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THE PRIVATE INVESTMENT FUND RULES 2016

A handwritten signature in black ink, appearing to be 'C. Schrauwers', written over a dotted line.

Signed by C. Schrauwers
Chairman – Guernsey Financial Services Commission

THE GUERNSEY FINANCIAL SERVICES COMMISSION

THE PRIVATE INVESTMENT FUND RULES 2016

GUIDANCE NOTES

These Guidance Notes are intended to aid the understanding of the Guernsey Financial Services Commission's ("*the Commission*") policy and practice and should be read in conjunction with the Private Investment Fund Rules 2016 ("the Private Investment Fund Rules").

The *private investment fund* regime recognises that there is a category of fund whereby management have a closer relationship to the investors. In such instances, *the Commission* is prepared to dispense with the requirement to prepare *information particulars*, although *managers* may still wish to do so.

The Commission will require a licensee domiciled in Guernsey to take responsibility for the management of the *private investment fund*. Such a *manager* would warrant to *the Commission* on every application to register such fund that, *inter alia*, it has assessed that the investors are able to sustain any losses incurred on their investment in the fund at the time they have made their investment. This product being private, *the Commission* considers this a reasonable requirement. Should a *manager* not be able to make such warranty, it is extremely doubtful whether the fund would exhibit the characteristics of a *private investment fund*.

In considering the characteristics of a *private investment fund*, *the Commission* does not limit the number of investors to which it might be marketed. However the *private investment fund* should contain no more than 50 legal or natural persons holding an ultimate economic interest in the *private investment fund*, save in the instance where the investment is made by an investment manager acting as agent for a wider group of stakeholders. This may be, for example (but not exhaustively), a manager acting as agent for investors in a *collective investment scheme* or equivalent, pension holders in an occupational pension scheme, or government funds – whether local or sovereign. The *private investment fund* may be open-ended or closed-ended.

Excepting a period of one year commencing from the moment of first subscription, the *manager* must also consider a “rolling test”, applied on a continuous basis, whereby in the previous twelve months the *private investment fund* could add no more than 30 new ultimate investors. The *manager* shall keep a record of such tests.

The following summarises the key features of the Private Investment Fund Rules –

- (1) Each *private investment fund* must be registered under the *Law* with the *Commission*.
- (2) *Private investment funds* may be established as companies, *unit trusts* or *limited partnerships* or such other vehicle or entity as may be approved by the *Commission*.
- (3) The *private investment fund* must have within its structure a licensee responsible for management. This may be, for example, the *corporate trustee* of a *unit trust*, or the *manager* of a company, or the *general partner* of a *limited partnership*. Accordingly it is not anticipated that the *designated administrator* would be able to carry out this function.
- (4) Clause (3) means that the *private investment fund* cannot entertain a structure whereby there are separate investment advisers acting in respect of individual cells.
- (5) The *private investment fund* must meet the definition of a *collective investment scheme* under paragraph 1 of Schedule 1 to the *Law*.
- (6) Provisions regarding periodic notifications that are to be made to the *Commission* regarding changes to the *private investment fund*, financial statements and statistical information are also included within the *Private Investment Fund Rules*.

A *designated administrator* licensed under the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended must be appointed.

A *private investment fund* is not required to appoint a *custodian*. If the *private investment fund* is open-ended, a *designated custodian* must be named under the *Law*, however *the Commission* is prepared for such party to be the *designated administrator*. Further *the Commission* is willing to consider the appointment of a *custodian* that is domiciled outside Guernsey.

PRIVATE INVESTMENT FUND RULES 2016

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PRIVATE INVESTMENT FUND RULES 2016

The Guernsey Financial Services Commission (“*the Commission*”), in exercise of the powers conferred on it by sections 12, 14, 16 and 18 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987 as amended (“*the Law*”) hereby makes the following rules:-

PART 1 – INTRODUCTION

1.01 Citation and commencement

- (1) These rules, which may be cited as the Private Investment Fund Rules 2016 (“*the Private Investment Fund Rules*”), are made on 15 November 2016 and shall come into operation on the 16 November 2016.

