



GUERNSEY
FINANCIAL
SERVICES
COMMISSION

**CONSULTATION PAPER ON AMENDMENTS TO
THE PROTECTION OF INVESTORS (BAILIWICK OF
GUERNSEY) LAW, 1987 AS AMENDED**

30 APRIL 2010

Introduction

1. This consultation paper proposes amendments to the Protection of Investors (Bailiwick of Guernsey) Law, 1987 as amended (“the POI Law”). All of the proposed amendments reflect an extension of current provisions, as they relate to licensees under the POI Law, to collective investment schemes that are either authorised or registered under that law. The current provisions applicable to licensees are not appropriate in terms of the Commission’s regulatory responsibilities relating to collective investment schemes, which themselves are legally separate from licensees. The Commission is seeking comments from interested parties on the proposals in this paper.

The proposals outlined in this consultation paper result from the Commission’s experience over the past three years in its regulation of collective investment schemes as regulated products under the POI Law. This has been particularly relevant in cases, which are not currently in the public domain, in which enforcement action may have been considered, and where the lack of appropriate powers as set out below has hindered the Commission’s investigation and consideration of relevant issues. The proposals, if enacted, will also enable the Commission in some circumstances, potentially to apply sanctions to the directors of schemes instead of to licensees.

Prior notification of appointments of managers of licensees, and directors, partners and managers of schemes, together with the requirement to obtain the Commission’s confirmation that it has no objection to those appointments. Schedule 3 to the POI Law.

2. Section 28A of the POI Law requires that no person shall become a director or controller of a licensee which is a company or a partner in a licensee which is a partnership, unless he has notified the Commission in writing of his intention to become such a director, controller or partner and the Commission has notified him in writing that there is no objection to his becoming such a director, controller or partner.

Section 27C of the POI Law requires a licensee to notify the Commission where any person has become or ceased to be a director, controller, partner or manager of a licensee within 14 days of the day on which the licensee became aware of that fact.

The POI Law does not currently contain any equivalent provisions relating to the appointment of managers of licensees or directors, partners or managers of authorised or registered collective investment schemes under the POI Law. For the purposes of this proposal the term “manager” refers to an individual who is being appointed in such a capacity by a licensee or collective investment scheme, not the third party entity appointed manager – for example as the principal manager or designated manager – by a scheme.

The Commission considers that it would be appropriate for provisions to be included in the POI Law relating to the appointment of managers of licensees and the appointment of directors, partners and managers of collective investment schemes that are equivalent to the existing provisions relating to the appointment of directors of licensees. This would entail the requirement for an individual to notify the Commission in advance of the intended appointment and for the Commission to

consider the appointment and provide its confirmation that it has no objection before the individual may act. An individual acting in the absence of this confirmation from the Commission would be guilty of an offence as is the case for appointments to licensees. In practice, the Commission is seeking to extend the provisions currently set out in sections 27C and 28A to the POI Law to include reference to managers of licensees and these collective investment scheme related issues.

In order to provide a foundation upon which the Commission may consider these appointments, it is also proposed that Schedule 3 to the POI Law (Requirements for Authorised or Registered Collective Investment Schemes) should be extended to include provisions applicable to fit and proper persons and to the integrity and skill applicable to directors, partners or managers of collective investment schemes. In practice, the provisions of parts 1 and 2 of Schedule 4 to the POI Law will be adapted to collective investment schemes rather than licensees and the text inserted in Schedule 3. For the purposes of clarity, the appendix proposes additional wording to Schedule 3 of the POI Law.

As with Schedule 4 to the POI Law, the Commission also proposes to add general information gathering powers to Schedule 3.

Power to obtain information and documents

3. Sections 27 and 30 of the POI Law currently provide the Commission with powers to require information and documents to be disclosed to it by licensees, former licensees, applicants for licences and those persons who appear to the Commission to be carrying on controlled investment business. In addition, an individual who is, or who has been at any time directly or indirectly employed by the licensee or who has, or who has at any time had, any direct or indirect proprietary, financial or other interest in or connection with the licensee falls within the scope of these provisions. The current powers have been used on numerous occasions to allow the Commission to undertake its regulatory responsibilities, including investigations, as well as enabling the Commission in appropriate cases to assist overseas regulatory agencies who have requested assistance in respect of matters of interest or concern to them.

Collective investment schemes normally take one of three forms, being limited companies (including protected cell companies and incorporated cell companies), unit trusts and limited partnerships. In the case of the last two types, unit trusts and limited partnerships, an entity licensed under the POI Law would be acting as the trustee or general partner and the Commission would be able to seek all of the relevant information from those parties.

