

THE COLLECTIVE INVESTMENT SCHEMES (COMPENSATION OF INVESTORS) RULES 1988 (AS AMENDED)

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SCHEDULE - Interpretation and construction

THE COLLECTIVE INVESTMENT SCHEMES (COMPENSATION OF INVESTORS) RULES 1988 (AS AMENDED)

THE GUERNSEY FINANCIAL SERVICES COMMISSION, in exercise of the powers conferred by sections 12,19 and 20 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987¹ and now vested in it², hereby makes the following rules:

PART 1- INTRODUCTION

1.01 Citation

These rules may be cited as the Collective Investment Schemes (Compensation of Investors) Rules 1988.

1.02 Commencement

These rules shall come into operation on 15th November, 1988.

1.03 Interpretation and Construction

For the purposes of interpreting and construing these rules, unless the contrary intention otherwise requires-

- (a) any word or expression for which there is an entry in the first column of the schedule has the meaning given against it, or is to be construed in accordance with the directions given against it, in the second column of the schedule;
- (b) words and expressions defined in the P.O.I. Law have the same meanings as in that Law;
- (c) related words and expressions, and corresponding parts of speech, to those given meanings by virtue of paragraphs (a) and (b) of this rule, are to be construed accordingly;
- (d) the Interpretation (Guernsey) Law, 1948³ applies throughout the Bailiwick as it applies to the interpretation of an enactment in force in the Island of Guernsey;
- (e) a reference -
 - (i) to a numbered provision, is a reference to the provision so numbered in these rules;
 - (ii) to a subdivision within one of these rules, is a reference to the subdivision of that rule which is so numbered;
 - (iii) to an enactment, is a reference to that enactment as from time to time varied, repealed and replaced, extended or applied by or under any other enactment.

¹ Order in Council No. XX of 1987; No. XIX of 1987; Ordinance No. XVII of 1988.

² by virtue of section 3(1)(f)(g) and (3) of, and Schedule 2 to, the Financial Services Commission (Bailiwick of Guernsey) Law, 1988 (Order in Council No. XIX of 1988).

³ Ordres en Conseil Vol XIII, p. 355.

PART 2- STRUCTURE OF THE SCHEME FOR COMPENSATING INVESTORS

2.01 Establishment of compensation funds

- (1) It is the duty of the Commission, whenever it is satisfied that a compensation event has occurred, to establish, maintain, administer and apply towards the compensation of investors, a fund in accordance with these rules.
- (2) It is hereby declared in the interests of clarity that the Commission's duty under paragraph (1) of this rule is a part of its statutory functions under the F.S.C. Law.

2.02 Administration of compensation funds

- (1) Any fund established pursuant to rule 2.01, though forming part of the Commission's funds and resources within the meaning of section 12 of the F.S.C. Law, shall be maintained and accounted for separately from the Commission's other funds and resources.
- (2) Any part of such a fund which is not immediately to be applied towards the compensation of investors may be invested by the Commission in accordance with section 16 of the F.S.C Law, but having particular regard to the need for prudence.
- (3) Without prejudice to the Commission's general powers of management under the F.S.C. Law, there shall be paid
 - (a) into that fund:
 - (i) contributions levied under rule 4.02 and interest payable under rule 4.03 (1);
 - (ii) money recovered by the Commission under rule 6.01 and required to be paid into the fund by virtue of rule 6.01 (4);
 - (iii) the income from any investment of such contributions, interest and money recovered;
 - (iv) any other money received by the Commission and determined by it to be so paid;
 - (b) out of that fund:
 - (i) money required for the payment of compensation, together with interest payable, in accordance with these rules;
 - (ii) money required for the discharge of expenses incurred by the Commission in the fund's administration;
 - (iii) any money required to be repaid by rule 4.04(2) (b).

2.03 Participants

- (1) Every licensee which is for the time being
 - (a) the designated manager, or
 - (b) the designated trustee or custodian, or
 - (c) the principal manager of a Class A authorised collective investment scheme is a “participant” for the purposes of these rules.
- (2) A person is also a “participant” -
 - (a) for the purpose of compensation, in respect of liabilities to investors incurred by it whilst it was a participant within paragraph (1);
 - (b) for the purpose of the levying of contributions, in respect of any default of another participant which occurred whilst that person was a participant within paragraph (1).

