

A Guide to Funds and Private Equity in Guernsey



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Introduction to Guernsey

The Bailiwick of Guernsey comprises the inhabited islands of Guernsey, Alderney, Sark, Herm, Jethou and Brecqhou. The islands are situated in the Bay of St. Malo, with their closest point being 8 miles (13 km) from the Cherbourg peninsula. The Bailiwick is in the same time zone as the United Kingdom.

The islands are an “appendage” or possession of the Crown and allegiance is given to Queen Elizabeth the Second. As such, the Bailiwick of Guernsey is part of the British Isles but independent of the United Kingdom. The island of Guernsey has its own government known as the States of Deliberation (“**the States**”) which legislates at insular and local levels on all matters, including the raising and expenditure of taxes. The United Kingdom government in Westminster may legislate, with consultation, on behalf of the islands on matters relating to defence, foreign policy and broadcasting.

The States is also the executive body in the island and, following a fundamental reform of the machinery of government in Guernsey approved by the States in 2003, the States now has 10 departments responsible for, among other things, health, home affairs, education, the environment and social services. Each department is headed by a minister and each minister has a seat on the Policy Council which is chaired by the Chief Minister who is elected by the States. The Policy Council has ultimate responsibility for the policy of the States and will oversee the interaction between the various departments.

Guernsey is neither a member nor an associate member of the European Union. The island’s relationship with the European Union is governed by Protocol number 3 to the Treaty of Accession of 1972. The effect of this Protocol is that the island falls within the common customs area and the common external tariff, but is not required to comply with E.U. directives and is free to maintain an independent fiscal policy.

About Carey Olsen

With more than 300 staff, including 130 lawyers, Carey Olsen is a leading law firm in the Channel Islands. Our pan-island presence in Guernsey and Jersey and full-service capability enable the firm to deliver legal solutions across the Channel Islands. Our London Office has a permanent team of Guernsey and Jersey lawyers and provides a convenient base for connecting with our City contacts and clients.

Our core services include corporate and commercial, investment funds and private equity, banking and finance, restructuring and insolvency, trusts and fiduciary, commercial and residential property, employment, competition, litigation and dispute resolution.

Fund Regulations in Brief

- No fund can be established in Guernsey without authorisation or registration with the Guernsey Financial Services Commission (the “**GFSC**”).
- A promoter who is new to Guernsey must be able to show a demonstrable track record in the promotion and management of funds.
- No Guernsey body may provide services to a fund without a licence.
- Administrators, custodians, fund managers and other service providers to funds, licensed by the GFSC, are subject to certain minimum capitalisation requirements and other regulations.
- No person from outside Guernsey may provide investment services from within Guernsey without a licence.
- All open-ended funds must appoint a manager and a custodian incorporated and resident in Guernsey (but subject to certain concessions in respect of hedge funds as set out below).
- The acceptance of subscription monies from prospective investors is subject to international standard “know your customer” regulations.

- Open-ended and closed-ended funds may be established as “registered” or “authorised” funds. A registered fund is registered in Guernsey within three business days. Authorised funds may also be fast tracked under the QIF (“qualifying investor fund”) regime described below.

Authorised open-ended funds may be established as Class A, B or Q funds.

Investment Business

Investment business in Guernsey is regulated by the GFSC. The GFSC was established by Guernsey’s government by statute as a body corporate in 1988 with the task of taking such steps as it considered necessary for the development and effective supervision of finance business in the Bailiwick of Guernsey and as well as regulating investment business, it is also responsible for the supervision of banks, insurance companies and fiduciaries.

Funds may be either closed-ended or open-ended collective investment schemes. No fund can be established as a collective investment scheme in Guernsey without authorisation by the GFSC (as an “authorised” fund) or registration with the GFSC (as a “registered” fund) under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (as amended) (the “**POI Law**”).

