

# FUND FINANCE FRIDAY

## Crossing the Pond: The LLC is Coming to Jersey

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Due to its proximity to the UK, the corporate vehicles available in Jersey have historically followed those available in England and Wales. This is mainly because HMRC classifies an entity according to its characteristics rather than using the "check-box" election system seen in the U.S.

The introduction of the limited liability company (LLC) under Jersey law is designed with the U.S. market in mind and is seen as a means to enable Jersey to continue to grow the amount of in-bound business from North America. A Jersey LLC should be treated in the same way as any other non-U.S. LLC, and we expect the Jersey LLC to become an increasingly prevalent part of the fund (and therefore fund finance) landscape.

### What is an LLC?

For the benefit of those on the Eastern side of the Atlantic, an LLC provides a very flexible structure, and LLCs can differ from one to the next. The key features of an LLC are:

- it has legal personality (so can contract and hold assets in its own right);
- it has limited liability;
- it must have at least one member;
- an LLC can have managers to run it (similar to a general partner in a limited partnership, but who need not be a member in the LLC) or the members can run the LLC themselves (like the partners in a general partnership);

- the LLC agreement will not be made publicly available (similar to a limited partnership agreement);
- treatment of Jersey LLCs will follow the U.S.-style "check box," allowing a Jersey LLC to be classified as a partnership or a company for tax and accounting purposes; and
- Jersey LLCs will be able to create separate series consisting of separate members, managers, interests or assets, each of which will have separate legal personality. These series LLCs are typically used for fund or structured finance transactions and are similar in concept to Jersey cell companies (or the Irish ICAV or Luxembourg compartments).

As can be seen, none of the above are particularly novel to fund structures, but the current corporate vehicles available in Jersey require compromising on at least some of the above features, whereas the LLC will provide flexibility to address them all.

### **Considerations for lenders**

For lenders, generally speaking, there is no legal or regulatory impediment to lending to funds in Jersey, and this would apply equally where the fund vehicle is an LLC.

The due diligence a lender will need to undertake on a Jersey LLC will be mostly similar to that of a limited partnership, being (as a high-level summary):

- establishing the person(s) who have the ability to issue capital call notices;
- establishing the powers and restrictions/limitations in relation to call rights and rights available where there is a defaulting member;
- ensuring that the LLC has the relevant powers in the LLC agreement to enter into the finance documents and perform its obligations thereunder, namely (i) the power to borrow, (ii) the power to grant security and powers of attorney and (iii) provide guarantees;
- checking the LLC does not have a limited life that expires before the term of the facility; and
- depending on the type of fund, checking to see that any regulatory borrowing restrictions are being complied with.

### **Taking security from an LLC in Jersey**

The Security Interests (Jersey) Law 2012 creates a simple security regime permitting security to be created over present and future intangible moveable property situated in Jersey. Security can be easily taken from an LLC by way of a Jersey law security interest agreement over (amongst other things) the following assets of a Jersey LLC:

- bank accounts maintained in Jersey;
- call rights a party has under an LLC agreement (and rights of enforcement in connection with those call rights);
- shares in a Jersey company (or membership interests in a Jersey LLC); and
- contract rights under a Jersey law-governed agreement.

The above list is not exhaustive but rather the more common security we see in fund finance deals.

There are certain perfection requirements, but for the most part, perfection of the security will be achieved by way of the registration of a "financing statement" on the public Security Interests Register (which incurs a GBP 150 fee per registration).

In relation to security over call rights, as is currently the case when taking security over call rights in a Jersey limited partnership or company, notice of the security will not need to be given to the members of the LLC to perfect the security. However, we would expect the standard practice in Jersey of delivering such notice to investors to also apply to delivering a notice to the members of an LLC, as this can provide protections to the lenders that go beyond perfection.

### **Timing**

The Government of Jersey passed the Limited Liability Companies (Jersey) Law 2018 to enable limited liability companies to be created in Jersey back in September 2018. The enabling legislation is still being finalised, a process expected to come to a conclusion by December 2020, having been postponed slightly due to COVID-19.

### **Conclusion**

The introduction of the LLC to Jersey is an exciting new development. However, the familiarities with U.S.-incorporated LLCs (for U.S.-based fund managers and lenders) and limited partnerships (for European-based fund managers and lenders) should mean that there is no need to be concerned with the use of a Jersey LLC in a fund structure.