

# New Guernsey Fund Rules

## Introduction

The Protection of Investors (Bailiwick of Guernsey) (Amendment) Law 2007 (the "Amendment Law") came into force on 29 October 2008. In addition to amending the Protection of Investors (Bailiwick of Guernsey) Law 1987 (as amended) (the "POI Law"), the Amendment Law repealed those parts of the Control of Borrowing (Bailiwick of Guernsey) Ordinance 1959 ("COBO") which were relevant to funds business. Whereas closed-ended funds were previously dealt with under COBO, both open-ended and closed-ended funds are now regulated in Guernsey by the POI Law.

In summary:

- the consent of the Guernsey Financial Services Commission ("GFSC") is no longer required for the raising of money through the issue of shares in a company, units in a unit trust or interests in a limited partnership;
- GFSC consent is no longer required to form a limited partnership; and
- the three day registered fund approval process is now available to open-ended as well as closed-ended funds.

## Fund categories

The POI Law divides Guernsey funds into two categories:

- authorised investment schemes; and
- registered investment schemes.

Both open-ended and closed-ended funds may be either authorised or registered schemes under the POI Law and funds may take the form of companies, limited partnerships, unit trusts or other entities.

The policy of the GFSC is to subject authorised investment schemes to closer supervision than registered schemes. In the case of closed-ended schemes, there is little of substance to distinguish between the two categories. Indeed, the new rules applicable to authorised closed-ended funds replicate large portions of the minimum disclosure requirements that were expected of closed-ended funds under the COBO regime. In relation to open-ended funds, the registered regime provides for a lighter touch than the authorised category which, until the recent changes, was the only form of regulation available to an open-ended fund in Guernsey.

The most significant advantage that registered schemes have over authorised schemes is the fast-track three day approval process for the fund and the fast-track ten day approval process for service providers. Authorised funds remain subject to the lengthier, traditional approval process.

## New Rules

On 15 December 2008, the GFSC implemented the following rules (collectively referred to in this Briefing as the "New Rules"):

- The Registered Collective Investment Scheme Rules 2008 – which apply to open-ended and closed-ended registered investment schemes;
- The Authorised Closed-Ended Investment Schemes Rules 2008 – which apply, as their name suggests, to authorised closed-ended investment schemes; and
- The Prospectus Rules 2008.

The Prospectus Rules 2008 prescribe the information that must be contained in:

- a prospectus issued by a Guernsey registered fund (open-ended or closed-ended);
- a prospectus issued by any other Guernsey entity; and
- a prospectus in respect of any offer of securities made to the public in Guernsey by a Guernsey or non-Guernsey entity. The public is defined as 50 or more people in Guernsey.

For registered closed-ended funds, the Prospectus Rules 2008 replace the old minimum disclosure guidelines issued by the GFSC.

Authorised open-ended schemes continue to be governed by the Class A, Class B and Class Q Rules. The qualifying investor fund process also remains available for authorised open-ended and closed-ended funds.

There is an exemption in respect of a prospectus offering shares which are to be listed on a stock exchange in an International Organisation of Securities Commissions ("IOSCO") member country. It is not yet clear how this exemption might affect limited partnerships where interests are so listed.

### Transitional arrangements

Existing closed-ended funds (which were approved prior to 15 December 2008) are deemed to be authorised closed-ended investment schemes under the New Rules. An existing open-ended or closed-ended fund can elect to be treated as a registered (rather than an authorised) collective investment scheme by writing to the GFSC on or before 15 April 2009<sup>1</sup>.

There is no requirement for an existing fund to comply with the New Rules immediately although the principal documents of a fund must be amended to comply with the new authorised or registered rules (as appropriate) on or before 15 December 2010. However, where any amendment is made to those documents prior to that date, the principal documents must also be revised to comply with the New Rules at that time.

### Plus ça change

Notwithstanding the radical changes brought in by the Amendment Law and the New Rules, many aspects of Guernsey fund regulation remain the same.

The definition of a fund in Guernsey remains unchanged. Although clearer guidance is now given in the POI Law, the GFSC continues to apply the three basic criteria:

- pooling of contributions of investors;
- third party management of the portfolio of assets; and
- spread of risk.

The raising of additional money by existing funds does not require any consent (as was previously the case). However, if this involves the issue of a revised prospectus, the transitional rules applicable during the interim period will require that prospectus to be amended to comply with the New Rules.

The creation of an additional class or sub-class of shares, or of an additional cell by a closed-ended umbrella fund, only requires a notification to the GFSC. No prior consent is required. However, open-ended registered funds do need prior consent.

It is important to note that the requirement to obtain GFSC consent pursuant to COBO, where a fund issues shares for a consideration other than cash, has not been repealed. Therefore, consent will continue to be required whenever a Guernsey company issues shares other than for cash consideration. This issue frequently arises in amalgamation proposals.

The reporting of quarterly statistical information and the requirement for the filing of annual returns by funds continue. However, it is worth noting that, under the New Rules relating to registered schemes, the first annual return must be made within 12 months of the registration being granted. This means that Guernsey fund administrators will not be required to submit annual returns in respect of all of the funds which they administer at the end of the year. Rather, each fund will have its own individual twelve month period commencing on the day it was first registered.

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<sup>1</sup> Rule 7.02(2) of the Authorised Closed-Ended Investment Schemes Rules 2008 provides that existing closed-ended collective investment schemes must elect within four months of the commencement of the rules (i.e. by 15 April 2009) to be treated as a registered closed-ended scheme. However, Rule 8.02(2) of the Registered Collective Investment Scheme Rules 2008 allows closed-ended schemes a slightly longer period of up to 30 April 2009 to make that election.

Both open-ended and closed-ended funds are now regarded as category 1 controlled investments under the POI Law. Previously, closed-ended funds were category 2 controlled investments. This has had a few unintended consequences that have not yet been dealt with in the wording of the New Rules and the legislation. By way of example:

- licensees currently licensed to provide services in respect of category 2 controlled investments have been deemed by the GFSC to be licensed to do so only in respect of category 1 investments; and
- the GFSC has confirmed that the non-Guernsey scheme rules which require Guernsey service providers to obtain GFSC consent prior to providing services to category 1 controlled investments do not apply to closed-ended funds.

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