Collective Investment Schemes

Under the POI law, a collective investment scheme is any arrangement relating to property of any description (including money) the purpose or effect of which is to enable investors to participate in, or receive profits or income arising from, the acquisition, holding, management or disposal of the property, or sums paid out of such profits or income; and in which the investors do not have a day-to-day control over the management of the property to which the arrangement relates (whether or not they have any right to be consulted or give directions); and under which (i) the contributions of the investors and the profits or income out of which payments are to be made to them are pooled; or (ii) the property in question is managed as a whole by or on behalf of the person responsible for its management. A collective investment scheme is open-ended if shareholders have an absolute right to sell their interest at a price related to the net asset value. All funds which fall within the definition of a collective investment scheme under the POI Law must be regulated by the GFSC.

Authorised Funds

Open-Ended Authorised Funds

There are three classes of authorised open-ended funds: Class A, Class B and Class Q. Open-ended funds may also be regulated by the GFSC as “registered” funds or “fast tracked” as “authorised” funds as a “qualifying investor fund” (QIF). Both the QIF and “registered” fund application processes enable a fund’s approval/registration to be processed by the GFSC within three business days.

Class A Schemes

‘A Schemes’ are those which comply with a detailed rule book which enables them to be recognised under the UK Financial Services and Markets Act 2000 so that they can be promoted to the public in the United Kingdom in the same way as if they were UK authorised unit trusts. It is not possible, given the prescriptive nature of the A Scheme Rules, for a hedge fund to be established as an A Scheme.

Class B Schemes

‘B Schemes’ are usually, but not necessarily, those which are marketed on a restricted basis to institutional or professional investors. The rules governing B Schemes lay down requirements as to the information which must be contained in the principal documents and the scheme particulars but do not impose specific restrictions on investment and borrowing powers and are generally designed to be flexible whilst at the same time reflecting best practice. The overriding requirement is that the assets of a B Scheme must be invested with the aim of spreading risk so the manager must adopt and adhere to an investment objective and investment and borrowing restrictions designed to achieve this. The following is a summary of the rules regulating Class B Schemes:

- (a) **Advertising and marketing of the scheme.** The contents of any material must be approved by the custodian.
- (b) Certain expenses may be paid out of the scheme property in any event, e.g. the periodic charge payable to the manager and the custodian’s fees and expenses (provided in the latter case those expenses are authorised by the principal documents by which the scheme is constituted). All other expenses to be charged to the scheme property must be disclosed in the scheme particulars.

- (c) **Investment objectives and powers.** The scheme property must be invested with the aim of spreading risk and shall only comprise assets permitted by the principal documents and described in the scheme particulars.
- (d) The manager and the custodian are obliged to take reasonable steps and exercise due diligence to avoid investments in contravention of the preceding paragraph and generally must take steps immediately to rectify any transgression.
- (e) Units in another collective investment scheme managed by the manager or persons in the same group may not be acquired for the scheme unless the manager ensures that any preliminary charge payable on the issue of those units or upon the redemption of the same is not being suffered by the scheme.
- (f) **Borrowing and hedging powers.** No hedging transaction or borrowing may be undertaken unless permitted by the principal documents and disclosed in the scheme particulars. The manager and custodian are obliged to take reasonable steps and exercise due diligence to avoid contravention of any limits.
- (g) **Title to units and dealings in units.** There are provisions concerning the establishment of a register of holders and the issue and contents of certificates. There are also provisions relating to the transfer of shares by holders.
- (h) **Pricing.** The manager and the custodian must comply with the principal documents and the scheme particulars in relation (amongst other things) to pricing of shares.
- (i) **Management of the scheme.** It is the duty of the manager to manage the scheme and make investment decisions and it is the duty of the custodian to take reasonable care to ensure that the scheme is properly managed by the manager within the terms of the principal documents and the most recently published scheme particulars.
- (j) The directors must not give any directions or exercise any powers etc. which would cause the scheme to operate otherwise than in accordance with the principal documents and the scheme particulars or the Class B Rules.
- (k) The manager is entitled to discharge all the powers etc. of the directors subject to any directions from time to time given by the directors and if so required the directors must execute such deeds and documents as may be necessary for that purpose.