PART 3- COMPENSATION OF UNPAID INVESTORS

3.01 Payment of Compensation

- (1) A compensation event occurs whenever the Commission is satisfied, on an application made by or on behalf of an investor and on the basis of evidence submitted by him or on his behalf or which is otherwise available to the Commission, that a participant -
 - (a) is in default; and
 - (b) has an eligible liability to the investor and
 - (c) is unable, or likely to be unable, to meet that liability in whole or in part.
- (2) Upon the occurrence of a compensation event the Commission shall, subject to paragraph (3) and to rules 3.04, 3.05 and 6.01 (2), determine that the investor should be paid compensation of an amount (not exceeding 90% of the amount of the liability which the Commission is satisfied that the participant is unable, or likely to be unable, to meet) appearing to the Commission to be appropriate having regard to -
 - (a) the investor’s rights in respect of the liability; and
 - (b) any compromise of the liability; and
 - (c) any security or right of set-off available to the investor in respect of the liability; and
 - (d) the investor’s ability, if any, to recover in respect of the liability from any third party also liable in respect of it; and
 - (e) any other means whereby the investor has, or has had, or might have, an opportunity of recovering in respect of the liability, including any means of so recovering from the defaulting participant.

- (3) Notwithstanding paragraphs (1) and (2) of this rule, if the Commission considers that it would be imprudent, having regard to other claims which may be made, to determine that an investor should be paid compensation of the amount which would otherwise have appeared appropriate, then the Commission may instead determine that the investor should be paid compensation of a lesser amount on account of the compensation which would have been determined in accordance with paragraph (2), but without prejudice to its powers to make a further determination under that paragraph in respect of the balance.

3.02 **Meaning of “default”**

A participant is “in default” when the Commission determines that it should be so regarded on the basis that-

- (a) the participant is unable, or likely to be unable, to satisfy claims in respect of any description of civil liability incurred by it in connection with a Class A authorised collective investment scheme; and
- (b) the participant:
 - (i) has passed a special resolution for its winding-up; or
 - (ii) has been ordered to be wound up by the Royal Court or the Court of Alderney; or
 - (iii) has been wound up; or
 - (iv) has had its name struck off the register of limited liability companies; or
 - (v) has had its affairs adjudged to be in a state of desastre; or
 - (vi) has been the subject of an interim vesting order made in saisie proceedings; or
 - (vii) being a body incorporated in England and Wales, has had an administrator appointed for it under section 9 of the Insolvency Act 1986; or
 - (viii) being a body incorporated outside the Bailiwick, has been the subject of proceedings appearing to the Commission to correspond as nearly as may be to those mentioned above; or
 - (ix) has made any voluntary arrangements with its creditors; or
 - (x) cannot be traced; or
 - (xi) has insufficient resources available to it in the Bailiwick.

3.03 **Meaning of “eligible liability”**

- (1) An “eligible liability” is a civil liability (including a liability to account for property held in connection with controlled investment business) owed by a participant to an investor in a Class A authorised collective investment scheme at the date of the participant’s default.
- (2) Where a liability is owed to any person acting as agent for one or more other persons, then, without prejudice to the status of the liability owed to the one or more other persons, the liability to the agent is not an eligible liability.

- (3) Where a liability is owed to two or more persons jointly, being persons not carrying on business together with a view of profit, each of those persons shall be regarded for the purposes of these rules as owed his pro rata share of that liability.

3.04 Exceptions from entitlement to compensation

- (1) An investor's application for compensation shall be rejected if it appears to the Commission that-
 - (a) it is submitted more than 6 months after the investor became aware, or ought reasonably to have become aware, of the default, unless the Commission determines that it ought to be allowed because of exceptional circumstances; or
 - (b) it is made by a professional investor, so far as the liabilities of the participant were for his own account (including liabilities to him as trustee) or;
 - (c) it is made by a business investor or by an experienced investor, and relates to money which was lawfully maintained with his consent otherwise than in a segregated account; or
 - (d) the applicant has any responsibility for, or has directly or indirectly profited from, the circumstances giving rise to the participant's financial difficulties.
- (2) The Commission may reduce the amount payable by way of compensation if and to the extent that it appears to the Commission that payment of the full amount would provide benefits to the investor disproportionate to the benefits which might reasonably have been payable.