1.02 Interpretation

- (1) Unless the context otherwise requires, in these Private Investment Fund Rules, expressions defined in the *Law* have the same meaning as they have in the *Law* and the following expressions have the meanings assigned to them:

“**administration agreement**” is the agreement by which a *designated administrator* is appointed administrator of a *private investment fund* to discharge the duties of the administration of the *private investment fund*;

“**annual accounting period**” is the period, normally of 12 months, as specified by the governing law or specified in the *information particulars* or *principal documents*;

“**annual notification**” means the notification to be submitted to *the Commission* in accordance with Rule 5.02;

“**approved derivative**” means a derivative that is traded or dealt in or on a regulated derivatives market;

“approved security” means a transferable security that is admitted to official listing on the Channel Islands Securities Exchange Authority Limited or an exchange recognised in an EEA State or is traded on or under the rules of a regulated securities market;

“associate”, in relation to any person, means –

- (a) the spouse or child of that person;
- (b) any company of which that person is a director;
- (c) any person who is an employee or partner of that person;
- (d) if that person is a company
 - (i) any director or subsidiary of that company; and
 - (ii) any director or employee of any such subsidiary; and
- (e) if that person has with any other person an agreement or arrangement as to the acquisition, holding or disposal of *shares* or other interests in a company or under which they undertake to act together in exercising their voting power in relation to a company, that other person;

“collective investment scheme” or **“investment scheme”** means any arrangement such as is identified as described in paragraph 1 of Schedule 1 to the *Law*;

“the Commission” means the Guernsey Financial Services Commission;

“corporate trustee” in relation to a *private investment fund* that is a *unit trust*, means the trustee of the *unit trust*, which shall be licensed under the *Law*;

“custodian” means a body corporate appointed to hold the property of a *private investment fund* (other than a *unit trust*) and to discharge the duties imposed by the *custodian agreement*; and

“custodian agreement” may be interpreted in that context;

“designated administrator” in relation to a *private investment fund* means the person appointed to discharge the duties contemplated by an *administration agreement*, and has the status of designated manager under the *Law*;

“designated custodian” in relation to an open-ended *private investment fund*, other than a *unit trust*, means the *custodian* of the *private investment fund* (as designated in the *Commission’s* registration of the *private investment fund* under section 8 of *the Law*);

“designated trustee” or **“trustee”** in relation to an open-ended *private investment fund* that is a *unit trust*, means the trustee of the *unit trust* (as designated in the *Commission’s* registration of the *private investment fund* under section 8 of *the Law*);

“directors” means, in respect of a company, any person appearing on the register of directors of such company, in respect of a *limited partnership*, any person appearing on the register of directors of the *general partner* of such *limited partnership* and in respect of any other incorporated bodies, any person responsible for the management of the incorporated body;

“general partner” means a person who is so appointed under a limited partnership agreement and who has unlimited liability for all debts of the partnership;

“holder” in relation to a *share* in a *private investment fund*, means the person who is entered in the register as the holder of the *share* or unit or *limited partnership* interest or the first named holder in the case of joint holders;

“information particulars” means particulars of a *private investment fund* and includes a prospectus, scheme particulars, offering memorandum, explanatory memorandum, term sheet, application form, subscription agreement, admission document, listing particulars or any other similar documents or any combination of the foregoing; the Private Investment Fund Rules do not require information particulars to be prepared;

“investment adviser” means a person who, under a commercial arrangement not being a mere contract of employment, provides the *manager* or the Board of *directors*, the *general partner* of a *limited partnership* and the *manager* or *corporate trustee* of a *unit trust* of a *private investment fund* with advice as to the merits of investment opportunities available to such *private investment*

fund whether or not he regularly exercises a discretionary power over investments for the account of that scheme;

“**Law**” means the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended;

“**limited partnership**” means a partnership, wherever domiciled, which is for the time being registered as a limited partnership in accordance with the relevant legislation;

“**manager**” means the person, licensed under the *Law*, appointed manager of a *private investment fund*, and might be appointed to the company, be the *general partner* of a *limited partnership*, or be the *corporate trustee* of a *unit trust* (appointed under a *unit trust* instrument or *management agreement*); and

