THE AUTHORISED COLLECTIVE INVESTMENT SCHEMES (CLASS B) RULES, 2013 ("THE CLASS B RULES")

Feedback on Consultation

The Roles of the Principal Manager, Designated Manager, Trustee and their interaction

The consultation revealed interconnected 'themes' that were causing concern: the role of the trustee and its responsibilities, in respect of the scheme itself and its oversight of the manager; the role of the principal manager and designated manager; and how all three interact. Consequently a meeting was held between Commission executives and representatives of the Guernsey Investment Fund Association. The fund administrators and trustees present were representative of the differing views expressed during the consultation process. I expand on the outcomes of this part of the consultation below.

For the purposes of the Class B Rules alone, the concept of designated administrator has been introduced; this term is then tied back to the term designated manager as defined in the Law. This more closely reflects the practice that designated managers generally only administer the funds, as distinct from participating in the decision-making process of the funds. Until such time as the Law is amended the term "designated manager" remains.

Concern was also expressed that the Commission was trying to extend its reach to the regulation of funds' investment managers who are domiciled outside Guernsey. This was not the intent within the Class B Rules, nor within the Guidance Note at 2.01, which has been amended to reflect both points.

The role of the designated trustee was also the source of much comment. As stated in the consultation paper, a key feature proposed in the draft Class B Rules was sufficiency of disclosure to investors, allied to a fair opportunity to redeem holdings in light of proposed changes. The result has been to remove certain provisions, included in the draft rules issued for consultation, that required the prior approval of the designated trustee. Rather, the designated trustee must be notified and sufficient disclosure, and opportunity to redeem, be given to investors regarding relevant matters. It should be noted that none of these amendments in any way change the duty of oversight that the designated trustee has over the management and administration of the Class B fund.

A number of correspondents commented on draft Rules 2.14, 2.15 and 2.16. Despite the varying views, a consensus was reached at the meeting referred to above that, as a general principle, designated trustees should not be responsible for the preparation of scheme particulars, nor are they therefore liable to pay compensation for misleading statements contained therein. Further the Commission accepted representations that the draft Class B Rules as issued for consultation were not consistent with the equivalent provisions set out under the Authorised Collective Investment Schemes (Class A) Rules 2008.

The exception to the above arises in the instance where a Class B fund is a unit trust. Where there is no principal manager, the designated trustee must take responsibility. In fact, even with a principal manager the legal position points to the designated trustee as responsible. However, the Commission accepts the commercial reality that who prepares – and who takes responsibility for – the scheme particulars is somewhat different. Therefore, providing the contractual position diverts the responsibility away from the designated trustee and onto the principal manager, the Rules will not impede on the commercial position.

In conclusion, the responsibilities placed on the designated trustee will only be fulfilled through proper enquiry, and Rule 4.01(6) obliges the manager, directors of company schemes and the designated administrator to supply all documents that the trustee may reasonably require.

Comments to other themes raised by the Commission in the draft rules

- Updated requirements to take account of The Companies (Guernsey) Law 2008 ("the Companies Law").

  Some respondents highlighted additional areas for conformity, which have been incorporated within the Class B Rules.

  Some respondents queried why unit trusts or limited partnerships should be expected to comply with the provisions of the Companies Law contained in, for example, Part 8. The Commission does not consider these requirements to be particularly onerous such as to warrant variation of these requirements.

- Rule 2.10 which removes the requirement under section 4.06(4) of the current Class B Rules for Commission approval to any amendments to the authorised scheme's investment, borrowing or hedging restrictions, replacing it with a notification requirement only.

  While there were a few respondents who objected most respondents were in favour of this change.

- Rules 2.07(3) and 4.05(4) exemplify the change in emphasis within the Draft Rules to a disclosure-based requirement and the role of the designated trustee rather than a requirement to obtain specific approval from the Commission.

  This is discussed more fully above. Both Rules now refer to a notification to the designated trustee.

- Addition of guidance in Part 3 of the Draft Rules clarifying which parties can act as registrar to an authorised Class B scheme, which in itself is a change from the current regime that is focussed on the designated trustee, albeit that function is currently often delegated to another party.

  Respondents asked for greater clarity in the Guidance Note and this has now been given. The designated trustee retains an oversight role, even where the registrar is not the designated administrator.

Responses to the questions raised by the Commission

- The concept of an 'approved law firm'.

  The general view expressed by respondents was that the existing term from the previous Class B Rules, in effect it referring to any firm with a place of business in Guernsey, should be retained.

- Should the definitions include the requirement that a 'qualified auditor' has a place of business in Guernsey - as currently worded? This is the current position of, for example, the Licensees (Conduct of Business) Rules, 2009.

The general view expressed by respondents was that the wording in the Licensees (Conduct of Business) Rules, 2009 should be retained.

- Rule 2.07(3) – has been amended from the current requirement, in order to require the approval of the designated trustee rather than the Commission to fees or charges paid out of the scheme property.

  Responses varied to this proposed amendment. Designated trustees were generally concerned with how a level of materiality would be achieved and the responsibility for assessment. The suggestion, which the Commission has adopted, is that investors have sufficient opportunity to redeem prior to any change and the trustee is notified of any change rather than having to approve them.

- Rule 2.08(9) attempts to prevent double charging – is the provision for prevention wide enough?

  In accordance with a common consensus, the Class B Rules have been changed to proscribe any form of double charging – including ongoing periodic fees. The exception to this relates to feeder funds, which allows double charging, providing there is adequate disclosure within the scheme particulars i.e. the applicable fees at all levels should be disclosed specifically.

- Whether the requirements of Rule 3, which cover the issuing of physical certificates (for example, 3.01(7)(b) and 3.02), are still necessary in light of current operating conditions, not just for future schemes but existing Class B schemes.

  Although respondents confirmed the Commission's assumption that the issuing of physical certificates is now rare, the view was that these requirements should be retained.

- Rule 3.04 retains (but in a modified form) a provision concerning default by a holder – is this Rule required or should it be removed, leaving the coverage to the discretions disclosed in the scheme particulars and provided for in principal documents?

  There were no strong views expressed by respondents on this proposal and so the Rule has stayed unchanged.

- The Draft Rules retain (at Rule 4.04) – 'Record of Units held by the Manager'; the Commission would welcome views on whether such a section is still necessary.

  There were no strong views expressed by respondents on this proposal and so the Rule has stayed unchanged.

- The Commission has been asked, on the existing Class B Rules, for derogations so as not to prepare consolidated accounts; should this be a provision within Part 6?

  Whilst a number of respondents commented that this should be provided for we have accepted alternative representations that a failure to prepare consolidated accounts would most likely lead to a qualified audit opinion, the accounts not being true and fair.

- The working party questioned whether Rule 7.02 was required; with the exception of 7.02(2) this is a permissive rather than obligatory Rule; the Commission would welcome specific comments on this point.

  In accordance with the weighting of responses received, we have retained Rule 7.02 (with the exception of Rule 7.02(2), below).

- Rule 7.02(2) now makes it mandatory for a resolution for an increase in the manager's periodic charge.

  This requirement has been changed. In its place are provisions that allow investors sufficient opportunity to redeem.

I would like to place on record my gratitude to everyone who took the opportunity to respond to this consultation. In addition I would like to thank the Working Party and the participants in the roundtable discussion.

Following approval of the Class B Rules, they have, today, been placed on the Commission's web site in final form (Click Here). The rules come into operation on 2 January 2014.

Carl Rosumek
Director of Investment Supervision and Policy
2 October 2013