3.05 Limits of compensation

- (1) The sum payable to an investor as compensation is limited as follows:
 - (a) where the total amount of the defaulting participant's liabilities to the investor does not exceed £50,000, the maximum payable is 90% of those liabilities;
 - (b) where that total amount exceeds £50,000 but does not exceed £100,000, the maximum payable is £45,000 plus 30% of so much of that total amount as exceeds £50,000;
 - (c) where that total amount exceeds £100,000, the maximum payable is £60,000.
- (2) The maximum amount which the Commission may determine should be paid by way of compensation, together with interest payable under rule 3.06, in any compensation year is the amount determined by the Commission as an amount which may be expected not to cause the total net compensation costs for that year to exceed £5,000,000.
- (3) Accordingly, if it appears to the Commission that that amount is otherwise likely to be exceeded, it shall not determine that the full amount should be paid in respect of any undetermined claim but shall ensure, as far as it reasonably can, that all payments which it then determines should be made, taking into consideration any payment on account, are abated rateably one with another.

3.06 Interest

- (1) Interest on the compensation payable to an investor shall be paid to him at 2% below **LIBOR** in respect of any period between 3 months after he makes a valid claim and the date on which, pursuant to a determination under rule 3.01(2) (or to the extent relevant a determination under rule 3.01 (3)), that compensation is paid.
- (2) Interest payable under this rule is not to be taken into account for the purposes of the limits imposed by rule 3.05 (1).

PART 4- LEVIES BY COMMISSION ON PARTICIPANTS

4.01 Ascertainment of likely net compensation costs

upon the occurrence of a compensation event the Commission shall -

- (a) take such steps as it considers appropriate to bring to the attention of investors who may be affected thereby the default of the participant concerned and the rights of investors to apply for compensation under these rules;
- (b) when it considers that it has sufficient information, estimate the likely net compensation costs arising out of the default concerned on the assumptions that all contributions levied under rule 4.02 will have been paid to the Commission, and all compensation amounts determined under rule 3.01 (2) and (3) will have been paid to investors, by a specified date.

4.02 Contributions to likely net compensation costs

- (1) As soon as practicable after it has estimated the likely net compensation costs arising out of a default, the Commission shall levy an equal contribution from each participant of an amount ascertained by dividing the amount of those costs by the number of participants on the date of the levy.
- (2) A contribution under this rule shall be levied by serving a written notice on the participant stating
 - (a) the amount of the contribution; and
 - (b) the method by which that amount has been calculated;and
 - (c) the date on or before which it is to be paid to the Commission.
- (3) The Commission may from time to time revise its estimate of the likely net compensation costs arising out of a default, and, if it revises its estimate upwards, may levy additional contributions from participants in accordance with this rule.

4.03 Interest and enforcement

- (1) If any contribution levied under rule 4.02 remains unpaid after the date by which it should have been paid in accordance with sub-paragraph (2) (c) of that rule, the participant which should have paid it is liable to pay to the Commission on the amount of the contribution interest at 2% above LIBOR in respect of the period between that date and the date when it is in fact paid.

- (2) Contributions payable under rule 4.02 and interest payable under paragraph (1) of this rule are debts due to the Commission; and the Commission is under a duty to enforce payment of such debts, if need be by taking legal action.

4.04 Balancing of contributions and costs

- (1) When-
- (a) all compensation and interest payable in respect of a defaulting participant pursuant to all determinations made under rule 3.01 (2) and (3) has been paid; and
 - (b) it appears to the Commission that no further determination under these provisions is likely to be made in respect of the default concerned-
- the Commission shall calculate the actual net compensation costs arising out of the default concerned.
- (2) The Commission shall then -
- (a) if those actual net compensation costs exceed the total of all contributions and interest paid pursuant to all levies made towards them under rule 4.02, levy in accordance with that rule a further contribution from each participant sufficient in total to ensure that those actual net compensation costs are fully recovered; or
 - (b) if the total of all contributions and interest paid pursuant to all levies made towards them under rule 4.02 exceeds those actual net compensation costs, repay to each person which made a contribution pursuant to such a levy an amount calculated by the following formula -

where:

$$PC \div \left[\frac{TC}{(TC - NCC)} \right]$$

“PC” represents the contributions, and any interest, paid by that person pursuant to all levies made under rule 4.02 in respect of the default concerned; “TC” represents the total of all contributions, and any interest, paid pursuant to all such levies; and “NCC” represents the actual net compensation costs arising out of the default concerned.

PART 5- CO-OPERATION WITH COMMISSION

5.01 Cooperation with Commission

- (1) It is the duty of every participant to co-operate with the Commission in making available all information, books and documents, and otherwise to render all such assistance, as is necessary to assist the Commission to perform its functions under these rules.
- (2) Where a participant is being or has been wound up, has had an administrator appointed for it, or has made any voluntary arrangements with its creditors, the duty imposed by paragraph (1) applies equally to the liquidator, the administrator, or the supervisor of those arrangements, as the case may be.

