

THE PRIVATE INVESTMENT FUND RULES and GUIDANCE (2), 2021

Made:

Coming into Operation:

The Private Investment Fund Rules, made in accordance with the Protection of Investors (Bailiwick of Guernsey) Law, 2020 (“the Law”), are set out in this document. Guidance, provided by the Guernsey Financial Services Commission (“the Commission”) is set out in blue boxes.

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PART 1 INTRODUCTION

1.1 Application

- (1) The Private Investment Fund Rules (2), 2021 replace The Private Investment Rules (1) 2021.
- (2) The Commission may in its absolute discretion, by written notice, exclude or modify the application of any provision of these Rules.
- (3) The Commission may issue supplementary guidance regarding the standards of conduct and practice expected in relation to any aspect of the regulatory framework. Such guidance will not constitute rules of the Commission.
- (4) Unless specifically agreed otherwise by the Commission, these Rules apply to registered collective investment schemes that have elected to be within the private investment fund regime.

PART 2 REQUIREMENTS FOR REGISTRATION

2.1 Registration of Private Investment Funds

- (1) All funds applying for registration, with the Commission, as Private Investment Funds (“PIFs”), must fulfil all of the criteria set out at Schedule 1 for either -
 - (a) POI Licensed Manager PIF – Route 1;
 - (b) Qualifying Private Investor PIF – Route 2; or
 - (c) Family Relationship PIF – Route 3.

2.1 Application for registration

- (1) The manager, or designated administrator of a proposed PIF seeking a declaration of registration, from the Commission, must submit the appropriate application form and must also provide such other information as the Commission may require.

2.2 Registration declaration

- (1) The Commission may grant registration, under section 8 of the Law, to a PIF, by declaration if it is satisfied with the undertakings required, and the application made, in accordance with these Rules.
- (2) A declaration of registration must confirm the designation of the administrator.

2.3 Undertakings

- (1) As a condition of the registration of a scheme as a private investment fund, the Commission is entitled to require any undertakings, indemnities, bonds, guarantees and assurances as it may determine in order to secure compliance with these Rules.

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PART 3 MANAGEMENT, ADMINISTRATION, CUSTODY AND AUDIT

3.1 Management

- (1) A PIF registered under Route 1 of Schedule 1 must appoint a licensee as manager and it is the duty of the manager to manage the scheme in accordance with –
 - (a) the principal documents;
 - (b) these Rules; and
 - (c) where applicable, the most recent information particulars.

3.2 Administration

- (1) There is no obligation to produce information particulars for a private investment fund. Where these are produced, the manager, directors, general partner or trustee, must take responsibility for their preparation and publication.
- (2) It is the duty of the designated administrator of a private investment fund to administer the scheme in accordance with –
 - (a) the principal documents;
 - (b) these Rules;
 - (c) the most recent information particulars, where applicable; and

- (d) in the case of a company scheme, subject to any proper directions given by the manager and directors and, in the case of a limited partnership scheme, subject to any direction given by the general partner, or corporate trustee of a unit trust scheme as applicable.
- (3) It is the duty of –
- (a) the directors, in the case of a company;
 - (b) the directors of the manager;
 - (c) the directors of the general partner of a limited partnership, in the case of a limited partnership; and
 - (d) the directors of the corporate trustee, in the case of a unit trust,

not to give any directions or exercise any powers, duties or discretions that cause the scheme to operate other than in accordance with the principal documents and information particulars or these Rules.

- (4) Subject to any restrictions in the principal documents, the designated administrator may, at its discretion, delegate any function to any person provided that the designated administrator is satisfied at the outset, and continues to remain satisfied, that the delegate is competent to undertake the function in question.

Guidance Note:

Any such arrangement must be made in accordance with the Commission's "Guidance Note on Outsourcing of Functions by Entities Licensed under the Protection of Investors (Bailiwick of Guernsey) Law, 1987".

3.3 General provisions applicable to the designated administrator of a PIF

- (1) The duties of the designated administrator set out in these Rules, in the principal documents and in the information particulars, are in addition to the duties otherwise imposed by the applicable law.

3.4 Appointment of a qualified auditor

- (1) A PIF must appoint a qualified auditor as the auditor of the scheme.

