



**Financial Services
Commission**

Consultation Paper

Authorised EIF Directors & EIF Boards

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Introduction

This following was initially issued in the form of a newsletter. However, in order to avoid confusion as to its status and enable the industry to be formally consulted on its contents, it is being reissued as draft guidance.

Executive Summary

The consultation paper is seeking industry feedback on the implementation of this draft guidance note, in relation to the duties of authorised EIF directors and EIF Boards.

Basis of consultation

This paper has been published by the FSC to identify policy and implementation issues that may arise out of this proposed guidance note. The FSC wishes to obtain the views of all stakeholders either through industry representative bodies or individually.

Although the FSC is seeking responses directly to the questions posed in the paper, stakeholders are welcome to submit views on any aspect of the proposed guidance note.

Legal Notice

The advice or interpretation given in this paper represents the views of the FSC as to its expectations of how the requirements of the relevant legislation in question is to be complied with and/or how it falls to be applied. This, however, is not intended as a definitive interpretation of the applicable legislation which is ultimately a matter for the courts to determine. You are, therefore, strongly advised to seek appropriate legal advice before any action or decision is taken.

The FSC does not provide, or purport to offer, legal advice.

Feedback on the consultation paper should be addressed to;

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To reach her by no later than close of business on 23 December 2009.

To view the FSC policy on public consultation, please see
<http://www.fsc.gi/fsc/consult.htm>



Introduction

The purpose of this Guidance Note is to provide persons who are applying for, or actually already hold, a licence to act as an Experienced Investor Fund (EIF) director, in accordance with Regulation 7(1) of the Financial Services (Experienced Investor Funds) Regulations¹ (EIF Regulations), with information on what the Financial Services Commission (FSC) expects of an authorised EIF director.

Essentially, this Guidance Note aims to provide assistance on a number of areas for which authorised EIF directors are expected to have responsibility and oversight. This Guidance Note does not however purport to include an exhaustive list of such areas and represents the more salient matters which have most frequently been encountered by the FSC when dealing with EIF directors and individuals being considered for authorisation as EIF directors. This Guidance Note therefore represents our view on good practice.

The Authorised Director

The nature of the regulatory regime applied to EIFs, which is often described as “light touch” regulation, is such that the FSC expects the authorised EIF directors to be very much involved in the running and operation of the funds for which they act. The design of the EIF regime means that reliance and expectation are placed on the EIF directors’ involvement in a fund’s operations. Indeed this is one of the cornerstones of the “lighter touch” regulatory regime that is applied to EIFs – and authorised EIF directors are expected to be able to demonstrate this.

It is therefore not sufficient for the authorised EIF directors to effectively ‘delegate’ completely the decision-making and operation of the fund to the remaining directors or to other parties.

Relevant experience and expertise

Upon application to be licensed as an EIF director the FSC must determine if an individual has sufficient experience and expertise in order to discharge this function. The individual will therefore be expected to demonstrate an understanding of how EIFs and other funds operate and will need to provide evidence of fund-related experience and expertise. The FSC would expect such fund related experience to include, but not be limited to, involvement with a fund, oversight of fund related activity or holding of a position of responsibility within a fund structure. This may also include details of fund industry related qualifications, although these are not currently a prerequisite. An applicant must demonstrate how previous fund and investment involvement will enable him to have attained sufficient expertise to be able to effectively oversee the operation of an EIF.

If upon application for an EIF directorship licence, it appears that the applicant does not hold sufficient experience and expertise, the FSC may be in a position to grant the applicant a restricted licence limited to the provision of a directorship to one or more specific funds. This will, however, only be permitted where the board of said fund(s) collectively has sufficient fund related knowledge and experience. The onus here, therefore, is placed on the fund’s second authorised director, and the fund’s board more generally, to provide leadership and guidance. In such cases, applicants will be required to submit to the FSC, evidence relating to the fund knowledge and experience of all of the individuals on the board. Persons seeking to be granted a restricted licence may do so before their proposed appointment to the board of an EIF, however, any approval will be conditional upon the FSC being subsequently satisfied that the board as a whole meets the criteria outlined above.

