

GUERNSEY FINANCIAL SERVICES COMMISSION

QUALIFYING INVESTOR FUNDS

GUIDANCE – NOVEMBER 2021

The purpose of this document is to provide guidance in respect of relevant issues relating to Qualifying Investor Funds, due diligence issues that need to be considered by Guernsey licensed service providers to such funds and the information required to be submitted to the Commission in support of an application.

Any questions in relation to this guidance, including those in respect of the Commission's regulatory approach to Qualifying Investor Funds and the responsibilities of Guernsey licensed service providers in their operation of such funds should be referred in the first instance to the Authorisations and Innovation Division of the Commission.

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BACKGROUND

Qualifying Investor Funds and Qualified Investors

1. A Qualifying Investor Fund is either an open-ended or closed-ended collective investment scheme, authorised under the Protection of Investors (Bailiwick of Guernsey) Law, 2020 (“the POI Law”).
2. Only Qualified Investors (as defined below) would be permitted to invest in a Qualifying Investor Fund.
3. A Qualified Investor is deemed able:
 - (a) to evaluate the risks and strategy of investing in a Qualifying Investor Fund; and
 - (b) to bear the economic consequences of investment in the Qualifying Investor Fund including the possibility of any loss arising from the investment.
4. Qualified Investor means: a Professional Investor, an Experienced Investor, and/or a Knowledgeable Employee as defined below.
 - (a) A Professional Investor is:
 1. a Government, local authority, public authority or supra-national body (in the Bailiwick or elsewhere); or
 2. 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 that it includes, acquiring, underwriting, managing, holding or disposing of investments whether as principal or agent, or the giving of advice on investments; or
 3. an affiliate of the Qualifying Investor Fund or an associate of an affiliate of the Qualifying Investor Fund. (The terms “affiliate” and “associate of an affiliate” are intended to refer to financial services businesses or financial services professionals associated, directly or indirectly, with the operation of the fund in question).
 4. an individual investor who makes an initial investment of not less than US\$100,000 or equivalent in the fund in question. Provided the initial test has been met, subsequent investments by the same investor may be of lower amounts.

(b) An Experienced Investor is:

a person, partnership, or other unincorporated association or body corporate which 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:

1. open-ended and closed-ended collective investment schemes and/or
2. general securities and derivatives as defined in Schedule 1 of the POI Law. (In summary, that definition includes equities, bonds, warrants, options, futures, contracts for differences and rights on any of those investments)

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 advisor confirming that the investor has obtained independent advice.

(c) A Knowledgeable Employee is:

1. a person who is (or has been within a period of three years up-to the date of application for investment in the Qualifying Investor Fund) an employee, director, general partner, consultant or shareholder of, or to, an affiliate appointed by the Qualifying Investor Fund to advise, manage or administer the investment activities of the Qualifying Investor Fund, who is acquiring an investment in the Qualifying Investor Fund as part of his 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
 2. any employee, director, partner or consultant to or of any person referred to at 4(a)2 above or anyone who has fulfilled such a role in respect of any person referred to at 4(a)2 above within a period of three years up-to the date of application for investment in the Qualifying Investor Fund. The term “employee” would only cover persons who are, or have been, employed in a relevant role and would not extend to clerical, secretarial or administrative roles.
5. Funds, which are approved as Qualifying Investor Funds, must have in place measures to ensure that they are only available to investors who fall within the above definitions. The Commission would expect any declarations provided by potential investors to confirm what type of Qualified Investor they consider

themselves to be, that is, whether they are a Professional Investor, an Experienced Investor, and/or a Knowledgeable Employee.

Commission staff will assess licensees' systems and controls in this respect as part of their post-facto monitoring of licensees.

6. The Commission does not wish to prescribe the exact requirements relating to the contents of declarations to be obtained from potential investors into Qualifying Investor Funds or the form of disclaimers that will be disclosed within the scheme particulars, offering document (or equivalent) of such a fund. However, the Commission does consider that, as a minimum, the following issues should be referred to in any such declaration or disclaimer relating to a Qualifying Investor Fund:
 - (a) An acknowledgement that the fund has been established in Guernsey as a Qualifying Investor Fund and is suitable only for those investors who satisfy the definition of a Qualified Investor as published by the Guernsey Financial Services Commission as being either a Professional Investor or an Experienced Investor or a Knowledgeable Employee.
 - (b) A representation that the potential investor satisfies the definition of a Qualified Investor and that they will not acquire an interest in the fund for the benefit of any person who is not a Qualified Investor.
 - (c) An acknowledgement that the potential investor has read and understood the fund's scheme particulars, offering document or equivalent including the risk warnings disclosed.
 - (d) An acknowledgement that investing in the subject fund may involve special risks that could lead to a loss of all or a substantial portion of any investment that the potential investor makes in the fund.