In the case of collective investment schemes established as limited liability companies the directors of the schemes have responsibilities as laid down by company law, regulatory obligations and, where appropriate, listing obligations. A licensee will normally act for the scheme under a legal contract to provide for example, management, administrative or custodial services, but their responsibility will be limited by that contract and the relevant regulatory obligations. Those service providers do not retain full responsibility for the operation or direction of the collective investment scheme and it may not be appropriate to seek certain information or documentation from them. Therefore, whilst it is possible to approach

a licensee under the POI Law to provide information and documents in respect of a scheme established as a company under the current provisions, the information or documents required by the Commission may not necessarily be available from that licensee. This information could include, for example, copies of any important communications between the directors, or information in relation to one or more directors which is important to the consideration of fitness and propriety.

During the Commission's review into the operation of Guernsey incorporated split capital investment trusts (a type of closed-ended investment scheme that despite its name is a limited company) several years ago, the powers under the POI Law were used to obtain factual information relating to various of the schemes. However, in the absence of legal powers to compel directors of those companies to assist us with our enquiries the only approach we could take was to make requests for voluntary assistance from a sample of directors. In the event, all of the directors approached did co-operate with our requests for assistance and met with officers of the Commission on a voluntary basis. If a director had refused to co-operate there was little that we could have done about it. Such a situation is not appropriate when, under section 2A to the POI Law, the Commission must have regard to the objectives of protecting investors, the public, and the reputation of the Bailiwick as a financial centre.

The Commission therefore proposes to extend the existing provisions under section 27 of the POI Law so that a collective investment scheme authorised or registered under the POI Law, or a relevant person – being a director, manager, or partner of that scheme – is required to provide information or documents in response to an appropriate request from the Commission. As with the current provisions the extended provisions will cover specific requests and so will not allow “fishing trips” to attempt to obtain information inappropriately.

Prohibition Orders Etc

4. Section 34E of the POI Law currently provides that, if it appears to the Commission, having regard to the provisions of Schedule 4 to the POI Law (Minimum Criteria for Licensing), that an individual is not a fit and proper person to perform functions in relation to controlled investment business carried on by a licensee, the Commission may make a prohibition order prohibiting that individual from performing any function, any specified function or any specified description or function.

The law goes on to say that a prohibition order may relate to any controlled investment business, any specified controlled investment business or any specified description of controlled investment business; licensees generally; or any specified class of licensee. The emphasis of the current legal provisions is on licensees and activities relating to licensees, as well as containing a reference to a schedule to the POI Law that is specific to licensees.

The current process relating to the making of a prohibition order is covered by the document “Decision Committee Procedures”, which is available on the Commission's website, www.gfsc.gg. Sections 34G, 35 and 36 of the POI Law provide opportunities to make representations against the decision to make a prohibition order as well as an appeal to the Ordinary Court in respect of the decision.

The Commission does not consider that the current provisions as laid down in the POI Law specifically cover directors, managers or partners of authorised and registered collective investment schemes in that capacity. In the absence of such provisions, the Commission would not be able to make a prohibition order against such individuals in circumstances where they are not fit and proper.

The Commission is therefore proposing to extend the provisions of section 34E to cover directors, managers and partners of authorised and registered collective investment schemes under the POI Law. The decision making process referred to above will apply to cover prohibition orders applicable to these individuals and the legal safeguards provided by section 34G, 35 and 36 will also then apply to provide individuals with appropriate protections in the event that the Commission is minded to take this course of action.

Sections 11C and 11D of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 permit the Commission to issue public statements and discretionary financial penalties where it is satisfied that a licensee, former licensee or relevant officer:

- (a) has contravened in a material particular a provision of, or made under, the prescribed laws (in broad terms the regulatory laws and the AML/CFT legislation); or
- (b) does not fulfil any of the minimum criteria for licensing specified in the regulatory laws and applicable to him.

“Licensee” is defined as including authorised and registered collective investment schemes as it embraces any person who holds or is deemed to hold a licence, consent, registration, permission or authorisation from the Commission. “Relevant officer” is defined as including a director, controller, partner or manager of a licensee.

With reference to paragraph (b) above, in order to ensure that the Commission has a full range of potential sanctions in respect of funds and their partners, directors and managers, the Commission is also proposing that the ability to issue public statements and discretionary penalties should extend to non-fulfilment of Schedule 3 to the POI Law by schemes and their partners, directors and managers as it is proposed to be amended in this consultation document. The Commission’s Decisions Committee Procedures referred to above would apply to the issue of these sanctions, as would the existing legal safeguards should the Commission decide to exercise these powers.

