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Jersey Funds Update: Top Takeaways

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Quick Updates

1. Market trends and developments (Dan Birtwistle)

Since the last regular Mourant Funds updater, the team has seen the following trends and developments:

- a notable increase in the frequency of enquiries of a regulatory nature, both in relation to existing and proposed structures, where navigating the regulatory environment has necessarily become more complex;
- regular enquiries in relation to proposed new investment products with an ESG focus;
- a significant number of high-value PE transactions;
- a broadening of asset classes (including shipping, crypto and Africa-content-focussed investment);
- enquiries from jurisdictions that have not historically been routine users of Jersey as a domicile jurisdiction (eg South America and Israel);
- active UK RE market; and
- UK based clients establishing Jersey carry and/or co-invest structures alongside their existing UK structures.

2. An update on ESG (Felicia de Laat)

Codes amended for Sustainable Investments: From 15 July, the JFSC amended the FSB Code, CIF Code and the JPF Guide to introduce disclosures for sustainable investments (ie investments which contribute to a social or environmental objective). Funds marketed as having an investment objective of sustainable investments must disclose to potential investors all material information in relation to their sustainable investment strategy and objectives, including alignment with specific taxonomies, the basis on which due diligence, performance measurement and reporting are likely to be conducted and limitations on methodologies and data. The Jersey entity responsible for making these disclosures is the Jersey governing body of the fund or a Jersey fund services provider who has accepted responsibility for the fund's offer documents (including documents in which the terms of the investment are set out, such as the subscription agreement). Other Jersey fund services providers still have an obligation to notify the JFSC if they become aware that these disclosures have not been included in the offer documents.

Clarification on the EU Sustainable Finance Disclosure Regulations (SFDR): The EU Commission has clarified certain requirements of SFDR in a letter published in response to questions asked by the Joint Committee of the EU Supervisory Authorities in January. From a Jersey perspective, Non-EU AIFM marketing funds into the EEA under the National Private Placement Regimes must comply with the SFDR, including the financial product related provisions (ie the provisions relating to the fund). Some commentators take the view that both the firm level (such as the disclosure of integration of sustainability risks and the 'comply or explain' requirement on principal adverse impacts) and the fund level provisions of SFDR apply to Non-EU AIFMs but there is still uncertainty on this point and Non-EU AIFMs marketing into the EEA should seek advice on this. Another important (and perhaps unwelcome) clarification by the EU Commission is a confirmation that SFDR does apply to sub-threshold AIFMs and their funds.

What next for Jersey: In Jersey, the focus has to be on building local capability and skills in the sustainable finance sector. Administrators are already integrating ESG processes into their business processes and developing or acquiring the technology to create the reports and gather the data the clients need. Looking inwards, many Jersey businesses are integrating ESG processes into their own management and strategy to build and protect their reputations and brand in this area.

In the lead up to COP26 in Glasgow in November, there is a strong focus on the need to focus both public and private finance on achieving net zero. Mark Carney, UN Special Envoy for Climate Action and Finance and the Prime Minister's Finance Adviser for COP26 has published a paper available on the COP26 website titled 'Building a Private Finance System for Net Zero, Priorities for private finance for COP26', of which the key themes are reporting, risk management, returns and mobilisation of private finance, all of which are relevant to Jersey. It is worth a read, if you have a spare moment.

3. Developments for the real assets sector (Joel Hernandez)

Qualifying Asset Holding Company Regime: Recent developments affecting real estate funds include the UK's proposed 'Qualifying Asset Holding Company' (QAHC) regime which is due to come into effect in 2022. The QAHC regime aims to attract UK tax resident companies that elect into the regime with a more efficient tax treatment for the real estate assets held by the QAHC. At its heart, the regime is being designed to recognise the 'cardinal principle' of fund structuring which is to leave the investor in no worse position, from the perspective of tax paid on investment income and gains, than if they had invested in the underlying assets directly. The final detail/legislation is due to be released and is eagerly anticipated. As far as Jersey is concerned, due to the existing benefits that Jersey incorporated companies offer (familiarity to onshore advisors, no stamp duty on the transfer of shares, etc), Jersey incorporated companies might very well feature strongly as QAHCs in the future.

Developments in the UK REIT regime: We have seen a marked increase in the interest in REITs. Jersey companies are often used as 'Private REITs' to acquire interests in UK commercial property (often significant assets) where there are only a small number of investors (eg overseas sovereign and pension funds). REITs offer significant UK tax benefits, including exemptions on UK corporation tax on capital gains and rental profits from their property rental business. Also, gains on the sale of shares in underlying property holding companies held by REITs are also exempt from corporation tax in addition to direct disposals of UK commercial property. The marked increase in REITs has been driven, in part, by the announcement of the 25% UK corporation tax rate in 2023.

In addition, changes have been announced to simplify the UK REIT regime from 2022 onwards. One important development is the dispensation of the listing requirement for REITs which are held 99% by 'institutional investors'. These changes should increase the accessibility of REITs to investors and should simplify the launch process for Jersey incorporated private REITs.

4. Proposed changes to the civil financial penalty regime (Sarah Huelin and Mathew Cook)

Amendments to Jersey's civil financial penalties regime are proposed to help ensure compliance with Financial Action Task Force Recommendation 35 (**FATF 35**) which requires countries to have effective, proportionate and dissuasive penalties for failure to comply with AML/CFT requirements. It is proposed that civil penalties:

- may be imposed for significant and material breaches of the Money Laundering Order (as well as breaches of Code of Practice, as currently);
- will apply to a wider group of businesses including accountants, lawyers and other persons supervised by the JFSC for AML/CFT compliance (in addition to registered persons like banks, trust companies, investment businesses and fund services businesses, as currently);
- will apply to a wider group of individuals including principal persons of supervised businesses and collective investment funds, senior management, MLROs, MLCOs and Compliance Officers (in addition to principal persons of registered businesses, as currently); and
- will not be subject to a cap and will be calculated by reference to aggregate turnover, derived from all business activities of the business and its associated persons carried on in or from within Jersey.

We understand that a considerable amount of feedback was provided in response to this consultation, and so it will be important to review the feedback and the proposals for implementation. In light of the need to ensure FATF 35 compliance, it seems unlikely that there will be any radical departures from the proposals, but there is clearly, in our view, scope for refinement on some of the detail.

A key feature of any changes is likely to be the expansion of individuals within scope, and so businesses should start to consider:

- identifying the individuals who may be in scope – whilst further clarity from the JFSC on this point will be key, work can be done in looking to identify potential people in scope;
- reviewing how responsibilities are divided up between senior people;
- ensuring that those responsibilities are tracked to the regulatory requirements;
- validating that individuals holding responsibilities are appropriately experienced and qualified to do so;
- updating job descriptions to be clear as to responsibilities;
- ensuring your oversight structure is robust;
- considering how you will evidence how people are meeting their responsibilities and the validation of that;
- updating your conflicts of interest policies to address potential conflicts arising in light of any expansion of people in scope;
- training people on their responsibilities;
- considering insurance and indemnification arrangements (noting that coverage for penalties is unlikely to be permitted, but costs may be able to be covered); and
- preparing for potential challenge if issues do arise.

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