

Revision of Laws – industry specific changes: Investment Funds

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In this Update, we focus on certain notable changes made specifically for the investment funds sector following the implementation of the Protection of Investors (Bailiwick of Guernsey) Law, 2020.

Introduction

The Protection of Investors (Bailiwick of Guernsey) Law, 2020 (the **Law**) came into force on **1 November 2021**.

The purpose of this week's Update is to highlight certain aspects of the Law relevant to collective investment schemes (**funds**).

Definition of designated manager

The definition of 'designated manager' under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (the **1987 Law**) has been replaced with 'designated administrator' throughout the Law. This reflects the reality of the appointment and avoids any confusion to third parties who may not understand that the designated manager does not necessarily have supervisory responsibility for the overall management of the fund or its assets.

Fund authorisation and registration process

It is no longer necessary for a fund's authorisation or registration as a collective investment scheme to state the name of its (i) designated administrator as that is considered no longer fit for purpose following AIFMD or (ii) designated trustee/custodian in order to facilitate the use of prime brokers for open-ended funds.

This does not mean that there is no longer a need to have a designated administrator or, where applicable, designated trustee/custodian and it is still necessary to identify those parties in the application. Any change of designated administrator, or where applicable, designated trustee/custodian continues to be subject to the Guernsey Financial Services Commission's (the **Commission**) prior written approval.

Ancillary vehicles

While the Law includes enabling provisions for 'ancillary vehicles', ie vehicles that are closely related to a fund structure or controlled investment, the proposal to introduce a new automatic statutory exemption for such vehicles has been put on hold.

That means that the discretionary exemption regime continues to apply albeit under the new Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2020 (the **2020 Fiduciaries Law**) under which it is a requirement to notify the Commission within 14 days of any change in circumstances such that an exemption is no longer applicable. This is intended to ensure that the facts and circumstances justifying the exemption remain unchanged. Failure to notify the Commission within the requisite period is a ground for refusal or revocation of the exemption and an offence.

Conditions imposed on an authorisation or registration

The Commission has the ability to impose conditions on funds and licensees as 'it thinks fit' giving it more flexibility and power than that previously under the 1987 Law (where any imposition was subject to 'as appear to be necessary or desirable').

It is an offence to contravene any condition of a licence, an authorisation or registration and is grounds for revocation or suspension of that licence, authorisation or registration under the new Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 (the **Enforcement Powers Law**).

Directions

The Commission's ability to issue directions has been introduced into the Law. Directions were not previously available under the 1987 Law and only applied in the other regulatory laws in relation to the surrender or revocation of a regulatory licence.

Directions are available as a regulatory tool at any time and allow the Commission to impose a requirement on a 'directed person' to do, or refrain from doing, something. The application of directions is general, rather than limited, so as to apply to a wider range of persons including funds, former funds and exempt persons, with directions ranging from limiting the scope of business, requiring the removal of certain persons and furnishing the Commission with documents and retaining assets in the Bailiwick.

The Commission can apply to the Court for an order requiring that the directed person comply with the direction and/or publish the imposition of directions on its website.

Declaration that a scheme is not a fund

The Law provides for the Commission to introduce rules to prescribe the mechanics for making a declaration that a scheme is not, in its opinion, a fund. It remains to be seen whether in fact such rules will be introduced but from an industry perspective it would be attractive to be able to apply for such an opinion from the regulator. This also extends to whether or not an activity is a restricted activity and whether or not an investment is a controlled investment for the purposes of the Law.

Publication by the Commission

The provisions concerning the Commission's ability to publish the list of, among others, authorised or registered funds on its website has been standardised. As well as naming the funds and the category of controlled investment in respect of which the authorisation or registration has been granted, the list may also include details of any conditions imposed, directions given or any enforcement requirements imposed.

Moreover the Law requires that the Commission publish the fact that a fund has ceased to hold an authorisation or registration whether by virtue of its revocation, surrender or expiration or any suspension. While the Law permits the Commission to publish the fact that a particular fund has been refused authorisation or registration (which was already provided for under other regulatory laws pre 1 November 2021), it is unlikely to occur as a matter of general policy. Evidence of the restricted use of this power can be seen from the limited publications on the Commission's website.

Application of enforcement provisions to funds

A number of enforcement provisions now apply to, among others, funds and former funds (as an **accountable person**) under the Enforcement Powers Law.

The imposition of an enforcement requirement may be to, for example:

- take certain steps, to refrain from adopting or pursuing a particular course of action or to restrict the scope of business in a particular way
- take all necessary steps to transfer to a trustee, custodian, licensed banking institution or person of any other class or description, in each case approved by the Commission, all assets or all assets of any specified class or description which:
 - belong to the accountable person or
 - are held by or to the order of the accountable person and either belong to investors or clients or belong to (A) an investment company the shares in which belong to investors or clients, or (B)

some other company, legal person or entity which is, or the assets of which are, wholly beneficially owned by investors or clients.

An enforcement requirement imposed on a fund can remain in force after the date of revocation, suspension, expiration or surrender of its authorisation or registration and the date on which that person or entity ceases to be an accountable person of that class or description.

Contravention of an enforcement requirement is not only an offence but also grounds for the suspension or revocation of a fund's authorisation or registration (but does not invalidate any contract or transaction). As noted above, the Commission can publish notice of the imposition of an enforcement requirement on its website, including information in respect of any person named in it.

Market Abuse

The market abuse provisions in the 1987 Law have been removed and are housed in the Enforcement Powers Law. The intention is to centralise these provisions to ensure that they remain consistent, and allow the Commission to investigate suspected market abuse, across all of the regulatory laws, not just the Law.

Rules

In this Update, we look at the new Prospectus Rules and Guidance, 2021 and the Licensees (Conduct of Business) Rules and Guidance, 2021 (below).

As a general note, the overall approach to the rules, codes and guidance that underpin the Law has not changed but there is detail and nuance which need to be taken into account, particularly when updating policies and procedures

Prospectus Rules

The Prospectus Rules and Guidance, 2021 (the **Prospectus Rules**) are largely the same albeit they look and feel different, with sections re-ordered and a two-level approach of rules, ie the relevant requirement accompanied by guidance with suggested (but non-binding) ways of complying with the Prospectus Rules.

Conduct of Business Rules

The key changes in the Licensees (Conduct of Business) Rules and Guidance 2021, which generally apply to all licensees, are that:

- it is now a requirement (as opposed to guidance) that a licensee which is administered by another firm in the Bailiwick must have at least one Guernsey resident director and for other licensees at least two
- a licensee must now notify the Commission if it proposes to outsource its compliance function (as opposed to should under the pre-existing rules)
- the provisions relating to notifications relating to key employees has been re-drafted to align with the Law.

Conclusion

This is just a snap shot of some of the changes made in the investment regulatory sphere. If you require legal advice in respect of any of the matters covered in this Update, or otherwise related to the new regulatory laws, please do get in touch.

In next week's Update, we will be looking at the enforcement regime and outlining some of the key changes made by the new Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020.

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