Consultation

Interested parties are asked to provide comments in writing to the Policy and International Affairs Division of the Commission by the close of business on Friday 28 May 2010. Copies of the responses will be provided to the Policy Council and the Commerce and Employment Department.

APPENDIX: PROPOSED ADDITION TO SCHEDULE 3 TO THE PROTECTION OF INVESTORS LAW

“6.(1) The applicant or scheme is a fit and proper person to hold an authorisation or registration and every person who is, or is to be, a director, controller, partner or manager of the applicant or scheme, is a fit and proper person to hold that position.

In determining whether a person is a fit and proper person to hold an authorisation or registration or a particular position, regard shall be had to –

- (a) his probity, competence, experience and soundness of judgment for fulfilling the responsibilities of a scheme or (as the case may be) of that position,
- (b) the diligence with which he is fulfilling or likely to fulfil those responsibilities,
- (c) whether the interests of clients or investors (or potential clients or investors), the interests of any other persons or the reputation of the Bailiwick as a finance centre are, or are likely to be, in any way jeopardised by his holding a authorisation or registration or that position,
- (d) his educational and professional qualifications, his membership of professional or other relevant bodies and any evidence of his continuing professional education or development,
- (e) his knowledge and understanding of the legal and professional obligations to be assumed or undertaken,
- (f) his policies, procedures and controls for the vetting of clients and his record of compliance with any provision contained in or made under –
 - (i) the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991,
 - (ii) the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999,
 - (iii) the Drug Trafficking (Bailiwick of Guernsey) Law, 2000,
 - (iv) the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002,
 - (v) the Disclosure (Bailiwick of Guernsey) Law, 2007,
 - (vi) the Transfer of Funds (Guernsey) Ordinance, 2007, the Transfer of Funds (Alderney) Ordinance, 2007 and the Transfer of Funds (Sark) Ordinance, 2007,
 - (vii) any legislation implementing European Community or United Nations sanctions and applicable in the Bailiwick, and
 - (viii) any other enactment prescribed for the purposes hereof by regulation of the Commission, and

- (g) his policies, procedures and controls to comply with any rules, codes, guidance, principles and instructions referred to in paragraph 6(2).
- (2) Without prejudice to the generality of subparagraph (1), regard may be had to the previous conduct and activities of the person in question and, in particular, to any evidence that he has –
- (a) committed any offence, and in particular any offence involving fraud or other dishonesty or involving violence,
 - (b) contravened any provision contained in or made under–
 - (i) this Law,
 - (ii) the regulatory Laws,
 - (iii) any enactment relating to money laundering or terrorist financing (including, for the avoidance of doubt, rules, instructions and guidance issued by the Commission in relation thereto), or
 - (iv) any other enactment appearing to the Commission to be designed for protecting members of the public against financial loss due to –
 - (A) dishonesty, incompetence or malpractice by persons concerned in the provision of regulated activities (within the meaning of the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000), banking, insurance, investment or other financial services, or
 - (B) the conduct of discharged or undischarged bankrupts or persons who are otherwise insolvent (including persons who have been declared in a state of "désastre"),
 - (c) engaged in any business practices (whether unlawful or not) –
 - (i) appearing to the Commission to be deceitful or oppressive or otherwise improper, or
 - (ii) which otherwise reflect discredit on his method of conducting business or his suitability to carry on business regulated by this Law, or
 - (d) engaged in or been associated with any other business practices or otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgement.
- (3) For the purposes of subparagraph (2) and for the avoidance of doubt –
- (a) "conduct and activities" includes any conduct, activity or omission in any jurisdiction,
 - (b) "offence" includes an offence under the law of another jurisdiction which would be an offence in the Bailiwick if the conduct, activity or omission constituting the offence occurred in the Bailiwick, and

- (c) "enactment" includes any primary or secondary legislation of any jurisdiction in the British Islands or elsewhere.
- 7. (1) The business of the applicant or scheme is or, in the case of a person who is not yet carrying on business regulated by this Law, will be carried on –
 - (a) with prudence and integrity,
 - (b) with professional skill appropriate to the nature and scale of his activities, and
 - (c) in a manner which will not tend to bring the Bailiwick into disrepute as an international finance centre.
- (2) In conducting his business the applicant or scheme shall at all times act in accordance with the following documents issued by the Commission –
 - (a) the Principles of Conduct of Finance Business,
 - (b) any rules, codes, guidance, principles and instructions issued from time to time under this Law and any other enactment as may be applicable to him.
- 8. The applicant, scheme and any person who is, or is to be, a director, partner or manager of the applicant or scheme, shall supply such information as the Commission may reasonably require for the purpose of assessing compliance with the Requirements for Authorised or Registered Collective Investment Schemes set out in this Schedule.”