¹ Regulation 7.(1) If an experienced investor fund is established as a company formed or redomiciled under the Companies Act or as a protected cell company, it shall have at least two Gibraltar resident directors authorised by the Authority to act as the director of an experienced investor fund.



A restricted licence may be expanded to a full licence to provide EIF directorships once the individual has been able to provide evidence that sufficient general knowledge, expertise and experience has been obtained.

Alternatively, an applicant may consider serving as a director, in addition to the two authorised EIF directors, in order to glean relevant knowledge in an effort to eventually be able to demonstrate that he has achieved the necessary levels of expertise and experience to allow an application for authorisation as an EIF director to be granted.

For the avoidance of doubt the Commission does not encourage the use of corporate directors as approved directors of EIFs.

Residence

Regulation 7(1) specifies that an EIF must have “at least two Gibraltar resident directors authorised by the Authority to act as the director of an experienced investor fund” (*underlining included for illustration purposes only*). In determining whether to authorise an individual as an EIF director, the FSC will therefore consider how said individual meets this particular requirement. An individual must either be physically resident in Gibraltar, or, if resident across the border, must have a tenable link with a Gibraltar firm either as an employee, director or similar. In either case, the individual must provide a notice address in Gibraltar for delivery of any formal correspondence and notifications. Said notice address will be reflected on the face of the licence issued and it is expected that this will correspond with the place of work of the applicant or residential address of the applicant in Gibraltar.

Q1. Do stakeholders consider the above residency test appropriate or that some other measure should be used?

Individuals acting as director to multiple EIFs

The FSC expects authorised EIF directors to be able to fully discharge their function as a director, of each fund for which they have been appointed to the board of, both effectively and efficiently. In doing so, the FSC expects that each individual fulfils the whole range of duties and responsibilities which acting as a director of a firm carries. Where an individual has been appointed to multiple boards and is additionally carrying out another full time role (for example as a professional adviser such as an auditor or lawyer), the FSC will expect that individual to be able to demonstrate that he is properly and fully conversant with the day to day running, and operations, of the relevant fund(s) and is able to devote sufficient time to fulfil his duties to the fund(s).

The Commission does not prescribe a maximum number of funds for which an individual is a director. However, cases where individuals provide directorships to more than 8 EIF's will be looked at closely in order to ascertain how much time is spent by that individual actively participating in each funds' operations. In doing so we will take account of the nature and activities of each fund itself.

Where as a result of such a review, the FSC concludes that an individual authorised as an EIF director is providing EIF directorships to an excessive amount of EIFs, especially where the provision of these directorships is not their primary business, the FSC may deem it necessary to cap the number of funds that said director can provide directorships to. The purpose of this is to ensure that directors can be sufficiently involved in the day to day running of each individual EIF.

Q2. Do stakeholders consider that the non prescriptive case by case approach detailed above is appropriate or consider that the numbers of EIF directorships undertaken by an individual should be formally capped and if so what would be considered the maximum amount?



Board meetings

Each EIF Board will, as is natural, decide the number of board meetings to be held for each EIF in each calendar year, and this will largely be determined by the nature and level of activity of the fund, as well as its investment strategy. The FSC would expect authorised EIF directors to attend all board meetings whether in person or via telephone unless there are exceptional circumstances. The EIF directors should apply the principles of good corporate governance as are applicable to the running of the fund.

Q3. Do stakeholders consider that there should be a minimum number of board meetings held annually?

Oversight of delegated investment management

Where the investment management of the fund has been delegated either to one of the directors or to another party, it is the board's responsibility, as a whole, to ensure that this firm or individual to whom the investment management function has been delegated is discharging the function effectively and efficiently and to the board's satisfaction. This may be done, for example, through regular presentations/discussions and the review and evaluation of reports submitted. In any case it is expected that any oversight of these functions is documented accordingly to evidence that this is in fact being carried out.

Oversight of fund administrator and depositary

The board should ensure that it has adequate oversight of the fund administrator and depositary. This may be done, for example, through discussions during board meetings and should include the monitoring of NAVs and the manner in which this is calculated and reported, as well as for example periodic review and evaluation of any advices and statements produced by said parties. Again it is expected that this is appropriately documented to evidence that oversight is being exercised.