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PART 4 CONFLICTS OF INTEREST

4.1 Conflicts of interest

- (1) The directors, the general partner and the corporate trustee, where applicable, must each take all reasonable steps to ensure that there is no breach of any of the following requirements of this rule by any “relevant person”, meaning –
 - (a) the designated administrator;
 - (b) in the case of a unit trust, the corporate trustee;
 - (c) any investment adviser;
 - (d) any manager;
 - (e) the fund itself (if a legal person);
 - (f) in the case of a company, the directors of the company;
 - (g) in the case of a limited partnership; directors or general partner of the general partner, and the general partner itself;
 - (h) the custodian; and
 - (i) any associate of any person described above.
- (2) Cash forming part of the scheme property may be placed in any current, deposit or loan account with a relevant person if the arm’s length requirement is satisfied.
- (3) A relevant person may lend money to the PIF if the arm’s length requirement is satisfied. Loans that form part of an investor’s commitments do not fall into this category.

- (4) A relevant person may not sell or deal in the sale of property to the PIF unless the arm's length requirement is satisfied. For the purpose of this section a sale includes any lease or other transaction under which scheme property is made available by the PIF.
- (5) A relevant person must not purchase scheme property from a PIF unless the arm's length requirement is satisfied. For the purpose of this section, a purchase includes any lease or other transaction under which the scheme property of the PIF is made available to the relevant person.
- (6) A relevant person must not vest property in a PIF against the issue of shares, unless –
 - (a) the arm's length requirement is satisfied; or
 - (b) it is vested for the purpose of arrangements under which the whole or part of the property becomes the initial scheme property of the PIF.
- (7) A relevant person must not enter into a stock lending transaction, in relation to the PIF, unless the arm's length requirement is satisfied.
- (8) A relevant person must not provide services, for the PIF, unless the services are provided on terms which satisfy the arm's length requirement.
- (9) The arm's length requirement is that the arrangements between the relevant person and the PIF are at least as favourable to the PIF as would be any comparable arrangement effected on normal commercial terms negotiated at arm's length between the relevant person and an independent party. The arm's length requirement is deemed to be satisfied when –
 - (a) the transaction satisfies the criteria for best execution on-exchange –
 - (i) if the property is an approved security or an approved derivative; and
 - (ii) the transaction is effected with or through a member of the relevant exchange under the rules of that exchange;

OR

- (iii) there is evidence in writing of the effecting of the transaction and of its terms; and
- (iv) the manager has taken all reasonable steps to effect the transaction or to ensure that it is effected on the terms which are best available for the PIF in the circumstances;

OR

- (b) the transaction satisfies the criteria for independent valuation if –
 - (i) the value of the property is certified in writing for the purpose of the transaction by a person selected or approved by the directors, in the case of a company, or the general partner in the case of a limited partnership, or the manager or corporate trustee in the case of a unit trust, as –
 - (A) independent of any relevant person; and
 - (B) qualified to value property of the relevant kind; and
 - (ii) the directors in the case of a company, the general partner in the case of a limited partnership, or the manager or corporate trustee in the case of a unit trust, are of the opinion that the terms of the transaction are not likely to result in any material prejudice to holders.
- (10) Sections (2) to (7) are subject to any provision in the principal documents or the information particulars forbidding the utilisation of any or all of them.

Guidance Note:

Where the principal documents or information particulars, of the scheme, prohibit any of the actions set out at (2) to (7) this Rule does not override that prohibition and, even if the arm's length requirement is satisfied, they must not be undertaken.

PART 5 NOTIFICATIONS

5.1 Immediate notifications

- (1) A change of the designated administrator is not effective until the Commission varies the declaration of registration.
- (2) The designated administrator must give immediate written notice, to the Commission, in respect of any proposal to reconstruct, amalgamate, terminate prematurely, wind-up or extend the life of the PIF.

5.2 Annual notifications

- (1) A designated administrator must notify the Commission, each year, of any change in respect of the information contained in the application form submitted for registration as a PIF or, in the absence of any change, notify the Commission of no change.
- (2) Such notifications must be submitted to the Commission together with the audited annual reports and accounts for the PIF as required under these Rules.

5.3 Annual reports and financial statements

- (1) The designated administrator must submit, to the Commission, copies of the audited annual report and accounts for the PIF, no later than six months following the end of the annual accounting period.

5.4 Quarter-end statistical information

- (1) The designated administrator must submit, to the Commission, a statistical return relevant to the PIF for each quarter. The information to be contained in such a return is as required by the Commission and must be made within the Commission's agreed timeframes.