- (l) **Auditors.** The directors (or members) shall appoint a qualified auditor subject to the approval of the custodian.
- (m) The manager is obliged to have the accounts audited by the auditor.
- (n) **Availability of documents.** The manager and the custodian must each make a copy of the principal documents and the most recently published scheme particulars available for inspection by the public free of charge during office hours at their principal places of business in Guernsey and in any other state or territory as required under local laws and must allow any person to obtain a copy of the same upon payment of a reasonable fee.
- (o) **Duties of custodian.** The custodian must take into its custody and keep under its control all of the scheme property and hold it in trust in accordance with the principal documents and the Class B Rules, although it may arrange for a person to become the registered holder of the scheme property title to which is in registered form subject to making and repeating certain enquiries and ensuring that title is held by the registered holder so as to protect the rights of the custodian.
- (p) The custodian must take reasonable care to ensure that the methods used by the manager in calculating prices for shares accord with the principal documents and the scheme particulars.
- (q) **Alteration to scheme.** The manager is obliged to give the GFSC written notice of any proposed alteration to the scheme or to replace the custodian and the custodian is obliged to give notice of any proposal to replace the manager; generally no effect may be given to such a proposal without the consent of the GFSC.
- (r) **Voting.** All rights of voting conferred by any of the scheme property shall be exercised or not in such manner as the manager may direct.
- (s) **Retirement.** The custodian is not entitled to retire voluntarily other than upon the appointment of a new custodian.
- (t) There are particular provisions relating to the replacement and retirement of the manager.
- (u) **Conflicts.** There are provisions relating to the circumstances in which the manager, the custodian and their associates may deal as principals regarding the scheme property.
- (v) **Income and Reports.** On or before each annual or interim income allocation date the directors must determine the amounts of income property available for income allocation in accordance with the principal documents and scheme particulars.
- (w) On or before each interim allocation date and each annual allocation date the company shall unless requested otherwise send to each holder a statement prepared by the manager showing the calculation of the amount of income to which it is entitled and how much represents equalisation if any.
- (x) The manager must in relation to each accounting period prepare a report and accounts containing certain specified matters.
- (y) The annual report must be signed on behalf of the company in accordance with applicable law (and by two directors of the manager).
- (z) The manager is bound to publish the annual report within six months of the end of the annual accounting period and must send a copy to each holder.
 - (aa) The manager and the trustee must make the most recent annual report available for inspection by the public free of charge during ordinary office hours to each place specified for that purpose and the most recent scheme particulars and the manager must send a copy of the GFSC.
 - (bb) The trustee must enquire into the conduct of the manager and the directors in respect of the management of the scheme during each annual accounting period and report on that to the holders.
 - (cc) **Meetings.** There are provisions relating to the convening of meetings; attendance, voting and quorum; and in respect of notices.
 - (dd) **Termination.** There are provisions as to when the scheme must be wound up being principally when its authorisation is revoked or the members pass a special resolution to that effect.
 - (ee) **Notices.** There are provisions relating to the service of notices and documents.
 - (ff) **Scheme Particulars.** There are provisions relating to the content of scheme particulars and prospectuses.

- (gg) The manager and the directors are responsible for the scheme particulars and the manager and the directors are liable to pay compensation in respect of any entry or misleading statement or omission.

Class Q Schemes

Schemes of Class Q may only be marketed to qualifying professional investors and are subject to a relatively short set of rules which do not lay down any requirements as to what must be included in a scheme's principal documents and which prescribe much simpler requirements than the B scheme rules as to the information which must be made available to prospective investors. As with B schemes, the property of a Q scheme must be invested to provide a spread of risk and in accordance with the limits or restrictions disclosed in the information particulars.

For the purposes of the Class Q Rules a "qualifying professional investor" is:

- (a) a government, local authority or public authority in the Bailiwick of Guernsey or elsewhere; or
- (b) a trustee of a trust which, at the time of investment, has net assets in excess of £2,000,000 (or currency equivalent); or
- (c) a body corporate or limited partnership, if it or any holding company or subsidiary of it has, at the time of investment, net assets in excess of £2,000,000 (or currency equivalent); or
- (d) an individual who has, together with any spouse, at the time of investment, a minimum net worth (which excludes that individual's main residence and household goods) of £500,000 (or currency equivalent).

The A, B and Q classifications of open-ended funds described above may only be established as "authorised" funds.