GUIDANCE

The Structure of the Fund

The Fund

1. A Qualifying Investor Fund is an open-ended or closed-ended collective investment scheme, authorised under the POI Law.
2. A Qualifying Investor Fund that is an open-ended collective investment scheme must comply with the requirements of the appropriate rules, that is the Collective Investment Schemes (Class A) Rules 2002, the Authorised Collective Investment Schemes (Class A) Rules 2008, the Authorised Collective Investment Schemes (Class B) Rules 2021 or the Collective Investment Schemes (Qualifying Professional Investor Funds)(Class Q) Rules 2021.
3. A Qualifying Investor Fund that is a closed-ended collective investment scheme must comply with the requirements of the appropriate rules, that is the Authorised Closed-Ended Investment Schemes Rules 2021.
4. Requests for modifications of the relevant rules must be made in writing to the Authorisations and Innovation Division of the Commission in accordance with the relevant provisions of the appropriate rules. Such requests should be made at least three working days in advance of the submission of the formal application for the authorisation/consent of the fund.

The Promoter and/or Investment Manager

5. The promoter and/or investment manager should be an institution regulated and in good standing, or, if conducting activities which do not require regulation, otherwise in good standing.
6. Good standing would imply that the institution itself, its directors, controllers and senior managers had not during the past 5 years been the subject of material disciplinary action by a regulator or professional body, or subject to any conviction for fraud, dishonesty or related offences of a financial nature.
7. The Guernsey licensed service provider associated with the application for authorisation under the POI Law must certify to the Commission that they have performed sufficient due diligence to be satisfied that the promoter and/or investment manager are fit and proper. In that regard, such service providers should take account of the issues referred to at 12(a), (b) and (c) below and should document their findings and conclusions accordingly.
8. For the avoidance of doubt, applications on behalf of newly formed promoters and/or investment managers will be considered. The Guernsey licensed service provider who is seeking the fund's authorisation or consent will need to consider the track record and experience of the controllers, directors and management of

such entities taking into account their previous employment history. Such previous employment history should demonstrate that the individuals possess relevant experience in relation to managing or advising on investors' funds using similar investment strategies to those that will be adopted by the Qualifying Investor Fund. The licensed service provider's consideration of these matters and conclusions arising should be documented.

9. Where applicants are aware of issues in relation to a promoter and/or investment manager (which term should be taken to include their controllers, directors and management) and associated parties, but are uncertain of their materiality or possible impact on the subject application, they should consult Commission staff prior to submitting the formal application at the time they become aware of the issue.
10. Commission staff will assess licensees' application due diligence as part of their post-facto monitoring of licensees. If the Commission were to find that declarations provided were defective, or misleading, the Commission would take action against the licensee and in appropriate cases would exclude that licensee from future participation in the self-certification programme.
11. The Commission expects each licensee to ensure that its due diligence in respect of the promoter and/or investment manager and associated parties is updated on a regular basis. The Commission will not prescribe the means by which this requirement is to be achieved but as set out in 7 above licensees should take account of the issues at 12(a), (b) and (c) below and should document their findings and conclusions. Where licensees become aware of issues in relation to a promoter and/or investment manager (which term should be taken to include their controllers, directors and management) and associated parties, but are uncertain of their materiality or possible impact on the subject Qualifying Investor Fund, they should consult Commission staff, at the time they become aware of the issue.
12. Promoters and/or investment managers (including their directors, controllers and senior managers) must be fit and proper. This can be defined as being a requirement for integrity (or honesty), competence and solvency. Guernsey licensed service providers should ensure that the following issues are covered as part of their due diligence procedures in respect of new client relationships and that their findings and conclusions are documented.

(a) Integrity

Promoters and/or investment managers (which term should be taken to include their controllers, directors and management) should be of a high reputation and standing. Poor reputation would be considered to be a negative factor.

The promoter and/or investment manager must carry on their business with prudence, professional skill and honesty.

In the case of promoters and/or investment managers with a limited history, due to the fact that they are newly or recently established, the integrity of the controllers, directors and management should be assessed in the light of previous employment and experience. It would be expected that the Guernsey licensed service provider would make direct contact with relevant individuals' previous employers as part of the necessary due diligence enquiries.

