

DRAFT COLLECTIVE INVESTMENT FUNDS (AMENDMENT No. 3) (JERSEY) LAW 200

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by the Finance and Economics Committee**



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European Convention on Human Rights

The President of the Finance and Economics Committee has made the following statement -

In the view of the Finance and Economics Committee the provisions of the Draft Collective Investment Funds (Amendment No. 3) (Jersey) Law 200 are compatible with the Convention Rights.

(Signed) **Senator F.H. Walker**

REPORT

Introduction

Article 19C of the Collective Investment Funds (Jersey) Law 1988 (the principal Law), sets out a number of powers which the Island's authorities, including the Jersey Financial Services Commission (the Commission), are able to exercise in order to assist a relevant supervisory authority in the proper exercise of one or more of that authority's functions. In deciding whether to exercise a power under this Article, the Commission is expected to take into account a number of factors, including whether corresponding assistance would be given by that country to the Commission.

The Collective Investment Funds (Amendment No. 3) (Jersey) Law 200 (the Law) addresses two anomalies in the principal Law, which could hinder the Commission's ability to provide proper regulatory assistance to overseas regulators. These anomalies put Jersey at variance with current international standards. The Law also clarifies the extent to which the Commission may communicate unsolicited information to another regulator.

Background

The principal Law provides that any person who conducts unauthorised business in Jersey, or who makes a misleading statement in Jersey, which is intended to induce another party to enter into a financial transaction, will be guilty of an offence, and gives the Island's authorities powers to investigate suspected offences. Requests received for assistance from overseas regulators, however, typically involve a suspected offence that is likely to have occurred outside Jersey, often with no corresponding offence in the Island. Under the principal Law, the Island's authorities are not able to offer assistance in these particular areas where an offence is committed outside Jersey, and, consequently, their ability to co-operate with overseas regulators is impaired.

The principal Law also prevents the Commission passing information to foreign regulators relating to the identity of a person who has transacted business with a regulated person, unless it has the consent of the person concerned. The meaning of this restriction is somewhat obscure, but could potentially hamper the Commission's ability to provide help where it would be perfectly proper to do so, and has attracted international criticism.

Provisions of the Law

The Law will -

- Permit the Island's authorities to assist other regulators in the investigation of unauthorised business and misleading statements (and practices) where it appears that an offence has been committed outside the Island, whether or not they suspect that an offence has been committed in Jersey.
- Permit the Commission to exchange information for regulatory purposes with outside authorities on customers of registered persons. The principal Law already includes sufficient safeguards to ensure that the Commission only has the power to provide assistance in the event of legitimate requests for information by overseas regulators, but, in future, the Commission will also be required to consider whether information communicated will be treated with appropriate confidentiality.
- Provide a clear basis for the Commission to communicate unsolicited information to overseas regulators, which it believes may be helpful in the discharge of the latter's functions.

Conclusion

The Law will ensure that the Island's authorities are able to provide proper regulatory assistance to overseas regulators, in line with current international standards.

Financial/manpower statement

This draft Law has no implications for the financial or manpower resources of the States.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 will, when brought into force by Act of the States, require the Committee 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). Although the Human Rights (Jersey) Law 2000 is not yet in force, on 1st October

2001 the Finance and Economics Committee made the following statement before Second Reading of this projet in the States Assembly -

In the view of the Finance and Economics Committee the provisions of the Draft Collective Investment Funds (Amendment No. 3) (Jersey) Law 200 are compatible with the Convention Rights.

Explanatory Note

The object of these draft amendments is to confer power for the exercise of certain investigative and other regulatory powers under the Collective Investment Funds (Jersey) Law 1988 in response to a request from a foreign finance industry regulator even when the request is based on an offence that occurred outside Jersey. The amendments would also lift certain existing restrictions on the passing of information to a foreign regulator and make it clear that information may be so passed without the need for a request from the foreign regulator. The amendments principally concern Article 19C and its numerous cross-references to powers of the Jersey Financial Services Commission, as well as to powers for the Royal Court to make certain orders and for the Bailiff to issue search warrants.

Where the co-operation relates to an offence that occurred outside Jersey, the offence must nevertheless be analogous to an offence that, if it were committed in Jersey, would give a foundation for the exercise of the relevant Jersey powers. Certain other matters may be taken into account, including that the co-operation is based on a reasonable degree of reciprocity (including contribution as to costs) between the Commission and the foreign regulator.

The Commission may also impose conditions on the use by the foreign regulator of any information that the Commission passes to the regulator.

The opportunity is also taken to make changes for the sake of law revision.