GFSC Approval Process for "authorised" open-ended or "authorised" closed-ended Funds

The traditional procedure for obtaining approval for an authorised fund involves three stages. The "traditional" process takes between four to six weeks to obtain the GFSC approval to the authorised fund. Alternatively an authorised fund may be fast tracked as a "qualifying investor fund" or QIF which means that the GFSC's approval is granted within three business days. This is discussed in detail below.

Stage 1

The first stage is an application for approval in principle involving the completion and submission of a form GFA setting out amongst other things, details of the nature and purpose of the scheme, the names and addresses of the proposed manager and trustee/custodian and the fees to be borne by the scheme. If the promoter is new to the island there is also a GFSC New Promoters Checklist which must also be submitted and the new promoter will first have to satisfy the GFSC as to its acceptability before the GFSC will go on to consider whether it is prepared in principle to approve the proposed fund. The forms in question can be downloaded from the GFSC's website, www.gfsc.gg.

The GFSC's policy in relation to new promoters is one of selectivity, which means that only promoters of the first rank are encouraged. Normally, a demonstrable track record in the promotion and management of funds is required, and the authorisation of intended promoters by regulatory authorities in other jurisdictions is not in itself generally sufficient. The GFSC's due diligence process will usually involve scrutiny of the most recent report and accounts of the applicant, or, if the applicant is newly established, the personal backgrounds and investment experience of the individuals behind the applicant. The GFSC will also make enquiries with any relevant regulators in the applicant's home jurisdiction and this can sometimes delay the approval process as some regulators can be slow to respond. Newly established fund management groups may also be approved by the GFSC. The GFSC would look at the track record of the individuals controlling and managing the operations of the promoter in determining whether it is fit and proper and has the necessary track record.

Stage 2

Assuming the promoter is acceptable to the GFSC and outline approval for the proposed fund is given, the next stage is an application for interim consent accompanied by a copy of the proposed prospectus or explanatory memorandum in as near to final form as possible. When all the documents are in final form and any queries raised by the GFSC have been dealt with to the GFSC's satisfaction, the application for final consent is made by letter accompanied by copies of all the material documents certified to be true copies of the originals and a printed copy of the prospectus or explanatory memorandum.

Qualifying Investor Fund (QIF) Regime

There is also a three day approval process for authorised funds established as “qualifying investor funds” in Guernsey. This fast track approval process is available to all authorised funds, whether open or closed-ended. This fast track process is similar to the registration by the GFSC of a “registered” fund described in further detail below.

GFSC Supervision of Self-Certification

The criteria which must be met in order to establish a QIF in Guernsey is set out in a GFSC Guidance Note dated February 2005. It should be noted that the GFSC strictly monitors the self certification by administrators of fast tracked funds. Regular checks are undertaken and steps taken to ensure that administrator’s due diligence standards are maintained. There is general recognition that the self certification process has to be properly regulated by the GFSC to ensure that the reviews undertaken by a Guernsey fund administrator are at least as comprehensive as those undertaken by the GFSC.

QIFs must only be offered to “qualified investors”. The QIF’s Guernsey administrator must be able to certify compliance with the GFSC’s QIF requirements. Approval will be given by the GFSC on the basis of the administrator’s self-certification. The Guernsey administrator will have an ongoing responsibility to monitor compliance with the matters it has self-certified and to ensure its rationale for the self-certification is clearly documented.

Definition of a Qualified Investor

A “qualified investor” is defined as a “professional investor”, an “experienced investor” and/or a “knowledgeable employee”. Definitions of the different classifications of investors are referred to as including:

- (a) a “professional investor”: is any individual investing at least US\$100,000 (or currency equivalent) (subsequent investments by that individual may be for lower amounts) or a person whose ordinary business or professional activity includes underwriting, managing or acquiring investments whether as principal or agent or the giving of advice on investments. The definition also includes financial services businesses or financial service professionals associated directly or indirectly with the operation of the QIF;

- (b) an “experienced investor” is a person who has in any period of twelve months (or in the course of employment by another person) so frequently entered into transactions of a particular type in connection with investment funds or general securities and derivatives of a substantial size 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, investments of that kind. Alternatively, this requirement is satisfied if an appropriately qualified investment adviser confirms that the investor has obtained “independent advice”;
- (c) a “knowledgeable employee” is: any employee, director, partner or consultant of an appropriately qualified “professional investor” or anyone who has fulfilled such a role within a period of three years up to the date of the application for investment in the QIF. The term “employee” will not cover, inter alia, clerical, secretarial or administrative roles. A “knowledgeable employee” will also include any employee, director, general partner, consultant or shareholder of an affiliate appointed by the QIF to advise, manage or administer the investment activities of the QIF and whose investment in the QIF is part of his remuneration or incentive arrangement or co-investment in the QIF.