Q4. Do stakeholders consider that oversight responsibilities should be a matter for the board as a whole or, given the importance placed by the EIF regime on approved directors, that oversight responsibilities of the approved directors should be separately codified?

Breaches

EIFs must comply with the requirements set out in the EIF Regulations at all times. This is specified clearly in Regulation 4(1)(c) which states that an EIF is a fund which, inter alia, "complies with the requirements for experienced investor funds specified in [the] Regulations". Where a fund ceases to comply with the requirements set out in the EIF Regulations, it will no longer be deemed to meet the criteria for an EIF and may be de-registered as such. Responsibility for ensuring that a fund continues to comply with the requirements of the EIF Regulations lies with the persons having the management and control of the fund. This clearly includes the board of directors, and more specifically, the authorised EIF directors.

Where any breach, or potential breach, is identified the Commission should be notified immediately. It is the authorised EIF directors' responsibility, together with the rest of the board, as well as the fund's administrator (where appropriate), to ensure compliance with the relevant legislation. This includes, inter alia, matters such as ensuring that material change notifications are submitted within the stipulated 28 day timeframe, ensuring that audited financial statements are submitted within 6 months of the financial period end and ensuring that the EIF annual return is also submitted on a timely basis.



As specified in Regulation 16, failure to inform the FSC of any requirement relating to non-compliance with Regulations 7 (management & control), 9 (audit requirements), 10 (name of EIF), 11 (changes in information provided to the Authority) or 12 (returns to the Authority) or Part 3 (offer document) shall constitute an offence. Likewise, failure to comply with Regulations 4(1), 5 (acceptance of participants) and 6 (general provisions with respect to EIFs) shall also constitute an offence.

Any advice, guidance or interpretation covered in this guidance note represents the views of the FSC as to its expectations of how the requirements of the relevant legislation in question is to be complied with and/or how it falls to be applied. This, however, is not intended as a definitive interpretation of the applicable legislation which is ultimately a matter for the courts to determine. The FSC does not provide, or purport to offer, legal advice.



Regulatory objectives and principles of good regulation – checklist

This table is to be completed with the submission of any consultative papers/discussion papers which impact upon policy or recommend regulatory changes. Its purpose is to ensure we have assessed our proposal against our regulatory objectives and principles of good regulation.

Each paper should have the purpose of achieving at least one regulatory objective. If it does not an explanation of why the proposal is being made should be given

Additionally detail in the right hand column whether the proposal accords with the applicable principle. Where the principle is not applicable state so. Where it does not accord detail briefly why this principle is not being complied with so this may be considered.

Which regulatory objectives are the proposals aimed to facilitate:?

- | | |
|---|-----|
| (a) To promote market confidence; | Yes |
| (b) The reduction of systemic risk; | Yes |
| (c) To promote public awareness; | No |
| (d) The protection of the reputation of Gibraltar; | Yes |
| (e) The protection of consumers; | Yes |
| (f) The reduction of financial crime, including the funding of terrorism; | No |

Do the proposals accord with the following principles of good regulation?

- | | |
|--|--|
| 1. The need to use our resources in the most efficient, effective and economic way; | Not applicable. |
| 2. The principle that the duty to manage a business falls upon the senior management of that business. The Directors of a licence holder, both executive and non-executive have ultimate responsibility for ensuring that the business is properly run and operates in accordance with regulatory requirements; | Yes – this guidance note better informs EIF directors of their individual responsibilities as well as of FSC expectations. |
| 3. The principle that a burden or restriction which is imposed upon authorised firms should be commensurate with the benefits expected to result from such action, so ensuring that the Authority is striking the right balance between achieving the statutory objectives and ensuring that the impact on those being regulated is not such as to be counterproductive; | Yes – the proposal aims to strengthen firms' better management of risk. |
| 4. The desirability of facilitating innovation in connection with regulated activities; | Not applicable. |
| 5. The international character of financial services and markets and the desirability of maintaining the competitive position of Gibraltar; and | Yes – this guidance note aims to further enhance the already favorable position of Gibraltar funds. |
| 6. The need to consider the adverse effects of regulation on competition and consumer choice. | Not applicable. |