Promoters and/or investment managers would be expected to deal openly and honestly with the Commission and any other regulatory authority to whose regulation they are subject (either on a consolidated basis or directly).

(b) Solvency

Promoters and/or investment managers should be solvent. A firm regulated in another jurisdiction should also comply with the solvency, capital adequacy or financial resources requirement (as appropriate) laid down by the relevant regulatory body to which it is accountable. Past performance in this respect should also be considered to ensure that relevant requirements have been consistently met in the past.

A promoter and/or investment manager that is not regulated would be expected to maintain a surplus of shareholders' funds as disclosed in its audited financial statements. Past performance in this respect should also be considered to ensure that relevant requirements have been consistently met in the past.

Promoters and/or investment managers would be expected to maintain adequate net liquid assets such that they are able to settle their debts when they fall due.

In the case of promoters and/or investment managers with a limited history, due to the fact that they are newly or recently established (that is, not being able to produce audited annual financial statements for a period of at least 24 months), it will be necessary for the Guernsey licensed service provider to consider financial projections relating to the proposal under consideration. It will also be necessary to consider whether the controllers, directors and management of such promoters and/or investment managers have previously been responsible for considering the solvency of an entity (for example, if they held a director role or financial control function). Where individuals have been directors or held relevant positions at entities that have gone into liquidation or suffered financial loss it will be necessary to consider the role undertaken by the relevant individual in such situations.

(c) Competence

The most obvious way to demonstrate competence is to have established a favourable track record, in a business similar to that to be conducted in the Bailiwick.

The promoter and/or investment manager should be able to demonstrate an acceptable complaints history. In the case of promoters and/or investment managers with a limited history, due to the fact that they are newly or recently established, it will be necessary for Guernsey licensed service providers to consider whether the controllers, directors and management of such entities have been subject to significant complaints whilst employed by other firms.

Promoters and/or investment managers should have staff of adequate skills, knowledge and experience to undertake and fulfil their duties efficiently and effectively.

Authorisation of the Fund

1. In order to consider authorising the fund the Commission must receive a copy of the application form (Form QIF (2019), which must be signed by the proposed designated manager/administrator of the fund. The form contains the following requirements:
 - (a) Declarations to the Commission from the proposed designated manager/administrator that they have performed sufficient due diligence to be satisfied that:
 - (i) the promoter and associated parties are fit and proper;
 - (ii) effective procedures are in place to ensure restriction of the fund in question to only Qualified Investors, as defined; and
 - (iii) the economic rationale for the proposed fund and any attendant risks are clearly disclosed.

The Commission attaches great importance to these declarations. It expects applicants to be able to demonstrate that they have documentary evidence to support the declarations given, and to be able to produce that evidence immediately should the Commission request it. Applicants who cannot substantiate their applications may, as noted in paragraph 10 on page 6 of this guidance, find themselves excluded from participation in the Qualifying Investor Fund self-certification programme.

- (b) Submission of fully completed, signed Form APA/APB/APQ/APC (as appropriate) together with OPQs in respect of controllers, directors and senior managers of the promoter and fund (as appropriate);
- (c) Payment of the application fee required under the relevant fee regulations;
- (d) Submission of complete final copies of the following documents:-
 - (i) scheme particulars, prospectus, offering document or equivalent;
 - (ii) the application form, subscription agreement or equivalent;
 - (iii) constitutive documents, that is the memorandum and articles of association, trust deed or limited partnership agreement, as applicable;
 - (iv) all material agreements entered into by the fund.
- (e) For Class A open-ended schemes, a lawyer's certificate.
For Class B open-ended schemes, a lawyer's certificate or a manager's certificate.
For Class Q open-ended schemes, a manager's certificate.

- (f) The licensing under the POI Law of persons intending to carry on a restricted activity within the Bailiwick of Guernsey in connection with the fund. Reference should also be made to 3 below.
- 2. The Commission will issue the necessary authorisation under the POI Law within three working days of receipt/resolution of all of the above issues.
- 3. Should the promoter of a Qualifying Investor Fund require the establishment of a Guernsey incorporated management company it will be necessary for such company to be licensed under the POI Law before the relevant authorisation or consent can be issued in respect of the fund. The application process relating to the issue of a licence under the POI Law as amended will normally take longer than the three working days referred to at 2 above.

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