The GFSC will expect a representation to be made by the relevant investors in the fund’s application form that the requirements described above in relation to the definition of a “qualified investor” have been satisfied.

Promoters and/or Investment Managers of QIFs

The administrator will also need to certify in relation to the promoter and/or investment manager of the QIF that it is of sufficient “good standing”. Applications for newly formed promoters/investment managers will also be acceptable, provided that the administrator is also able to certify the track record of the relevant principals.

The GFSC will also require that promoters/investment managers are “fit and proper”. The basis of how the relevant promoter/investment manager will qualify as “fit and proper” is set out in detail in the relevant GFSC QIF Guidance Note.

Authorisation of the Fund

Application to the GFSC is made by submitting the relevant offer document, form QIF, the constitutional and third party documents, a cheque in payment of the GFSC’s fee and the certificate required for certain classifications of funds.

Registered Funds

In February 2007, the GFSC introduced a new “registered” fund regime for fast-tracking closed-ended funds. This new regime was extended to open-ended funds in December 2008. The focal point of the regime is that the GFSC will register a fund within three working days, with the proviso that the relevant fund administrator has certified to the GFSC that a thorough due diligence exercise has been conducted and that the documents comply with the disclosure requirements of the Prospectus Rules 2008.

Application Form

Under the registered fund regime, a service provider can apply for registration by the GFSC on behalf of a limited company (including a protected cell company or incorporated cell company), a limited partnership or a unit trust. The GFSC application (Form REG), which must be signed by the service provider, contains ‘inter alia’ the following requirements/warranties:

- (a) confirmation the service provider has performed sufficient due diligence to be satisfied that the promoter and associated parties are fit and proper;
- (b) confirmation that 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 unless it is offered by someone licensed under the POI Law. Under the regulations, “public” means any person not regulated under any of Guernsey’s financial services regulatory laws; and
- (c) confirmation that the service provider is content that the disclosures in the fund’s prospectus/offer document meet the requirements set out in the GFSC’s Prospectus Rules and includes the GFSC’s standard legend.

The GFSC attaches great importance to these requirements. It expects the service provider to be in a position to have documentary evidence to support these requirements and be able to produce such evidence immediately at the request of the GFSC. Applicants who cannot substantiate their applications will be excluded from participation in the registered funds self certification programme.

The documents should also be lodged with the GFSC:

- (a) fully completed and signed GFSC form REG together with forms PQ in respect of the controllers, directors and senior managers of the promoter and the fund;
- (b) payment of the application fee;
- (c) submission of complete, final and certified copies of the following documents:
 - (i) prospectus, offering documents or equivalent;
 - (ii) the application form, subscription agreement or equivalent;
 - (iii) constitutive documents, that is the memorandum and articles of incorporation, trust deed or limited partnership agreement, as applicable; and
 - (iv) all material agreements entered into by the fund.

On receipt of all of the above documentation, the GFSC will register the fund within three working days. The service provider is encouraged to liaise with the GFSC in advance if it has any concerns about the fund to avoid any potential delays in the three working day consent.

Particular Concessions for Hedge Funds

The Guernsey Financial Services Commission has never discouraged the use of the island as a domicile for hedge funds, indeed many that are domiciled in other jurisdictions are administered in the island. However, there were four main areas where hedge fund operations did not fit comfortably within the established legal and regulatory framework and this rather discouraged promoters from using Guernsey as a hedge fund domicile. In order to address this problem, the GFSC issued a consultation paper in November 2003 seeking input from interested parties on possible solutions within the existing investment fund framework with the aim of improving the attractiveness of Guernsey as a hedge fund domicile. The four main areas on which the GFSC consulted were:

- (a) the role of custodians and prime brokers;
- (b) asset segregation;
- (c) net asset value and share price estimation; and
- (d) client money segregation.

