

**GUERNSEY FINANCIAL SERVICES COMMISSION**  
**REGISTERED CLOSED-ENDED INVESTMENT FUNDS**

**GUIDANCE**

The purpose of this document is to provide guidance in respect of relevant issues relating to Registered Closed-ended Investment 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 Registered Closed-ended Investment Funds and the responsibilities of Guernsey licensed service providers in their operation of such funds should be referred in the first instance to the Applications Team within the Investment Business Division of the Commission.

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## **BACKGROUND**

### **Registered Closed-ended Investment Funds**

A Working Party chaired by Advocate Peter Harwood was appointed in 2005 to consider investment sector legislation and regulation and to report to the Guernsey Financial Services Commission and to the Commerce and Employment Department of the States of Guernsey. In its report published in June 2006 the Working Party proposed the introduction of the concept of Registered Investment Funds, being either open-ended or closed-ended investment funds that would not be regulated by the Guernsey Financial Services Commission.

The proposals made it clear that regulated categories of funds would be funds that are capable of being offered by the issuer directly to the public in Guernsey whereas Registered Funds may not be offered directly by the issuer to the public within Guernsey, but may be listed.

All Registered Funds would have to comply with the minimum prospectus disclosure requirements required by a new proposed generic “prospectus” law applicable to all Guernsey domiciled entities, whether they be investment funds or trading or commercial entities. The introduction of a new generic “prospectus” law will be the subject of detailed consultation and the legislative process. Until such legislation is implemented it is proposed to utilise the existing disclosure requirements set out in the Commission’s application Form APC, which is currently submitted by closed-ended investment funds seeking consent under the Control of Borrowing Ordinance.

All Registered Funds would have to appoint a local licensed administrator. Each Registered Fund through its appointed administrator would be required to make an initial filing with the Commission and submit notifications to the Commission in respect of changes to the Fund, together with annual financial statements and quarterly statistical information. The administrator would be required to certify that it has undertaken due diligence on the promoter of the registered Fund. The Commission would need to establish clear guidelines to establish minimum criteria for the due diligence to be undertaken by the administrator. This document meets that requirement.

There should be a standard rubric to be incorporated on any Prospectus, Information Memorandum, Offering Circular or similar document issued by a Registered Fund and also in the annual report and accounts of a Registered Fund to the effect that the Fund is a Registered Fund and that the Commission has relied upon specific warranties provided by the Guernsey licensed service provider when issuing the relevant consent under the Control of Borrowing Ordinance. Evidence that such rubric has been incorporated in the relevant documentation would need to be submitted to the Commission. Reference should be made to the relevant requirements set out in this document, together with the associated form to be submitted in connection with an application under the Control of Borrowing Ordinance in respect of a Registered Closed-ended Investment Fund.

## **GUIDANCE**

### **The Structure of the Fund**

1. A Registered Closed-ended Investment Fund for which consent has been granted under the Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959 as amended can be a limited company (including a protected cell company or incorporated cell company), a limited partnership or a unit trust.

### **The Promoter and/or Investment Manager**

2. 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.
3. 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.
4. The Guernsey licensed service provider associated with the application for consent under the Control of Borrowing Ordinance 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 9(a), (b) and (c) below and should document their findings and conclusions accordingly.
5. 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 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 Registered Closed-ended Investment Fund. The licensed service provider's consideration of these matters and conclusions arising should be documented.
6. 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.
7. Commission staff will assess licensees' application due diligence as part of their post-facto monitoring of licensees. If the Commission were to find that warranties provided were defective, or misleading, the Commission will consider taking action against the licensee and in appropriate cases would

exclude that licensee from future participation in the self-certification programme.

8. 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 4 above licensees should take account of the issues at 9(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 senior management) and associated parties, but are uncertain of their materiality or possible impact on the subject Registered Closed-ended Investment Fund, they should consult Commission staff, prior to the submission of a formal application to the Commission, at the time they become aware of the issue.
9. 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 senior 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 senior 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.

## **Consent under the Control of Borrowing Ordinance**

1. In order to consider granting the requisite consent to the Registered Closed-ended Investment Fund the Commission must receive a copy of the application form (Form REG), which must be signed by the proposed administrator of the fund. The form contains the following requirements:
  - (a) Warranties to the Commission from the proposed 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 that the fund is not offered directly by the issuer to the public within the Bailiwick of Guernsey. For the purposes of this framework the public means any person not regulated under any of Guernsey's financial services regulatory laws; and
    - (iii) the status of the Registered Closed-ended Investment Fund is specifically referred to in the prospectus, offering document or equivalent such that neither the Commission nor the States of Guernsey Policy Council have reviewed the prospectus, offering document or equivalent and that neither the Commission nor the States of Guernsey Policy Council takes any responsibility for the financial soundness of the fund or for the correctness of any of the statements made or opinions expressed with regard to it.

**The Commission attaches great importance to these warranties. It expects applicants to be able to demonstrate that they have documentary evidence to support the warranties 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 7 on pages 3 and 4 of this guidance, find themselves excluded from participation in the Registered Closed-ended Investment Fund self-certification programme.**

- (b) Submission of fully completed, signed Forms GFA and APC together with Forms PQ 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 fees regulations;
- (d) Submission of certified complete final copies of the following documents:-
  - (i) 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) The licensing under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 as amended 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 consent under the Control of Borrowing Ordinance within three working days of receipt/resolution of all of the above issues. Following receipt of the formal application made by the licensed service provider in respect of the proposed Registered Closed-ended Investment Fund the Commission will conduct limited enquiries into the parties to be associated with the fund and will consider the fund's investment objectives. Any concerns arising from these enquiries and consideration will be raised with the Guernsey licensed service provider and may, in extreme cases, delay issue of the relevant consent. Where licensees have questions about any aspect of the proposed fund and its operation or 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 Registered Closed-ended Investment Fund, they should consult Commission staff, prior to the submission of a formal application to the Commission, at the time they become aware of the issue. This will assist Commission staff in expediting the formal application. The Commission's limited enquiries and consideration referred to above should not be considered to be a substitute for the licensee's responsibilities referred to in this document.
3. Should the promoter of a Registered Closed-ended Investment Fund require the establishment of a Guernsey entity that will undertake controlled investment business in connection with the fund then it will be necessary for such company to be licensed under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 as amended 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 Protection of Investors (Bailiwick of Guernsey) Law, 1987 as amended will normally take longer than the three working days referred to at 2 above.

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