

Jersey Securities Issuance: Investor Audit Right – CLO Exclusion

Jersey has a long-standing and sophisticated securities issuance regulatory regime. The regime is regulated by a single regulatory authority, the Jersey Financial Services Commission ("JFSC").

The JFSC has issued a regulatory policy which has been in its present form since 2006.

The Guidance Note: Securities Issues by Jersey Companies¹ ("Securities Issuance Guide") was published by the JFSC to outline requirements for Jersey issuers and the key features the JFSC expects to see as part of its regulation of Jersey securities issues, including structured note issuances such as collateralised loan obligation ("CLO") transactions.

Investor Audit Right

The Securities Issuance Guide outlines the requirement that instruments constituting securities must provide holders of 10% of the value of issued securities with the right to require an audit of the most recent accounts of the issuer, at such holders' expense (the "Investor audit right" or "IAR").

The IAR is intended to benefit investors (principally retail) subscribing for publicly traded debt or equity of Jersey issuers. However, the requirement to

provide for the IAR is not limited to retail securities issues.

For example, structured note issues by bankruptcy remote Jersey SPV issuers to sophisticated and institutional investors are also required to provide for the IAR in instruments constituting securities.

Prior Approach to the IAR Requirement

In institutional note issues, where an ability to audit an SPV issuer's accounts is not a commercial imperative (from an investor perspective) and there is transparency in relation to the portfolio of underlying assets, it has become usual for issuers to apply to the JFSC for a derogation in relation to compliance with the IAR requirement.

The derogation process has involved issuers individually applying to the JFSC for a derogation which must be considered on a fact specific, case-by-case basis. This can be time consuming for a right which is not beneficial for institutional investors.

Streamlined Solution

In response to industry participants highlighting the sub-optimal IAR derogation process and the fiscally transparent nature of many kinds of institutional

¹<https://www.jerseyfsc.org/industry/guidance-and-policy/securities-issues-by-jersey-companies/>

structured note transactions, the JFSC has reconsidered the application of the IAR to all kinds of securities issuance transactions.

In view of the introduction in 2021 of certain safe harbours regarding what constitutes a 'prospectus' under the Companies (Jersey) Law 1991 ("Prospectus Amendments"), the JFSC has revised the IAR requirement to exclude certain institutional structured note issuances, such as CLOs.

The revision results in the exclusion of the institutional note issuance transactions outlined below from the IAR requirement. Broadly, the exclusions mirror the safe harbour provisions reflected in the Prospectus Amendments.

Institutional Issuance – IAR Exclusion

Where any (or any combination) of the following circumstances exist, issuers who must obtain JFSC consent to the issue of securities will not need to apply to the JFSC for an IAR derogation:

- (a) the invitation is addressed to either or both
 - (i) qualified investors as defined in Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (OJ L 168, 30.6.2017, p12), as amended from time to time; or (ii) professional investors as defined in the Financial Services (Investment Business (Special Purpose Investment Business – Exemption)) (Jersey) Order 2001; or
- (b) the minimum consideration which may be paid or given by a person for securities to be acquired by that person is at least EUR 100,000 (or an equivalent amount in another currency); or

- (c) the securities are denominated in amounts of at least EUR 100,000 (or an equivalent amount in another currency); or
- (d) the invitation relates to a scheme specified in Article 3(2)(c) of the Companies (General Provisions) (Jersey) Order 2002 (noting that the term 'debenture' for the purpose of Article 3(2)(c) of the CGPO includes notes/loan notes).

The above exclusions are considered appropriate because the Prospectus Amendments have the effect that certain Jersey companies issuing securities will no longer be considered to be circulating a prospectus for Jersey law purposes and will, therefore, not be established as, or be deemed to be, public companies required to produce audited accounts.

Impact

The revisions to the IAR requirement will mean a reduction in the amount of time and effort expended by counsel and issuers in discussing and applying for Jersey regulatory consents as well as increasing overall transaction efficiency.

If you have any questions, including how these developments impact existing, pending and repeat transactions, please contact your regular Maples Group contact or any of the contacts listed below.

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