Following the close of the consultation period, the GFSC published a general policy framework for the authorisation of hedge funds in Guernsey which can be summarised as follows:

Custodians and Prime Brokers

For institutional and expert investor hedge funds, the GFSC will be prepared to designate as custodian a prime broker, regulated in an acceptable jurisdiction and having substantial net worth. In addition, the GFSC will not require a prime broker to offer physical segregation of fund assets from its own assets, even where fund assets held by the broker exceed credit extended by the broker.

For hedge funds targeted at retail and less sophisticated investors, the GFSC will generally continue to require a traditional custodian to exercise essential oversight of the fund manager. It will, however, be prepared to waive the requirement that the custodian take control of the fund's property, provided that the property is held by a prime broker regulated in an acceptable jurisdiction and having substantial net worth. The GFSC will normally expect such a custodian to be a licensed Guernsey institution but will be prepared to consider requests to designate custodians from other jurisdictions provided it can be satisfied that the custodian's role in overseeing the fund manager will be subject to monitoring by the custodian's regulatory authority.

For funds of this type, the prime broker will be expected to provide clear segregation from its own assets of all fund assets exceeding the amount required for collateral against credit extended by the prime broker. The segregation arrangements would have to ensure that surplus fund assets would be fully protected in the event of failure of the prime broker.

Net Asset Value and Share Price Estimation

Because of the nature of their assets and the way in which those assets are managed, it may often take many days, sometimes weeks, for a hedge fund manager finally to establish the fund's net asset value and the subscription and redemption prices. This can be a particular problem for funds of hedge funds as the speed with which the manager can calculate net asset value and prices will be dictated by the speed of the slowest hedge fund in the portfolio. To alleviate this problem, the GFSC will be prepared to permit arrangements which allow preliminary estimations of net asset value. On this basis, subscription monies could be taken into a fund before the final number of shares to be allocated had been determined, and interim redemption monies could be paid out of a fund, subject to a later final adjustment once the price calculations had been completed.

Client Money Segregation

The applicable Guernsey rules require that client money, including fund subscriptions and redemptions, be held in a client money account until it may properly be paid to the fund or, following a redemption, to the client. The GFSC will, if so requested, make available appropriate waivers from the operation of the client money rules, provided that it is satisfied as to the robustness of estimation procedures to be used, to enable subscription money to be paid into a fund on a subscription day notwithstanding that the fund may not be in a position to meet completely its obligation to the investor since the number of shares to be allocated will not at that stage be finally determined.

Service Providers

All authorised and registered open-ended collective investment schemes must have a designated manager and a designated trustee/custodian incorporated and resident in Guernsey. It is usual for a promoter to establish its own management company to act as manager. Invariably, the manager will delegate investment management back to an investment manager in the promoter's group or to a third party investment manager and will delegate administration to a Guernsey based fund administrator. In most cases the manager will not have a physical presence or staff in the island and in such cases the manager is called the "principal manager" and the Guernsey based administrator is treated as the designated manager.

In a B Scheme the designated trustee/custodian has a dual function, to safeguard the assets on the one hand and on the other to exercise oversight of the management and administration of the fund by the manager. In a Q Scheme, the role of the designated trustee/custodian is broadly limited to that of responsibility for the custody of scheme property and ensuring that sub-custodians are fit and proper.

The regime for closed-ended funds is more flexible than that for open-ended funds. There is no obligation to appoint a custodian. However, the GFSC's expectation is that closed-ended funds will at least need to be satisfied that appropriate arrangements are in place for the safekeeping of the assets. It is, however, always necessary for a Guernsey based administrator to be appointed to a Guernsey fund.

