

Qualifying Investor Funds in Guernsey

Briefing

This briefing provides an overview of the advantages of the fast track approval process for Qualifying Investor Funds as recently introduced by the Guernsey Financial Services Commission.

Regulatory regime

In February 2005, the Guernsey Financial Services Commission ('Commission') introduced a new regulatory regime resulting in a fast track approval process for Qualifying Investor Funds ('QIFs'). The new regime provides for the Commission's approval to be granted within three working days following completion of the specified criteria by the Guernsey resident service provider ('administrator') of the QIF.

Requirements

A QIF can be either an open-ended fund requiring authorisation under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 as amended ('POI') or a closed-ended fund requiring consent under the Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959 as amended. A key requirement for eligibility for fast track approval is that the fund is open only to Qualifying Investors. Broadly speaking, a Qualifying Investor is one who is able to evaluate the risks and strategy of investing in a QIF and is able to bear the economic consequences of such an investment including any potential loss.

There are three types of Qualifying Investor:

1. A Professional Investor which includes:
 - a Government, local authority, public authority or supranational body (in the Bailiwick or elsewhere);
 - a person, partnership or other unincorporated association or body corporate whose ordinary business or professional activity includes or it is reasonable to expect that it includes acquiring, underwriting, managing, holding or disposing of investments, whether as a principal or agent, or the giving of advice on investments; or
 - an affiliate or associate of the QIF which refers to financial services businesses or financial service professionals associated directly or indirectly with the operation of such a QIF.
2. An Experienced Investor which includes a person, partnership or other unincorporated association or body corporate, which has in any period of 12 months (on their own behalf or in the course of employment) frequently entered into transactions connected with open-ended collective investment schemes and/or general securities and derivatives (being transactions of a substantial size) entered into with or through the agency of reputable persons who:
 - carry on investment business and can reasonably be expected to understand the nature of and the risks involved in transactions of that description; or
 - provides a certificate from an appropriately qualified investment advisor confirming that the investor has obtained independent advice.
3. A Knowledgeable Employee which includes:
 - a person who is (or has been within three years up to the date of the application for investment in the QIF) an employee, director, general partner, shareholder of or consultant to an affiliate appointed by the QIF to advise, manage or administer the investment activities of the QIF, and is acquiring an investment in the QIF as part of their remuneration, incentive arrangement or, by way of coinvestment, either directly or indirectly through a personal investment vehicle, such as a trust for or substantially for that person; or
 - any employee, director, partner of or consultant to any appropriately qualified Professional Investor (as defined above) or anyone who has fulfilled such a role within three years of the date of application for investment in the QIF. The term 'employee' will not cover inter alia, clerical, secretarial or administrative roles.

A QIF must ensure that it has sufficient controls in place to ensure that only these specified types of investors are permitted to invest in the fund. The Commission will also expect potential investors to warrant or certify that they fall within one of these specified categories. Although the Commission does not prescribe the requirements for the content of a warranty or certificate, it has provided guidance as to the minimum standards it would expect.

Due diligence

The administrator will have to certify to the Commission that it has completed due diligence and that the promoter is either regulated and of good standing, or if it relates to an unregulated activity, that it is of good standing. Good standing implies that the entity itself, its directors, controller and senior management have not in the previous five years been the subject of any material disciplinary action by a regulatory or professional body or any conviction for fraud, dishonesty or related offences of a financial nature. If the application relates to a new or recently established promoter/ investment manager, the administrator will need to consider and document the track record and experience of the controllers, directors and managers of the entity. To do this it must consider their past employment which should show the relevant experience in managing or advising on investment funds or similar strategies to those proposed for the QIF.

The administrator must also confirm that the entity is fit and proper, as evidenced by showing its integrity, competence and solvency:

- Integrity means that the promoters/investment managers are of high reputation and standing. They must also carry on their business with prudence, professional skill and honesty. If the application relates to a newly or recently established entity the administrator will assess the integrity of its controller, directors and managers in light of their previous employment and experience.
- Competence can be shown by a favourable track record in a similar business and by demonstrating an acceptable complaints history. Again, if the entity is new or recently established the

administrator will consider competence of its controllers, directors and managers with regard to their previous employment. To comply with this criteria the promoter/ investment manager must also have staff with adequate skills, knowledge and experience to fulfil their duties.

- Solvency is demonstrated by past performance and the maintenance of adequate net liquid assets to meet debts as they arise.

Approval process

The administrator must submit the prescribed application form including:

- Confirmation of completion of due diligence so that the administrator is satisfied that the promoter/ investment manager and associated parties are fit and proper, that effective procedures are in place to ensure that only qualifying investors are permitted to invest and that the economic rationale for the proposed QIF and any risks are clearly disclosed;
- Submission of all required forms in respect of controllers, director and senior managers of the promoter/ investment manager;
- Payment of the prescribed fund application fee (currently £2,800); and
- Submission of certified complete final copies of the scheme particulars, prospectus, offering document, application form, subscription agreement, constitutive documents (memorandum and articles of association, trust deed or limited partnership agreement as appropriate) and all material agreements entered into by the QIF.

On receipt of the above, the Commission will issue the necessary authorisation or consent within three working days. However, if the promoter needs to establish a Guernsey management company, the required licence under the POI must also be obtained in order for the authorisation or consent for the QIF to be issued. The Commission will endeavour to fast track any such licence application.

Mourant International Finance Administration is able to approve QIFs and currently administers several in Guernsey.

Expert advice is on hand

Mourant du Feu & Jeune's funds team provides advice in relation to a broad range of funds in Guernsey, Jersey and the Cayman Islands, including hedge funds, property funds, private equity funds and money market funds. It advises on the establishment of investment funds, fund related deals and ongoing advice in relation to fund structures.

This briefing can only provide a general review of this area. Legal advice should be taken with regard to individual circumstances.

If you have any queries regarding the information in this briefing or simply wish to discuss your specific needs please contact:

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