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PART 6 GENERAL PROVISION

6.1 Interpretation

(1) In these Rules terms have their ordinary meaning unless specifically defined in the Law or in these rules.

(2) In these rules the following definitions should be followed -

“administration agreement” is the agreement by which a designated administrator is appointed to a private investment fund to discharge the duties of the administration of a private investment fund;

“annual accounting period” is the period, normally of 12 months, as specified by the governing legislation or specified in the information particulars or principal documents;

“approved derivative” means a derivative that is traded or dealt in or on a regulated derivatives market;

“approved security” means a transferable security that is admitted to official listing on the International Stock Exchange, or in the UK, or in an EEA State, or is traded on or under the rules of a regulated securities market;

“corporate trustee” in relation to a private investment fund that is a unit trust, means the trustee of the unit trust, which must be licensed under the Law;

“custodian” means a body corporate appointed to hold the property of a private investment fund, other than a unit trust, which must be licensed under the Law and a **“custodian agreement”** may be interpreted in that context;

“holder” in relation to a share in a private investment fund, means the person who is entered in the register as the holder of the share or unit or limited partnership interest or the first named holder in the case of joint holders;

“designated administrator” in relation to a PIF, means the person appointed to discharge the duties contemplated by an administration agreement, and has the status of designated manager under the Law;

“information particulars” means particulars of a private investment fund and includes a prospectus, scheme particulars, offering memorandum, explanatory memorandum, term sheet, application form, subscription agreement, admission document, listing particulars or any other similar document or any combination of these. Information particulars do not include the disclosure statement required for registration under Route 2;

“investment adviser” means a person who, under a commercial arrangement not being a mere contract of employment, provides the manager or the board of directors, the general partner of a limited partnership and the manager or corporate trustee of a unit trust of a private investment fund with advice as to the merits of investment opportunities available to such private investment funds whether or not they regularly exercise a discretionary power over investments for the account of that scheme;

“manager” means the person, licensed under the Law, appointed manager of a PIF, and might be appointed to the company, be the general partner of a limited partnership, or be the corporate trustee of a unit trust (appointed under a unit trust instrument or management agreement);

“principal documents” means, in relation to –

- (a) a unit trust, the trust instrument and the management agreement;
- (b) a company, the articles of incorporation of a Guernsey company (or an equivalent document under the applicable law of a non-Guernsey body corporate), the management agreement, administration agreement and the custodian agreement;
- (c) a partnership, means the limited partnership agreement, the partnership agreement, the partnership management agreement and the custodian agreement; and
- (d) a private investment fund other than a unit trust, a company or limited partnership; the documents dealing collectively with the same or similar obligations and duties as the principal documents constituting a unit trust, a company or a limited partnership and, further, the administration agreement and custodian agreement;

“qualified auditor” means a person who holds a current practising certificate issued by –

- (a) The Institute of Chartered Accountants in England and Wales;
- (b) The Institute of Chartered Accountants in Scotland;
- (c) The Institute of Chartered Accountants in Ireland;
- (d) The Association of Chartered Certified Accountants; or
- (e) Any body, outside the United Kingdom and Ireland, undertaking a similar regulatory role and having equivalent professional standards for membership as any of the bodies specified above;

“share” means a share, limited partnership interest, or unit or similar interest in a private investment fund;

“unit trust” means a private investment fund, other than a limited partnership, under which the property of the scheme is held in trust for the investors.–

- (3) The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016¹ applies to the interpretation of these rules.
- (4) A reference in these rules to an enactment should be taken to include any amendments, re-enactments (with or without modification), extensions and applications.

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¹ Order in Council No. V of 2018, as amended.

PART 7 REVOCATIONS, CITATION AND COMMENCEMENT

7.1 Revocations

7.1.1 Revocation of The Private Investment Fund Rules (1) 2021

- (1) The Private Investment Fund Rules (1),2021 are revoked.

7.2 Citation and commencement

- (1) These rules may be cited as the PIF Rules 2021.
- (2) These rules come into force on *****.

SCHEDULE 1

Private Investment Fund Registration Routes

ROUTE 1 – POI Licensed Manager

In order to register as a POI Licensed Manager PIF, the scheme must fulfil the following criteria –

- (a) the number of investors must be no more than 50 legal or natural persons holding an ultimate economic interest in the PIF, except where the investment is made by an investment manager acting as agent for a wider group of stakeholders;

Guidance Note:

This may be, for example but not exhaustively, a manager acting as agent for investors in a collective investment scheme or equivalent, pension holders in an occupational pension scheme, or government funds – whether local or sovereign.