“**management agreement**” may be interpreted in that context;

“**principal documents**” in relation to:

- (a) a *unit trust*, means the trust instrument and the *management agreement* (if any);
- (b) a company, means the articles of incorporation of a Guernsey company (or an equivalent document under the applicable law of a non-Guernsey body corporate), the *management agreement*, *administration agreement* and the *custodian agreement* (if applicable);
- (c) a partnership, means the *limited partnership* agreement, the partnership agreement, the partnership *administration agreement*, the partnership *management agreement* and the *custodian agreement* (if applicable);
- (d) a *private investment fund* other than a *unit trust*, a company or a *limited partnership*, means the documents dealing collectively with the same or similar obligations and duties as the principal documents constituting a *unit trust*, a company or a *limited partnership* and, further, the *administration agreement* and *custodian agreement* (if applicable);

“private investment fund” means a *collective investment scheme* declared in a *registration* issued by the *Commission* under section 8 of the *Law* and Rule 6.02 to be a *private investment fund*, and

“qualified auditor” means a person who has a place of business in Guernsey and who holds a current practising certificate issued by:

- (a) (i) The Institute of Chartered Accountants in England and Wales; or
- (ii) The Institute of Chartered Accountants of Scotland; or
- (iii) The Institute of Chartered Accountants in Ireland; or
- (iv) The Association of Chartered Certified Accountants; or
- (b) A body outside the United Kingdom undertaking a similar regulatory role and having equivalent professional standards for membership as any of the bodies specified in (a) above.

“registration”, “registered” and related expressions shall be construed accordingly;

“scheme property” means the property of a *private investment fund*;

“share” means a share, *limited partnership* interest, or unit or similar interest in a *private investment fund*;

“unit trust” means a *private investment fund* (other than a *limited partnership*) under which the property of the scheme is held in trust for the investors.

- (2) The Interpretation (Guernsey) Law, 1948 applies to the interpretation of these Rules.
- (3) References to enactments shall include reference to any modifications or reenactments thereof for the time being in force.

PART 2 – APPLICATION OF RULES

2.01 Application of rules

- (1) Unless specifically agreed otherwise by *the Commission*, all the Private Investment Fund Rules apply to *registered collective investment schemes* which have elected to be within the *private investment fund* regime, which is defined by paragraph 1 of Schedule 1 to the *Law* and Rules 2.01(2), 2.01(3), 2.01(4), and 2.01(5).
- (2) The number of investors in a *private investment fund* must be no more than 50 legal or natural persons holding an ultimate economic interest in the *private investment fund*, save in the instance where the investment is made by an investment manager acting as agent for a wider group of stakeholders. This may be, for example, but not exhaustively, a manager acting as agent for investors in a *collective investment scheme* or equivalent, pension holders in an occupational pension scheme, or government funds – whether local or sovereign.
- (3) The *private investment fund* must also be limited to no more than 30 new ultimate investors being added in the preceding twelve months.
- (4) The *private investment fund* must be a *collective investment scheme*.
- (5) The *private investment fund* must have within its structure a licensee responsible for management.

PART 3 – MANAGEMENT, ADMINISTRATION, CUSTODY AND AUDIT

3.01 Management of the private investment fund

- (1) There is no obligation to produce *information particulars* for a *private investment fund*. However, where these are produced, the *manager* must take responsibility for their preparation and publication.
- (2) It is the duty of the *manager* of a *private investment fund* to manage the scheme in accordance with:
 - (a) the *principal documents*;
 - (b) these rules; and
 - (c) the most recent *information particulars* (if applicable).