POI Licence

The POI Law makes it a criminal offence, subject to certain exceptions, for any person to carry on or hold himself out as carrying on any controlled investment business in or from within the Bailiwick of Guernsey without a licence issued by the GFSC and in addition it is an offence for a Bailiwick body to carry on or hold itself out as carrying on any controlled investment business in or from within a territory outside the Bailiwick of Guernsey unless that body is licensed to carry on that business in the Bailiwick and the business would be lawfully carried on if it were carried on in the Bailiwick. Subject to limited defences, agreements entered into in contravention of the POI Law are unenforceable. An investment manager to whom a principal manager of a fund has delegated investment management responsibilities and which is not incorporated in Guernsey is not treated as carrying on controlled investment business in Guernsey but the principal manager itself, the custodian/trustee and the designated manager all require a licence from the GFSC to enable them to provide services to that fund.

A person is treated as carrying on controlled investment business if he engages by way of business in any of the “restricted activities” specified in Schedule 2 of the POI Law in connection with any “controlled investment” identified and described in Schedule 1. Category 1 of schedule 1 identifies and describes open and closed-ended collective investment schemes as “controlled investments” and category 2 of that schedule identifies general derivatives and securities. Activities described in Schedule 2 for which a licence is required if carried on in connection with any controlled investment are promotion, subscription, registration, dealing, management, administration, advising and custody.

The GFSC may grant or refuse an application at its discretion and in considering whether or not to grant a licence the GFSC is required to have regard to the need to protect the public and the reputation of the Bailiwick as a financial centre. Among the matters which the GFSC must take into account in reaching a decision are whether the applicant is a fit and proper person to carry on the business proposed and, the manner in which it is proposed to organise the carrying on of the business to which the application relates. The GFSC has power to impose conditions on a licensee either on the grant of a licence or at any time after its issue and also to cancel or suspend a licence in certain specified circumstances.

Fund Structures

Funds are typically structured as either unit trusts, companies or limited partnerships. The principal features of these are as follows:

Unit Trusts

A unit trust is not a separate legal entity but is constituted by an agreement in writing, commonly known as a “trust instrument”, between a manager on the one hand and a trustee on the other. The trust concept has been recognised in Guernsey for over one hundred years and trusts generally are now governed by the provisions of The Trusts (Guernsey) Law, 2007.

The assets of a unit trust are held by its trustee and are managed by the manager, who may appoint one or more investment managers/advisers to assist it. Contracts in relation to the management and administration of the trust fund will be entered into by the manager, whereas the trustee will enter into contracts in relation to the assets themselves, such as bank deposits, borrowings and security agreements.

Companies

Companies are incorporated under the provisions of the Companies (Guernsey) Law, 2008 (as amended). Fund companies which are established as open-ended so that investors have the right to realise their investment in the company will normally issue redeemable preference shares to facilitate this, as par or no par value shares.

All companies formed under Guernsey law, have separate legal personality and are capable of suing and being sued in their own names. Management and control is vested in a board of directors although, particularly in the case of open-ended companies, it is often the case that investment management will be delegated to a management company.

Limited Partnerships

Limited partnerships, which are now the favoured vehicles for closed-ended private equity funds, are established under the provisions of the Limited Partnerships (Guernsey) Law, 1995 (as amended). A limited partnership can only be created by a written partnership agreement and cannot come into existence until it has been registered in the register of limited liability partnerships. An unusual feature of Guernsey’s partnership law is that the general partner may make an election at the time of registration as to whether or not the partnership is to have separate legal personality.

A limited partnership consists of one or more general partners who are admitted to the partnership as general partners in accordance with the partnership agreement and who are jointly and severally liable for all debts of the partnership without limitation and one or more limited partners who are admitted to the partnership as limited partners in accordance with the partnership agreement, who upon entering the partnership contribute or agree to contribute to the capital thereof a specified sum and who are not liable for any debts of the partnership beyond the amounts contributed or agreed to be contributed. Among the features which make the Guernsey limited partnership attractive to fund promoters are the following:

- There is no limit on the number of limited partners who may be members of a limited partnership.
- A person may be both a general partner and a limited partner and a body corporate or a partnership may be a general partner or a limited partner.
- The general partner is not required to be resident in Guernsey.
- Although the partnership is registered in a public register which is open to inspection, the names of the limited partners do not appear on it and there is no requirement to file an annual return.
- A limited partnership can distribute both capital and profits without formality provided that the partnership is solvent before and after the distribution.