COLLECTIVE INVESTMENT FUNDS (AMENDMENT No. 3) (JERSEY) LAW 200-

A LAW to amend further the Collective Investment Funds (Jersey) Law 1988, sanctioned by Order of Her Majesty in Council of the

(Registered on the _____ day of _____ 200-)

STATES OF JERSEY

The _____ day of _____ 200-

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

ARTICLE 1

In this Law, “the principal Law” means the Collective Investment Funds (Jersey) Law 1988,^[1] as amended.^[2]

ARTICLE 2

For Article 19C of the principal Law^[3] there shall be substituted the following Article -

“ARTICLE 19C

Co-operation with relevant supervisory authority

(1) The following powers may be exercised (by the officer or person specified in the relevant provision) in order to assist a relevant supervisory authority -

- (a) the power to refuse to grant a permit under paragraph (1) of Article 6 or to cancel a permit under paragraph (6) of that Article;
- (b) the power to impose conditions on the grant of a permit under paragraph (1) of Article 6 or to vary such conditions or attach a new condition under paragraph (3) of that Article;
- (c) the powers relating to information and documents under Article 8;
- (d) the powers under Article 19 (Investigation by Commission);
- (e) the powers under Article 19B (Entry and search of premises);
- (f) on the application of the Commission, the powers under Article 20 (Applications to court);
- (g) subject to Article 19H, communication by the Commission to the relevant supervisory authority of information that is in the possession of the Commission, whether or not as a result of the exercise of any of the above powers.

(2) The Commission shall not exercise the power referred to in sub-paragraph (g) of paragraph (1) unless satisfied that the relevant supervisory authority will treat the information communicated with appropriate confidentiality and that -

- (a) the power is exercised in order to assist the authority in the exercise of its supervisory functions; or

(b) the exercise of the power has been requested by the authority and requested only for the purposes of obtaining assistance for the authority in the exercise of one or more of its supervisory functions.

(3) The other powers referred to in paragraph (1) shall not be exercised by virtue of this Article unless the Commission is satisfied that the exercise has been requested by the relevant supervisory authority and requested only for the purposes of obtaining assistance for the authority in the exercise of one or more of its supervisory functions.

(4) In deciding whether to exercise a power by virtue of this Article, the following factors (among others) may be taken into account -

- (a) whether corresponding assistance would be given in that country or territory to the Commission;
- (b) whether the case concerns the possible breach of a law, or other requirement, which has no close parallel in the Island or involves the assertion of a jurisdiction not recognized by the Island;
- (c) the seriousness of the case and its importance in the Island and whether the assistance could be obtained by other means;
- (d) whether it is otherwise appropriate in the public interest to give the assistance.

(5) The exercise of powers by virtue of this Article may be refused unless the relevant supervisory authority undertakes to make such contribution towards the costs of its exercise as the Commission considers appropriate.

(6) For the purposes of this Article -

(a) a reference -

- (i) in paragraph (8) of Article 8 to an offence under the provisions of Article 9 or to a contravention of the provisions of paragraph (1) or (2) of Article 4; or
- (ii) in paragraph (3) of Article 19 to an offence under the provisions of Article 9 or to a contravention of the provisions of Article 4,

shall include a reference to an offence (committed at any time, including a time before the enactment of this Law) against, or contravention (so committed) of, a law of a country or territory outside the Island constituted by an act, or omission, that, if it arose in the Island, would constitute (at the time when the relevant request referred to in paragraph (3) was received) an offence, or contravention, under a provision referred to in clause (i) or (ii), as that provision was in force at the latter time; and

(b) a reference in paragraph (4) of Article 19B to proceedings shall include a reference to proceedings outside the Island.

(7) For the purposes of this Article, a reference (however expressed or implied) in Article 4 or 9 (or in any provision necessary for the interpretation of that Article) to Jersey, or to any class of person, any qualification or any provision, shall be construed, in the application of that Article to a contravention of a law of a country or territory outside the Island, as a reference to that country or territory, or to an equivalent class of person, qualification or provision, in terms of the law of that country or territory.

(8) The exercise of a power under any provision shall be no less an exercise of that power under that provision because it is exercised by virtue of this Article, and this Law (and any other law that applies when a power is exercised directly under that provision) applies also when that power is exercised by virtue of this Article.”.

ARTICLE 3

(1) This Law may be cited as the Collective Investment Funds (Amendment No. 3) (Jersey) Law 200.

(2) This Law shall come into force on such day as the States may by Act appoint.

(3) Anything that could have been done, or completed, under a provision of the principal Law before its

amendment or substitution by this Law may be done, or completed, under the provision as so amended or under the substitute provision.

[1] Volume 1988-1989, page 133.

[2] Volume 1990-1991, page 1091, Volume 1996-1997, page 550, Volume 1998, pages 261 and 385, Volume 1999, pages 419 and 525, Volume 2000, page 697 and R & O 8081.

[3] Volume 1988-1989, page 159 and Volume 1998, page 407.