3.02 Administration of the private investment fund

- (1) It is the duty of the *designated administrator* of a *private investment fund* to administer the scheme in accordance with:
 - (a) the *principal documents*;
 - (b) these rules;
 - (c) the most recent *information particulars* (if applicable); and
 - (d) in the case of a company scheme, subject to any proper directions from time to time given by the *manager* and *directors* and in the case of a *limited partnership* scheme, subject to any direction given from time to time by the *general partner*, or *corporate trustee* of a *unit trust* scheme as applicable.
- (2) In the case of a company, it is the duty of the *directors* not to give any directions or exercise any powers, duties or discretions that cause the company to operate other than in accordance with the *principal documents* and *information particulars* (if applicable) or these rules. This duty also

applies to the *directors* of the *manager*. Further, where the scheme is a *limited partnership*, this duty applies to the *directors* of the *general partner*. Where the scheme is a *unit trust*, this duty applies to the *directors* of the *corporate trustee* of the scheme.

- (3) Subject to any restrictions in the *principal documents*, the *designated administrator* may at its discretion delegate any function to any person provided that the *designated administrator* is satisfied at the outset, and continues to remain satisfied, that the delegate is competent to undertake the function in question. Any such arrangement must be done in accordance with the *Commission's* 'Guidance Note on the Outsourcing of Functions by Entities Licensed under the Protection of Investors (Bailiwick of Guernsey) Law, 1987'.

3.03 Custody of the scheme property

- (1) A *custodian* that is not domiciled in Guernsey may be appointed to the *private investment fund*.

3.04 General provisions applicable to the designated administrator of a private investment fund

- (1) The duties of the *designated administrator* imposed by these rules and by the *principal documents* and the *information particulars* (if applicable) are in addition to and not in derogation from the duties that are otherwise imposed on it by applicable law.

3.05 Appointment of a Qualified Auditor

- (1) A *private investment fund* must appoint a *qualified auditor* as the auditor of the scheme.

PART 4 – CONFLICTS OF INTEREST

4.01 Conflicts of interest

- (1) The *directors*, the *general partner* and the *corporate trustee* (as relevant) must each take all reasonable steps to ensure that there is no breach of any of the following requirements of this rule by any “relevant person”, meaning:
 - (a) the *designated administrator*;
 - (b) in the case of a *unit trust*, the *corporate trustee*;
 - (c) any *investment adviser*;
 - (d) any *manager*;
 - (e) the fund itself (if a legal person);
 - (f) in the case of a company, the *directors* of the company;
 - (g) in the case of a *limited partnership*: *directors* or *general partner* of the *general partner*, and the *general partner* itself;
 - (h) the *custodian*; and
 - (i) any *associate* of any person described above.
- (2) Cash forming part of the *scheme property* may be placed in any current, deposit or loan account with a relevant person if the arm’s length requirement in paragraph (9) is satisfied.
- (3) A relevant person may lend money to the *private investment fund* if the arm’s length requirement in paragraph (9) is satisfied. For the avoidance of doubt, loans that form part of an investor’s commitments do not fall into this category.
- (4) A relevant person may not sell or deal in the sale of property to the *private investment fund* unless the arm’s length requirement in paragraph (9) is satisfied and, for the purpose of this paragraph, a sale shall include any lease

or other transaction under which *scheme property* is made available by the *private investment fund*.

- (5) A relevant person may not purchase *scheme property* from a *private investment fund* unless the arm's length requirement in paragraph (9) is satisfied and, for the purpose of this paragraph, a purchase shall include any lease or other transaction under which the *scheme property* of the *private investment fund* is made available to the relevant person.
- (6) A relevant person may not vest property in the *private investment fund* against the issue of *shares*, unless:
 - (a) the arm's length requirement in paragraph (9) is satisfied; or
 - (b) it is vested for the purpose of arrangements whereby the whole or part of such property becomes the initial *scheme property* of the *private investment fund*.
- (7) A relevant person may not enter into stock lending transactions in relation to the *private investment fund* unless the arm's length requirement in paragraph (9) is satisfied.
- (8) A relevant person within paragraph (1) above may not provide services for the *private investment fund* unless the services are provided on terms which satisfy the arm's length requirement in paragraph (9).
- (9) The arm's length requirement is that the arrangements between the relevant person and the *private investment fund* are at least as favourable to the *private investment fund* as would be any comparable arrangement effected on normal commercial terms negotiated at arm's length between the relevant person and an independent party.