PART 6- SUBROGATION

6.01 Rights of Commission against defaulting participant

- (1) Where a participant is in default, this rule has effect for the subrogation of the Commission to the rights of investors who apply for compensation under these rules.
- (2) Notwithstanding any other provision of these rules the Commission shall not determine that compensation should be paid to an investor in respect of a liability unless he has agreed that -
 - (a) his existing rights in respect of that liability, or in respect of any part of that liability required by the Commission, shall vest in the Commission; and
 - (b) he will execute any document (including any declaration of trust), do any act and provide any assistance to the Commission to enable it to exercise those rights; and
 - (c) he will pay to the Commission any amount which he receives in respect of those rights, after deduction of any amount which, under paragraph (4), the Commission would have been required to pay to him; and
 - (d) where relevant, any prospect of his recovering in excess of the compensation payable under these rules (and interest on it) will be in the hands of the Commission, which may compromise the claim.
- (3) Where the investor so agrees, the participant's liability to the investor is extinguished or, as the case may be, reduced, and there is hereby conferred on the Commission a right of recovery against the participant, being a right otherwise identical to the investor's right in respect of the liability.
- (4) Any sums received by the Commission by virtue of this rule shall be paid into the fund established pursuant to rule 2.01 up to the amount of the compensation payable to the investor and in respect of the default concerned, interest on it at 2% over LIBOR and the costs of recovering those sums; any balance shall be paid to the investor.
- (5) The difference between any amounts paid into the fund under paragraph (4) and any estimate of such amounts earlier made by the Commission shall be treated as reducing or, as the case may be, increasing the net compensation costs arising out of the default concerned and the total net compensation costs for the year in which it is so paid.

SCHEDULE

Rule 1.03 (a)

Interpretation and construction

(1) Word or expression	(2) Meaning
business investor	(a) a government or public body (in the Bailiwick or elsewhere); (b) a trustee of a trust, if the trust's assets (before deducting liabilities) have at any time during the previous 2 years amounted to at least £10,000,000; (c) a body corporate having more than 20 members, or being the subsidiary of a holding company with more than 20 members, if it or any holding company or subsidiary of it has called up share capital or net assets of not less than £500,000; (d) any other body, if it or any holding company or subsidiary of it has called up share capital or net assets of not less than £5,000,000.
Class A authorised collective investment scheme	A collective investment scheme authorised pursuant to the Collective Investment Schemes (Class A) Rules 2002
compensation event	construe in accordance with rule 3.01 (1).
compensation year	the period beginning on any 15th November and ending on its first anniversary.
default	construe in accordance with rule 3.02.
eligible liability	construe in accordance with rule 3.03.
experienced investor	(a) an individual who has in any period of 12 months (whether on his own behalf or in the course of his employment by another person) so frequently entered into transactions of a particular type in connection with (i) units in collective investment schemes (ii) shares, stocks or debentures of incorporated or unincorporated bodies government or public securities being transactions of substantial size (or of substantial size in relation to his total wealth) entered into with or through the agency of reputable persons who carry on investment business, that he can

(1) Word or expression	(2) Meaning
	reasonably be expected to understand the nature of, and the risks involved in, transactions of that description in connection with collective investment schemes;
	(c) in relation to any transaction for the account of a trust, every trustee of that trust if any of its trustees is an experienced investor within paragraph (a) of this definition;
	(d) in relation to any transaction entered into by a body of persons (whether incorporated or not) which carries on business or acts as a trustee, through the agency of an experienced investor within paragraph (a) of this definition who is a member, officer or employee of it, that body.
The F.S.C. Law	the Financial Services Commission (Bailiwick of Guernsey) Law, 1988.
fund	any fund established pursuant to rule 2.01.
LIBOR	the London interbank offered rate.
net compensation costs	the costs of paying compensation and interest under these rules plus the costs of establishing claims, including legal and accountancy services, and other similar costs, less any amounts recovered under rule 6.01, either (a) in connection with a particular default; or in the course of a compensation year, according to the context. (b) in the course of a compensation year, according to context
the P.O.I. Law	the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended.
participant	construe in accordance with rule 2.03.
principal manager	the principal manager, as defined in the Collective Investment Schemes (Class A) Rules 2002.
professional investor	in relation to any services provided by a participant, a person who carries on finance business as defined in the F.S.C. Law and for whom those services are provided in the course of his carrying on that finance business.