

FSC Newsletter

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**Financial Services
Commission**

Changes to Experienced Investor Fund Regulations

This Newsletter applies to all Experienced Investor Funds (EIFs) and service providers, namely the fund administrator, EIF directors and depositary.

This Newsletter aims to provide details of the FSC's expectations on some of the key changes made to the requirements as a result of the implementation of the Financial Services (Experience Investor Funds) Regulations 2012, (EIF Regulations). By providing details of its expectations and processes the FSC hopes to facilitate the establishment and operation of EIFs under the new Regulations.

Fund Administration

The change to the definition of administrators will allow selected administrators, not licensed locally, in certain circumstances to administer EIFs.

This change is not aimed at allowing all funds to be administered externally, but to allow "brand name" administrators under certain circumstances to provide services to an EIF. The purpose of the change in definition will allow the setting up of large funds which require a substantially large administrator in terms of size and international reputation. It is therefore intended to only allow the top few international fund administrators.

Furthermore, the fund administrator would need to be established in the EEA or in a jurisdiction with equivalent legislative and regulatory regime providing equivalent protection to investors as those in Gibraltar.

In respect of the process for approving fund administrators, this is expected to be done on a 'general' basis whereas the industry association [Gibraltar Funds & Investment Association (GFIA)] will make proposals for large "brand name" fund administrators to be approved for all EIFs by the Commission. These proposals will be approved and vetted by the GFIA prior to making said proposal to the Commission.

Information required by the Commission includes in relation to the proposed external fund administrator, to enable it to provide fund administration services to an EIF, would include:

- Details of jurisdictional equivalence;
- Details of protections and details of regulatory regime of administrator's jurisdiction;
- Details of fund administrators 'standing' i.e. that is a 'brand name' for example size in industry, locations represented at, clean regulatory history etc;
- Details of rationale for using this administrator over a locally licensed administrator;
- Confirmation that the relevant administrator has consented to this and to be listed on the FSC's website.

The Commission may consider requests directly from funds/firms/individuals, however, these will be scrutinised further by the Commission. Furthermore, such requests will only



be considered where there is a specific and clear rationale which includes details of why the service cannot be provided locally.

The Commission will then make its own determination which may include any checks or requests for further information that it considers necessary. The Commission will then consider making a recommendation for the Minister. If an administrator has been given consent by the Minister, these will be listed on the Commission's website.

Consent and listing of these administrators does not mean that these have been approved or licensed by the Commission. The Commission has no regulatory oversight of these entities and cannot be considered as approval/licensing of the entity. The Commission expects funds to conduct their own due diligence and assessments when selecting a fund administrator.

Each external administrator will need to appoint a local agent. This local agent will be the point of contact locally for the Commission and other stakeholders of the fund. The local agent should be familiar with the fund and developments and be in a position to answer queries and deal with issues raised by the regulator and/or other stakeholders. It is envisaged that the local agent will be either a local fund administrator, auditor or law firm.

Re-domiciliations

Regulation 3(1)(i) allows the Commission to permit participants of re-domiciled funds (either by fund or category of fund, from a particular jurisdiction). The Commission expects requests in this respect to be made for professional funds based in equivalent jurisdictions where the category of professional/experienced client is similar and does not dilute the EIF brand. The Commission would expect information to be supplied detailing the differences and similarities between the professional/experienced investor regimes in the jurisdiction of origin.

Furthermore funds based outside Gibraltar may decide to re-domicile to Gibraltar and in this respect the fund may consider whether it wishes to maintain its current fund administrator. These requests will be considered on a case by case basis. And consideration will be given to whether the fund administrator may for example provide a very niche service or have a contractual and good working relationship with the fund. However, the Commission will need to be satisfied that the administrator is of good standing and from an equivalent jurisdiction. The process for approving fund administrators for specific funds is set out on the section on 'Fund administration' above.

Meaning of an Experienced Investor

The definition of Experienced Investor has been expanded as provided for in Regulation 3. These new types of experienced investors are considered equivalent to the existing experienced investors.

Referring to professionally advised investors the onus is on the fund to ensure that it adequately records that investors have been recommended by an adviser to invest in the EIF. The adviser needs to be regulated to provide this advice in the jurisdiction in which they are based.

Likewise funds should ensure that they also record how an investor has invested 100,000E in one or more EIFs. The Commission expects funds to ensure that it maintains records evidencing this.

Where the responsibility for these functions is delegated to the fund administrator, the EIF needs to ensure that it maintains adequate oversight and is satisfied with the controls being put in place and that the oversight of this function is evidenced. This should be standard practice for all functions outsourced by the EIF.