- (b) the scheme must be limited to no more than 30 new ultimate investors being added in the preceding twelve months;
- (c) the scheme must be a collective investment scheme; and
- (d) there must be a licensee responsible for its management.

ROUTE 2 – Qualifying Private Investor

In order to register as a Qualifying Private Investor PIF, the fund must fulfil the following criteria –

- (a) all investors must fit within the definition of a Qualifying Private Investor (“QPI”);
- (b) the number of investors must be no more than 50 legal or natural persons holding an ultimate economic interest in the PIF.
- (c) any marketing must be specifically targeted to individual investors who have been identified as QPIs and the number of offers of units for subscription, sale or exchange must not exceed 200;
- (d) the fund must have a designated administrator appointed to it but there is no requirement to appoint a manager;
- (e) the designated administrator must make a declaration, to the Commission in the format required, that effective procedures are in place to ensure restriction of the scheme to QPIs; and
- (f) all investors have received a disclosure statement in the format prescribed by the Commission.

For the purposes of this Route a “Qualifying Private Investor” means an investor who is able

–

- to evaluate the risks and strategy of investing in a PIF; and
- to bear the consequences of investment in the PIF, including the possibility of any loss arising from the investment.

Qualified Private Investors must be Professional Investors, Experienced Investors or Knowledgeable Employees where –

a Professional Investor is –

- a Government, local authority, public authority or supra-national body, either in the Bailiwick or elsewhere;
- a person, partnership or other unincorporated association or body corporate, whether incorporated, listed or regulated in an OECD country or otherwise, whose ordinary business or professional activity includes, or it is reasonable to expect includes, acquiring, underwriting, managing, holding or disposing of investments whether as principal or agent, or the giving of advice on investments;
- an affiliate of a PIF or an associate of an affiliate of a PIF – where the terms “affiliate” and “associate of an affiliate” refer to financial services

businesses or financial services professionals associated, directly or indirectly, with the operation of the PIF; or

- an individual investor who makes an initial investment of not less than US\$100,000 or equivalent, where the amount invested represents no more than 25% of the individual's investable assets, into the fund;

an Experienced Investor is –

- a person, partnership, or other unincorporated association or body corporate which has in the period of twelve months, whether on their own or in the course of their employment by another person, so frequently entered into transactions of a particular type in connection with –
 - open-ended and closed-ended collective investment schemes;
 - general securities and derivatives as defined in Schedule 1 of the POI Law;

being transactions of substantial size entered into with, or through the agency of, reputable persons who carry on investment business, that he can reasonably be expected to understand the nature of, and the risks involved in, transactions of that description; or who provides a certificate from an appropriately qualified investment adviser confirming that the investor has obtained independent advice;

a Knowledgeable Employee is –

- a person who is, or has been within a period of three years up to the date of application for investment in the PIF, an employee, director, general partner, consultant or shareholder of, or to, an affiliate appointed by the PIF to advise, manage or administer the investment activities of the PIF, who is acquiring an investment in the PIF as part of their remuneration or an incentive arrangement or by way of co-investment, either directly or indirectly through a personal investment vehicle, such as a trust, for or substantially for, that person; or
- any employee, director, partner or consultant to or of any person who falls under the definition of a Professional Investor, or anyone who has fulfilled such a role in respect of any person who falls under that definition within a period of three years up to the date of application for investment in the PIF. The term “employee” only covers persons who are, or have been, employed in a relevant role and does not extend to clerical, secretarial or administrative roles.

“Offer” means an offer that is capable of acceptance and is not intended to capture pre-marketing material.

ROUTE 3 – Family Relationship

In order to register as a Family Relationship PIF, the fund must fulfil the following criteria –

- (a) all investors must share a family relationship or be an eligible employee of the family;
- (b) the PIF cannot be marketed outside the family group;
- (c) the fund must have a designated administrator appointed to it but there is no requirement to appoint a manager; and
- (d) the designated administrator must make a declaration, to the Commission in the format required, that effective procedures are in place to ensure that all investors fulfil the requirement of being related as family.

For the purposes of this Route an “**eligible employee**” means an employee of the family meeting the definition of a Qualifying Private Investor under Route 2.