- (10) The arm's length requirement set out in sub-paragraph (9) shall be deemed to be satisfied where the transaction with the relevant party satisfies any of the criteria set out in paragraphs (11) or (12).
- (11) The transaction satisfies the criteria for best execution on-exchange if:
- (a) the property is an *approved security* or an *approved derivative*; and
 - (b) the transaction is effected with or through a member of the relevant exchange under the rules of that exchange; or
 - (c) there is evidence in writing of the effecting of the transaction and of its terms; and
 - (d) the *manager* has taken all reasonable steps to effect the transaction or to ensure that it is effected on the terms which are the best available for the *private investment fund* in the circumstances.
- (12) The transaction satisfies the criteria for independent valuation if:
- (a) the value of the property is certified in writing for the purpose of the transaction by a person selected or approved by the *directors* in the case of a company or, in the case of a *limited partnership*, the *general partner* or, in the case of a *unit trust*, the *manager* or *corporate trustee* as:
 - (i) independent of any relevant person; and
 - (ii) qualified to value property of the relevant kind; and
 - (b) the *directors* in the case of a company, in the case of a *limited partnership* the *general partner* or, in the case of a *unit trust* the *manager* or *corporate trustee*, are of the opinion that the terms of the transaction are not likely to result in any material prejudice to *holders*.
- (13) Paragraphs (2) to (7) are subject to any provision in the *principal documents* or the *information particulars* forbidding the taking of advantage of all or any of them.

PART 5 – NOTIFICATIONS

5.01 Immediate Notifications

- (1) No change of the *designated administrator* of a *private investment fund* or, in the case of an open-ended *private investment fund* the *designated custodian* or *trustee*, is effective until such time as *the Commission* varies the declaration of *registration* of the *private investment fund*.
- (2) The *designated administrator* of a *private investment fund* must give written notice forthwith to *the Commission* in respect of any proposal to reconstruct, amalgamate, terminate prematurely, wind-up or extend the life of the *private investment fund*.

5.02 Annual notifications

- (1) A *designated administrator* of a *private investment fund* must notify *the Commission* each year of any change in respect of the information contained in the application form submitted for *registration* as a *private investment fund* or, in the absence of any change, notify *the Commission* by way of confirmation of no change.
- (2) Such notifications must be submitted to *the Commission* together with the audited annual reports and accounts for the scheme as required under 5.03 (1).

5.03 Annual reports and financial statements

- (1) The *designated administrator* of a *private investment fund* must submit to *the Commission* copies of the audited annual report and accounts for the scheme, no later than six months following the end of the *annual accounting period*.

5.04 Quarter-end statistical information

- (1) The *designated administrator* of a *private investment fund* must submit to *the Commission* a statistical return relevant to the scheme for each quarter. The information to be contained in such statistical return is as required by *the Commission* from time to time and must be within *the Commission's* agreed timeframes.

PART 6 – REGISTRATION OF PRIVATE INVESTMENT FUNDS

6.01 Application for registration of a private investment fund

- (1) The *manager* of a proposed *private investment fund* seeking a declaration of *registration* from *the Commission* shall submit the appropriate application form to *the Commission* and shall also provide such other information as *the Commission* may require.

6.02 Registration declaration

- (1) *The Commission* may grant *registration* under section 8 of the *Law* to a *private investment fund* by declaration if it is satisfied with the undertakings required by Rule 6.03 and the application made pursuant to Rule 6.01.

6.03 Undertakings

- (1) As a condition of the *registration* of a scheme as a *private investment fund*, *the Commission* shall be entitled to require such undertakings, indemnities, bonds, guarantees and assurances as *the Commission* may determine to secure compliance with these rules.

PART 7 – EXISTING REGISTERED COLLECTIVE INVESTMENT SCHEMES

7.01 Application

- (1) This Part applies to all existing *collective investment schemes* that have been registered under section 8 of the *Law*.

7.02 Election of an existing collective investment scheme that is currently registered to become a private investment fund

- (1) An existing *collective investment scheme* that is currently registered under section 8 of the *Law* may elect, prior to 16 November 2017, to be treated as a *private investment fund* under these rules.