Protected Cell Companies and Incorporated Cell Companies

Protected cell companies (“PCC’s”) were introduced as a new concept by the introduction of a new Ordinance in 1997. The ability to establish cells as corporate entities came about later, in 2006, with the introduction of a new type of company, an Incorporated Cell Company (ICC). A summary of the PCC and ICC laws is covered in a separate briefing note and is available from Carey Olsen on request.

Taxation

Taxation in Guernsey is the responsibility of the States of Guernsey Income Tax Authority and the principal legislation is contained in the Income Tax (Guernsey) Law, 1975 as extensively amended since 1975. Guernsey does not levy any form of capital gains tax, inheritance tax or value added tax either in respect of fund vehicles or investors in fund vehicles. The income tax position for fund vehicles is as follows:

Unit Trusts

The Income Tax (Exempt Bodies) (Guernsey) Ordinance, 1989 provides that a body is exempt from income tax for any year of charge on its income (other than Guernsey source income excluding bank deposit interest) if it is a body of a description set out in Schedule 1 of the Ordinance, has applied for and been granted exemption and meets the conditions of eligibility set out in Schedule 2 of the Ordinance. Exemption has to be applied for annually and is subject to payment of a fee currently fixed at £600. Unit trusts and any companies in their beneficial ownership fall within category A of Schedule 1 and the condition of eligibility are as follows:

- there must be an agreement in place with a person resident in Guernsey for the provision of managerial and secretarial services for remuneration calculated on an arms length basis;
- there must be no investment in any property situate in Guernsey other than bank deposits or other exempt bodies.

Guernsey residents are not precluded from investing in an exempt trust but in any such case the manager must notify the Tax Authority in the event that any Guernsey resident subscribes for units.

Companies

A company incorporated in Guernsey is treated as resident in Guernsey in any year of charge unless it has been granted exemption under the Exempt Bodies Ordinance. An investment company is entitled to exemption on the same conditions as set out above for a unit trust.

Limited Partnerships

A limited partnership, whether or not it has elected to have separate legal personality, is transparent for the purposes of Guernsey tax. There is no requirement for the partnership as such to make any returns or pay any fees to the States of Guernsey Income Tax Authority and it is the responsibility of each partner to determine whether he has any liability in Guernsey to tax. A limited partner who is resident in Guernsey for Guernsey income tax purposes is liable to income tax on his share of the profits of a limited partnership whether those profits are generated in Guernsey or elsewhere. A limited partner which is an individual who is not solely or principally resident in Guernsey or a company which is not resident in Guernsey is not liable to tax in Guernsey on any income derived from a limited partnership’s international operations, defined as business operations conducted on behalf of a limited partnership with, and investments made on behalf of a limited partnership in, persons who are not resident in Guernsey for the purposes of the Income Tax (Guernsey) Law, 1975.

The Channel Islands Stock Exchange

The Channel Islands Stock Exchange (“**CISX**”) is a company limited by guarantee and by shares which was established in Guernsey in 1998. The CISX was created primarily to provide trading and listing of investment funds, debt instruments and shares in companies and is designed to bring the expertise available in the Channel Islands to the growing number of international businesses requiring first class offshore financial services within the European time-zone. The CISX provides a listing facility and screen-based trading.

The CISX is licensed to operate as an investment exchange under the POI Law and is regulated by the GFSC. In October 2003, the CISX was approved as an Affiliate Member of the International Organisation of Securities Commissions (“**IOSCO**”). The CISX was officially recognised by the Australian Stock Exchange in July 2000 and, in September 2002, was recognised as a Designated Offshore Securities Market (“**DOSM**”) by the U.S. Securities & Exchange Commission under Regulation S of the U.S. Securities & Exchanges Act 1933. On the 11th December 2002, the CISX announced that the UK Inland Revenue had designated the CISX as recognised under Section 841 of the Income and Corporation Taxes Act 1988 (“**ICTA**”) and in addition, the UK Financial Services Authority has approved the CISX, with effect from the 1st February 2004, as a Designated Investment Exchange within the meaning of the Financial Services and Markets Act 2000.

The Irish Stock Exchange and the Hong Kong Stock Exchange classify Guernsey as a regulated jurisdiction for the purposes of listing funds domiciled in Guernsey.

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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