

Initial coin offerings in Jersey: An introduction

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The rise of blockchain technology has been headline news across the globe and with the market value of cryptocurrency approaching \$1 trillion, investor interest in the digital asset classes has never been higher. At the forefront of the digital revolution in financial services is the emergence of initial coin offerings or "ICOs".

An ICO is a new method of raising capital through blockchain technology. It is often said to be comparable to a traditional initial public offering (known as an "IPO") or to crowdfunding. Instead of issuing debt or equity as you would expect in a traditional capital raise, the issuer/operator issues digital tokens, often referred to as "coins", in exchange for consideration in the form of fiat currency, crypto currency or both.

Mindful of concerns raised by regulators across the globe, recent statements from the Jersey Government and the Jersey Financial Services Commission (the **JFSC**) have warned potential investors of the risks involved in investing in an ICO. Jersey has a robust regulatory regime and these statements highlight that conducting an ICO may fall within the scope of existing Jersey legislation both for the company/operator issuing the tokens (the **ICO Issuer**) and service providers in relation to the ICO. However, both statements have envisaged the possibility of an ICO being structured through Jersey.

In this briefing, we highlight some of the key Jersey regulatory issues that should be considered in relation to structuring an ICO through Jersey. Whilst this list is not exhaustive we hope it will provide some useful guidance.

Jersey is an ideal jurisdiction from which to launch an ICO, given its:

- status as a leading financial centre;
- robust and internationally well-respected regulatory framework;
- European time zone;
- having more than 13,000 resident financial services professionals; and
- having a number of regulated services providers in the Island who are experienced in administering complex structures, including investment funds investing in digital assets and ICOs, and ICO Issuers themselves.

Jersey has a long track record as one of the leading jurisdictions for financial services, and as such has developed a robust and well respected regulatory framework. That said, if thought is given to the issues we have highlighted below, and with proper guidance from Jersey advisers, the regulatory hurdles are by no means insurmountable.

How do you incorporate a Jersey ICO Issuer?

The process for incorporating any company in Jersey involves making an application to the Jersey Companies Registry (the **Registry**) for a certificate of incorporation and a consent (the **COBO Consent**) to issue shares under Article 2 of the Control of Borrowing (Jersey) Order 1958 (**COBO**).

This application is made by the proposed new company's Jersey corporate service provider (the **CSP**), which will be a Jersey based administrator and will be regulated by the JFSC.

In considering such an application the Registry would have regard to its duty to protect the integrity and reputation of the Island of Jersey pursuant to the Sound Business Practice Policy issued by the JFSC.

In the context of an application to incorporate a new ICO Issuer, the application should include information about the proposed ICO, the promoter, and any existing business or platform the ICO is designed to raise capital to support. In addition it should include the Jersey regulatory status of the ICO Issuer having regard to the questions noted below.

Depending on the particular characteristics of the proposed ICO, certain conditions may be added to the COBO Consent. For example, the Government's statement noted above makes it clear that ICOs conducted through Jersey ICO Issuers must be administered by a duly regulated CSP, and we would expect this requirement to be noted as a condition on the COBO Consent.

Jersey regulatory considerations

Some key Jersey regulatory questions to consider in relation to a Jersey ICO are:

Will the ICO Issuer be converting fiat currency to crypto currency, or vice versa?

If the issuer will be exchanging fiat currency for crypto currency (or vice versa), then the issuer will need to consider if it needs to register with the Registry as a "virtual currency exchanger". Procedures in relation to anti-money laundering and countering the financing of terrorism (**AML/CFT**) will need to be put in place, but in practice we would normally expect the AML/CFT process to be set up and administered by the CSP, rather than by the ICO Issuer itself.

Whilst the general rule is that virtual currency exchangers will be required to register with the JFSC, Jersey introduced innovative amendments to Jersey statute in 2015 which created a safe harbour for exchangers with a turnover of less than £150,000 (Exempt Exchangers). Exempt Exchangers simply have to notify the JFSC that they are exchanging virtual currency, but will not be required to register or pay annual fees to the JFSC.

This approach has created a "regulatory sandbox" which is targeted at encouraging innovation, allowing new business models, services and products to be tested without undue regulatory burden.

In any event, the ICO Issuer may be required to conduct AML/CFT measures on certain of the token holders pursuant to the requirements of the Jersey AML/CFT Handbook. As noted above, in practice this work is often co-ordinated by the CSP.

Will the ICO Issuer be issuing a "prospectus"?

Jersey companies law provides that a document is a prospectus (broadly) if it is an invitation to the public to become a member of a company, or to acquire or apply for any "securities", where:

- "securities" broadly means shares or debentures in a body corporate, or interests in or rights to acquire them; and

- an invitation is to the public if it is communicated to more than 50 people.

If there is a prospectus, then a consent from the Registry will be required before it can be circulated pursuant to the Companies (General Provisions) (Jersey) Order 2002.

Will the issuer be issuing "securities"?

In addition to the definition of "securities" under the Jersey companies law, if the coins or tokens being issued (i) fall within the definition of "securities" contained in COBO; and (ii) are being issued to more than 10 people, then an additional consent pursuant to COBO under Article 4 may be required from the Registry.

The definition of "securities" under COBO is as follows: "'security' includes shares, bonds, notes, debentures and debenture stock".

Will the issuer be a fund? Or an AIF?

In most cases we would expect ICOs to be launched as means of raising capital to fund an existing business or platform, in which case they are unlikely to be classed as funds or AIFs under Jersey law.

For more information on the various Jersey fund regimes please see our briefing on the regulatory regime for funds in Jersey.

Are the activities of the ICO Issuer otherwise regulated in Jersey?

We would expect to work with the promoter to understand the proposed activities of the ICO Issuer in Jersey, and in particular whether those activities would fall within the scope of the Jersey regulatory laws. For example, we would consider the Financial Services (Jersey) Law 1998 to determine whether the proposed activities might comprise "money services business" or "investment business".

Other important points to consider include:

How will the ICO be marketed to investors?

Prospective issuers should have regard to the relevant law and regulation in the jurisdictions where their target investors are located, in particular whether "securities" are being "marketed" as each term or equivalent is defined in the relevant jurisdiction. If so, then by whom – any marketeer/distributor may need to be regulated in that jurisdiction, and there may be registration or disclosure requirements that will need to be met.

Who will provide banking, custody and auditing services to the ICO Issuer?

As a practical matter the ICO Issuer may need to open a bank account, appoint an auditor and appoint a custodian to safeguard the proceeds of the ICO.

What about data protection?

The GDPR is due to come into force shortly, and its application and that of existing data protection law will need to be considered in relation to a potential ICO.

Potential ICO Issuers should also consider the application of FATCA, the OECD's Common Reporting Standard, intellectual property, and taxation.

In addition to providing advice on Jersey law and regulation, as an offshore law firm we frequently work alongside lead onshore lawyers and other professional advisers based in major onshore financial centres such as London and New York, and in a promoter's home jurisdiction. We are well placed to offer introductions to onshore lawyers, Jersey fund administrators to act as CSP and to Jersey tax advisers if required.

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