on investment business in accordance with the FS Law and will be taxed accordingly at 10% as a ‘financial services company’ within the definition of Article 123D of the Income Tax Law.

Also, regulated businesses which are not presently licensed for investment business will need to apply to be registered to carry on investment business in accordance with the FS Law. An additional regulatory fee will be payable for this additional class of business.

Government of Jersey specifically sought in its draft legislation consultation the views and engagement of such persons. No persons were forthcoming. It was understood that the previous changes made to the FS Law for advice given in relation to DB Schemes had already caught any local providers operating in this space.

5. Financial and manpower implications

There are no financial or manpower issues that would arise for the States or the Regulator from the adoption of the Draft Regulations.

6. Penalty review and European Convention on Human Rights Review

The Law Officers’ Department has undertaken a review of the Draft Amendments and confirmed that neither a review on the human rights aspects of the Draft Amendments is required, as it is secondary legislation, nor is a penalty review as no new penalties have been introduced. This is not, and should not be taken as, legal advice.

APPENDIX TO REPORT

**DRAFT FINANCIAL SERVICES (AMENDMENT OF
SCHEDULES TO LAW) (No. 2) (JERSEY) ORDER
202-**

Made [date to be inserted]
Coming into force [date to be inserted]

THE MINISTER FOR EXTERNAL RELATIONS AND FINANCIAL SERVICES, under Article 4(1)(b) of the Financial Services (Jersey) Law 1998 and on the recommendation of the Jersey Financial Services Commission, orders as follows –

1 Schedule 1 (investments) to the Financial Services (Jersey) Law 1998 amended

- (1) This Article amends Schedule 1 to the Financial Services (Jersey) Law 1998.
- (2) For paragraph 9A (defined benefit schemes) there is substituted –

“9A Pension schemes

Approved Jersey schemes or approved drawdown contracts (as those terms are defined in Article 130(1) of the Income Tax (Jersey) Law 1961).”

“**Note:** This paragraph applies only to the giving of investment advice in respect of a pension scheme.”

- (3) In paragraph 10 (rights and interests in investments) the Note is deleted.

2 Schedule 2 (exemptions) to the Financial Services (Jersey) Law 1998 amended

In Schedule 2 to the Financial Services (Jersey) Law 1998, paragraph 18 (defined benefit schemes) is deleted.

3 Citation and commencement

This Order may be cited as the Financial Services (Amendment of Schedules to Law) (No. 2) (Jersey) Order 202- and comes into force 7 days after it is made.

EXPLANATORY NOTE

These Regulations amend Article 1(1) (general interpretation) of the Financial Services (Jersey) Law 1998 to insert a definition for the term “subscription” so that, for the purposes of Article 2(2)(c)(i) of that Law in relation to a pension scheme, it includes the application or arrangement to participate in or pay into the pension scheme (*Regulation 1*).

Regulation 2 gives the name by which these Regulations may be cited and provides for these Regulations to come into force 7 days after they are made.



Jersey

DRAFT FINANCIAL SERVICES (AMENDMENT OF LAW No. 6) (INVESTMENT BUSINESS) (JERSEY) REGULATIONS 202-

Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES make these Regulations under Article 4(2) [Financial Services \(Jersey\) Law 1998](#) –

1 Article 1 (general interpretation) of the [Financial Services \(Jersey\) Law 1998](#) amended

In Article 1(1) of the [Financial Services \(Jersey\) Law 1998](#), after the definition “shareholder controller” there is inserted –

““subscription” for the purposes of Article 2(2)(c)(i) in relation to a pension scheme includes the application or arrangement to participate in or pay into the pension scheme;”.

2 Citation and commencement

These Regulations may be cited as the Financial Services (Amendment of Law No. 6) (Investment Business) (Jersey) Regulations 202- and come into force 7 days after they are made.