



JFA

JERSEY
FUNDS
ASSOCIATION

Strategy Manager
Economic Development Department
3rd Floor, Liberation Place,
St Helier, Jersey,
JE1 1BB.

15 April 2011

Dear Sir

Financial Services Ombudsman Scheme for Jersey and Guernsey (the "Scheme")

I write to provide comments on behalf of the Jersey Funds Association (the "JFA") in response to the recently issued consultation paper (the "**Consultation Paper**") in respect of the Scheme as follows.

1. Introduction

- 1.1. The JFA is an association of Jersey businesses and individuals involved in or associated with the Island's funds industry. It represents the majority of the businesses in the Island servicing or advising investment funds domiciled or administered in the Island. Its membership is broad and includes administrators, managers, investment managers and advisers, trustees, custodians, accountancy firms, law firms and non-executive directors. Its members would therefore be directly affected by the Scheme if implemented.
- 1.2. In the time available since the publication of the Consultation Paper it has only been possible to canvass a minority of the membership of the JFA in respect of the Scheme on an ad hoc basis, but the following views are thought to be broadly representative of the JFA's membership and are supported by a majority of the main committee of the JFA and of its Legal & Technical Sub-Committee.
- 1.3. There follows some general comments in respect of the Scheme and responses to some of the specific questions raised in the Consultation Paper.

2. The Scheme should be wholly or mainly funded by the States

- 2.1. Ultimately it is a political and social question as to whether a scheme such as the Scheme should be introduced in the Island. We are not aware of it having been requested by the JFA's membership and it is not likely to be used by the vast majority of the customers of members of the JFA, most of whom are not the private individuals who appear to be targeted to benefit from it as complainants. It is unlikely that there will be any benefit to the businesses of the members of the JFA as a result of the introduction of the Scheme. Accordingly we do not consider it appropriate that the operation of the Scheme should be funded by the financial services industry as a whole which would cause disproportionate costs to be borne by businesses which are unlikely to be the subject of a complaint under it. Rather, as a political and social measure, it is something which should be funded by general taxation, as in the Isle of Man. The Island is different from the UK (where the FOS is funded by industry) where the fixed costs of the FOS can be absorbed by the very large number of regulated businesses. There is a much smaller number of such

businesses in the Island and therefore it is feared that the burden on industry will be relatively greater.

2.2. Moreover any funding model which does not include a substantial element of taxpayer funding will have the result that there will be no incentive on the part of government (which will ultimately control the scope of Scheme through primary or delegated legislation) to minimise those costs. Indeed one could easily envisage a scenario in which there was an incentive to expand the scope and therefore the costs of the Scheme if this met political ends. The practical implementation of the Scheme by the Board (e.g. in the way in which it exercises its discretion to reject frivolous complaints or the salaries paid to the ombudsman and staff and fees paid to advisers) could also result in very high costs for industry. A mismatch between those being required to fund the Scheme and those controlling the costs of it through decisions about its scope and implementation would be rightly resented by the JFA's members if they are being required to fund it.

2.3. Whatever funding method is selected, the overriding principle should be that the scope of the Scheme and its cost should be kept to the minimum necessary to deliver the benefits to Islanders anticipated by it (see below). We are very concerned that this will not be the case and that the costs will be substantial given the reference (at para 15 of the Consultation Paper) to the budget, to include an office for the Board and for staffing. Given the complexity of financial services legislation in the Island it is not unreasonable to expect that there will also be a need for the ombudsman to take external advice from time to time, and therefore additional costs arising from that.

3. A rigorous cost benefit analysis should be undertaken before the Scheme is proceeded with

3.1. The Consultation Paper makes brief reference to the benefits to Islanders that might accrue from the Scheme (as consumers who might be complainants) but no attempt is made to compare these with the costs of the Scheme. It is submitted that there should be a rigorous cost benefit analysis of the Scheme before it is proceeded with in any form and that that analysis should inform the scope of the Scheme.

3.2. For example, there is a statement at para 6.1 of the Consultation Paper that there "is no restriction as to the residence of the complainant". Jersey's finance industry as long been predominantly focussed business emanating from outside the Island and therefore the Jersey resident customers form only a small minority of its customer base. No analysis appears in the Consultation Paper on whether it would be appropriate to restrict the Scheme to Jersey resident complainants. If it were so restricted it would significantly lower the potential cost and administrative burden of the Scheme and should therefore be considered.

3.3. There is an indication, at para 1.3 of the Consultation Paper, that the Scheme would support the proposed application for Jersey's membership of the Single Euro Payments Area. However, as far as we are aware, the Payment Services Directive requires only an out-of-court scheme for the settlement of disputes between payment service users and their payment service providers. It would not appear to be a reason for having a scheme that extends more broadly than that.

3.4. It is thought most unlikely that additional funds business would flow to the Island as a result of the implementation of the Scheme to offset the additional costs. We are not aware of any evidence that would suggest that any decision not to bring such business to the Island has been influenced by the absence of an ombudsman scheme. Further we are not aware that the Island's business reputation internationally is at risk from not having such a scheme.

4. Neither the Scheme nor the method of funding it should detract from the competitiveness of Jersey as a place to establish investment funds or fund businesses

4.1. The funds industry is highly competitive and mobile internationally and any change which makes Jersey's product offering (in the sense of the structures which it offers to its clients) less attractive is likely to be seized upon by its competitors looking to take

business from the Island. Certain elements of the Scheme as envisaged by the Consultation Paper would have this effect and these are as follows.