Approvals of EIFs

An additional filing timeframe for EIF notifications has been incorporated into the EIF Regulations.

As per Regulation 4(3)(a) an EIF can file for registration of the fund either 10 working days before or after the establishment of the fund. This provides greater flexibility to funds establishing themselves in Gibraltar.

Funds can continue under Regulation 4(3)(b) to establish themselves and notify the Commission within 10 working days, this will follow the usual process.

Funds wanting to be registered before launching the fund can do so as long as the Commission is notified at least 10 days before the establishment of the EIF. This does not restrict a fund from submitting the relevant documentation in advance of this timeframe and registering before the 10 days, which enables any possible concerns to be addressed by the fund prior to the fund's establishment.

The 10 days for funds notifying under Regulation 4(3)(a), does not come into effect until the Commission receives all the information required, as set out in the Regulations.

Within 10 days of receipt of a complete notification the Commission will either:

- a) Request further information from the fund, this will generally be used when a material aspect of the documentation is not clear and the Commission requires further clarification.
- b) Request the fund to make certain changes to its documentation, this will generally be used when the fund is not meeting one of its requirements.
- c) If the Commission will proceed to register the fund it will issue the fund with a registration letter.
- d) If the fund does not receive a, b or c, within 10 days the fund shall be deemed to be authorised.

Once the Commission is satisfied with the further information or changes made it will issue a written notice to the fund confirming that it is deemed to be authorised. The Commission aims to review these amendments/clarifications in a timely manner.

Management and control

The EIF Regulations have been clarified to reflect more accurately the management and control function of EIFs, regardless of the legal structure of the fund. The EIF Regulations now aim to clarify the appointment of authorised directors to an EIF depending on the vehicle used given that the directors of the EIF are ultimately responsible for the EIF.

The design of the EIF regime means that reliance and expectations are placed on the authorised EIF directors' to effectively oversee the fund and its operations. Indeed this is one of the cornerstones of the regulatory regime that is applied to EIFs and authorised EIF directors are expected to be able to demonstrate this.

It is therefore not sufficient, nor acceptable, for the authorised EIF directors to effectively 'delegate' the decision-making and operation of the fund to the remaining directors or to other parties.

It is imperative that EIF directors are familiar with what is required of them and that they ensure that they carry out their duties with due skill and care.

It has also been clarified where a specific responsibility also falls upon other service providers such as the administrator or depositary.



Further disclosures

As per international developments on disclosures, the information required in the offer document has been expanded upon in the EIF Regulations. As such additions have been incorporated into the information that is required to be included in the offer document. These are set out below.

The Commission expects, as per Regulation 16(2)(h), for details of how material changes are to be made to be set out in the offer document. Offer documents should for example advise what constitutes a material change and if for example prior approval is needed before certain material changes are made. The Regulations specify for the offer document to detail how investors will be advised, for example before or a certain number of days after the material change is made. Furthermore, it is expected that funds documentation provides sufficient details and care is exercised so that any material changes which could have an important impact on the investor and his decision to invest is adequately disclosed.

In relation to Regulation 16(3)(a) the Commission expects that details of the authorisations/licences held by the different parties/advisers is detailed in the offer document. Where the individual/entity does not need a licence in their jurisdiction for the service being offered, this should also be clarified in the offer document. It is expected that the offer document specify who is responsible for managing the investment activity of the fund.

Turning to Regulation 16(3)(b) the Offer Document will need to state how breaches to the fund's investment limits will be notified to investors and the FSC.

It is good practice for firms to notify investors of how material errors will be dealt with. Funds can also define 'material' in the offer document. When this is sufficiently material to have a significant impact on the investments, the fund will need to consider how best to advise the investors. It is important that funds are able to ensure that they have a process in place for dealing with errors be it in trading, valuing assets of the fund, calculating the NAV or other.

The offer document should also provide details of the director's relevant experience and qualifications to enable participants to make an informed decision, prior to investing in the fund.

Penalties

Regulation 13 gives the Commission penalty filing powers in relation to late filing of financial statements. The Commission has discretion for waiving these fees which will be exercised when there is a genuine reason, that could not have been avoided by the fund, for the delay in submission. The fee is set at £200 per week for late filing.

Transitional provisions

All existing EIFs should ensure that they are in compliance with the EIF Regulations within 90 days of them being issued. The fund should document that this has been assessed and its compliance with the EIF Regulations.

In respect of the new disclosure requirements, existing EIFs are required to be compliant as and when the offer document is updated. Existing EIFs, which are still making offerings to new clients, should update its offer document to ensure that this is fully compliant with the EIF Regulations.

New EIFs should ensure that they are fully compliant prior to being established.



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