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Jersey ICO guidelines

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The Jersey Financial Services Commission (**JFSC**) has published guidance on how ICOs will be approved in Jersey through existing laws and regulation, which has been endorsed by the Jersey government.

As with all Jersey companies, a proposed ICO issuing company will require a consent from the Jersey Companies Registry under the Control of Borrowing (Jersey) Order 1958 (**COBO**), and in considering an application the Registry will have regard to the Registry's Processing Statement (**RPS**) and the Sound Business Practice Policy (**SBPP**). In addition to publishing the Guidance, the JFSC has published updated versions of the RPS and the SBPP to specifically address ICOs, and the approach that the JFSC will take in considering applications to form an ICO issuer in Jersey.

In due course, the JFSC will be issuing a new standard application form that will need to be completed in respect of all ICO issuers.

The Guidance relates only to the treatment of ICOs under COBO (and the related the RPS and SBPP), and further Jersey legal and regulatory matters will need to be considered. In this regard, our previous briefing summarises some of the other Jersey legal and regulatory matters that will need to be considered when conducting an ICO from Jersey. This can be accessed here.

The Guidance provides that, as a general rule, Jersey based ICO issuers will be required to be incorporated in Jersey and administered through a licensed corporate service provider in Jersey (**CSP**). The Guidance therefore contains requirements applicable to both: (a) the ICO issuer; and (b) the CSP.

Classification of ICOs – is it a "security"?

An application to the JFSC will need to address whether the tokens are a "security" or not for the purposes of COBO. If the tokens are a "security", then in the absence of an exemption an additional consent under COBO will be required for the issue of "securities" other than shares. If the tokens are not a "security", then the additional COBO consent will not be required and the JFSC may consider relaxing some of the conditions that are set out in the Guidance.

In classifying an ICO, the Guidance provides that the JFSC will review ICO issuer applications with a focus on the economic functions and purpose of the token to be issued and in particular, whether the tokens are tradeable or transferable. The definition of "security" in COBO is broad, and the Guidance states that a token will be considered a **security token** for Jersey law purposes if it has characteristics usually associated with an equity or debt security, including:

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- a right to participate in the profits/earnings of the ICO issuer or a related entity;
- a claim on the issuer or a related party's assets;
- a general commitment from the ICO issuer to redeem tokens in the future;
- involvement in the ownership or running of the ICO issuer or a related party; and
- expectation of a return of the amount paid for the tokens, with or without interest or other form of gain.

If a token is deemed not to be a security token, it will typically be either:

- a **utility token** i.e. a token that merely confers on the holder the right to use or access a product or service, with no economic rights or any right to redeem the token for value; or
- a **cryptocurrency token** i.e. the token is designed to behave like a currency, referred to in some jurisdictions as a payment token.

General requirement for all ICO Issuers

To ensure consistency and provide a streamlined COBO application process, the Guidance requires all ICO issuers to:

- be incorporated as a Jersey company (i.e. not be a foundation/limited partnership or other form of vehicle);
- receive a consent under COBO before undertaking any activity;
- apply relevant AML/CFT requirements to persons that either purchase tokens from, or sell tokens back to, the issuer of those tokens;
- appoint and maintain a duly regulated Jersey CSP;
- appoint and maintain a Jersey resident director on the board of the ICO issuer, where the Jersey resident director is also a principal person or key person of the CSP;
- obtain the JFSC's prior approval to any change either to the issuer's administrator or the Jersey resident director of the issuer;
- prepare and file annual audited accounts with the Registry;
- have procedures and processes in place to (i) mitigate and manage the risk of retail investors investing inappropriately in the ICO, and (ii) to ensure retail investors understand the risks involved;
- prepare and submit to the JFSC for its approval an Information Memorandum (which may be in the form of a White Paper) which complies with certain content requirements required of a prospectus issued by a company under the Companies (Jersey) Law 1991; and
- ensure that any marketing material (including the information memorandum) is clear, fair and not misleading.

As with all new incorporations, the JFSC has reserved the right to consider each application on its own merits, so whilst the conditions set out above offer helpful guidance on the approach the JFSC is likely to take, they are by no means definitive.

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Jersey legal advice

The Guidance provides that an application under COBO in respect of an ICO issuer must be accompanied by analysis prepared by a Jersey law firm outlining:

- the proposed activity including relevant timelines;
- details of the issuer and the ICO;
- rationale for the ICO, amount to be raised and use of proceeds;
- summary of the features of the tokens;
- summary of purchase and redemption processes;
- service providers to the issuer;
- relationship between issuer and holder of tokens;
- management of underlying assets and security rights over such assets for holders of the tokens;
- how the activity will be wound up/dissolved and assets distributed to the holders of the tokens;
- Jersey legal and regulatory analysis considering applicable law and regulation (including laws in respect of investment funds, financial services, banking, AIFMD, proceeds of crime/AML).

CSP requirements

The Guidance provides that prior to a Jersey CSP agreeing to act as the administrator of an ICO, and on an ongoing basis, it must take steps to satisfy itself as to a number of factors, including:

- the honesty and integrity of the issuer and the persons associated with it;
- the issuer's approach to acting in the best interests and needs of each and all of its customers;
- the adequacy of the issuer's financial and non-financial resources;
- how the issuer will manage and control its business effectively, and ensure that it will conduct its business with due skill, care and diligence;
- the effectiveness of the issuer's arrangements in place for the protection of client assets and money when it is responsible for them;
- the effectiveness of the issuer's corporate governance arrangements;
- what systems the issuer has in place to prevent, detect and disclose financial crime risks such as money laundering and terrorists financing; and
- the issuer's marketing strategy, including the types of persons to whom the ICO will be marketed, how it will be marketed, and the jurisdictions in which it will be sold or marketed (including consideration of any relevant laws or restrictions that may apply in other jurisdictions).

The Guidance also summarises the JFSC's expectations in relation to ICO issuers mitigating the risk of anti-money laundering and countering the financing of terrorism.

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Retail investors

The Guidance provides that an ICO issuer must take appropriate steps to mitigate and manage the risks of retail investors investing inappropriately in ICOs. In this regard, the Guidance contains a safe harbour process, including an approved risk warning that must be actively confirmed by each investor as being understood and accepted.

Marketing and offer document

All marketing materials must be clear and fair containing prescribed wording in respect of the role of the JFSC in approving the ICO. In particular, the JFSC does not "regulate" an ICO issuer, as such. However, the approval procedure set out in the Guidance mandates a set of conditions designed to ensure that the issuer meets specific standards in terms of governance, investor disclosure, anti-money laundering and countering the financing of terrorism.

The offering document must comply with the content requirements set out in the Companies (General Provisions) (Jersey) Order 2002, and contain the specific statements set out in the Guidance. Prior to issuance of any tokens the JFSC must confirm that it has no objection to the issue of the offer document.

On-going requirements

The Guidance provides certain ongoing requirements:

- the board of directors of the ICO issuer must notify the JFSC if it defaults on any tokens issued;
- the board must make an annual filing to the JFSC confirming that there has been no breach of the conditions attached to the consent(s) issued under COBO;
- the ICO issuer must seek the prior consent of the JFSC to any material change to the matters set out in the application for a consent under COBO; and
- prior JFSC consent is required for any change in Jersey CSP, or any change in Jersey resident director.

You can access the JFSC's policy statement here.

If you have any further questions on this topic, please get in touch.

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