- 4.2. The proposal that the Scheme extend to all collective investment funds (as defined by the Collective Investment Funds (Jersey) Law 1988) would require such funds to register with the ombudsman and pay the fees of the Scheme. Only a small minority of such funds domiciled or administered in Jersey are aimed at retail consumers, the vast bulk of such retail business having migrated to Luxembourg or Dublin during the 1990s as a result of the implementation of the EU UCITS Directive. Most of such funds domiciled or administered in Jersey are today targeted at institutional investors (i.e. pension funds, banks, insurance companies) or high net worth investors who do not need or seek the sort of protection that the Scheme would offer. Unfortunately, because of the way in which regulation of funds in Jersey has developed over time it is not possible easily to identify in legislation a category of such funds that would only be targeted at retail investors. The only exception to this is "recognised" funds and it would seem appropriate that the Scheme extend to them if it is to extend to any. It should be noted that such funds represent only a small minority of funds business domiciled in the Island.
- 4.3. Aside from the funds themselves, structures established by clients of Jersey's funds industry also include entities regulated by the JFSC that have no physical presence (i.e. staff or office space) in the Island but which are nonetheless financial services businesses. These are entities which are managed by other regulated service providers with a physical presence in Jersey such as administrators, and are therefore known as "managed entities". Examples of such managed entities are general partners of limited partnerships and managers of unit trusts, often used in private equity and real estate fund structures. Clients establishing such general partners and managers have a large number of jurisdictions to choose from in deciding where to establish them. The decision on where to establish them is usually highly sensitive to cost and regulatory burden. The customers of such managed entities do not include retail customers and therefore we see no basis for the Scheme to apply to them and a risk that if it were to, such business would be lost to the Island.
- 4.4. Jersey is also making efforts to attract more fund businesses to the Island that will have a physical presence and will be regulated by the JFSC. These include the so called "high value, low footprint" businesses such as hedge fund managers. Such businesses do not generally seek retail customers. Again, Jersey is competing with other jurisdictions to attract such businesses. Doing so will become harder if the cost and administrative burden of the Scheme which has no relevance to their customer base is to be shared by them.
- 4.5. The implementation of the Scheme would have the effect of raising the costs of the funds industry generally. It would be up to participants in the industry to identify whether such costs can be passed on to customers or whether (as seems more likely given the competitiveness of the market internationally) they must be borne by those participants themselves. Therefore consideration should be given to anything which can be done to reduce those costs. For example, there is reference at para 4.1 of the Consultation Paper to there being a requirement for businesses to register with the ombudsman. However, this seems wholly unnecessary for businesses that are already registered by the JFSC and paying fees in respect of such registration. To the extent that a regulated business is to fall within the scope of the Scheme, there should be no requirement for dual registration with the JFSC and the ombudsman (i.e. registration with the JFSC should be sufficient).

5. The Scheme should be fair to both consumers and financial services providers

- 5.1. The Scheme would result in potential injustice if there is an absence of an appeal mechanism for financial services providers. No justification is offered in the Consultation Paper for this absence.
- 5.2. In a small community such as Jersey reputations are highly important and are at risk of being wrongfully and permanently damaged were an incorrect decision to be made by the ombudsman. Judicial review might provide a partial remedy in some cases, but the

success or failure of an application for judicial review will depend largely on technical matters irrelevant to the merits of the case.

5.3. It is therefore submitted that financial service providers should have the same right of appeal on the merits as complainants under the Scheme.

6. Responses to specific matters raised in the Consultation Paper

6.1. Comments are invited on [the approach set out in para 7.2] and whether there should be a limit on the size of the trust or foundation. If so, what would be a sensible limit for Jersey (para 7.2)?

Response:

We see no reason why a trust or foundation with higher level of assets than the UK equivalent should be permitted to use the Scheme in Jersey, and none is advanced in the Consultation Paper.

Where any **one** of the trustees of a trust or council member of a foundation is regulated as a trust company business, then the application of the Scheme to the trust or foundation should be excluded, on the basis that the trustees or council members as a group will have sufficient resources to progress a complaint with the financial services provider (see para 7.2).

In respect of "small businesses", there should also be a limit set by reference to net assets as well as income. There are many asset or investment holding entities established in Jersey which hold assets of extremely high value but which are structured to receive, for various reasons, no or very low levels of income. It would be wrong if such entities were to be able to make use of the Scheme.

Given that other entities (e.g. charities or small businesses) are excluded from the operation of the Scheme on the basis that they have sufficient resources to progress a complaint with the financial services provider (see para 7.2), there seems no reason not to exclude high net worth individuals from the Scheme.

6.2. Comments are welcome on this list taken broadly from the UK scheme, as at least some of them will not be relevant to Jersey (para 7.5)

Response:

Enabling "potential customers" to be complainants seems unnecessarily broad, not least because it is difficult to see how a potential customer that does not become an actual customer could have legitimate grounds for complaints against a financial services provider. "Potential customer" would also be a very difficult concept to define in legislation.

See paragraph 4.2 above for the reasons why the Scheme should extend only to collective investment funds that are recognised funds.

6.3. A 3 month limit is proposed for Jersey, do respondents agree (para 9.4)?

It is not clear why the Scheme should be any more generous to complainants than the UK scheme (no reason for this is given in the Consultation Paper), and therefore the 8 week period seems more appropriate.

6.4. Comments from Jersey's industry are specifically invited as to the favoured percentage split between income from annual levies and case fees (para 15.2.2)

See paragraph 2 above generally in respect of funding.

Without knowing the approximate amounts to be charged, it is not possible to comment meaningfully on the proposed split or on any of the methods of charging fees generally as described in para 15.2.

We would be happy to meet with the Department to discuss any of the foregoing comments.

Yours faithfully

pp. Nikki Sanchez (secretary to Ed Devenport)

Ed Devenport
Vice Chairman
Jersey Funds Association