

The restated Protection of Investors (Bailiwick of Guernsey) Law

Insights - 18/10/2021

The Protection of Investors (Bailiwick of Guernsey) Law, 1987 (the **1987 POI Law**) is due to be repealed and replaced by the Protection of Investors (Bailiwick of Guernsey) Law, 2020 (the **2020 POI Law**) with effect from 1 November 2021, following a long period of consultation between the relevant stakeholders including the Guernsey Financial Services Commission (the **Commission**) and Guernsey's financial services community.

What has changed?

In headline terms, the categories of licensees, exemptions available and the definition of controlled investments have remained unchanged and, as such, the categorisation of existing legal structures are unaffected by the amendments.

That said, many of the details relating to the operation of licensees and other regulated entities and the powers of the Commission to supervise licensees and other entities carrying on controlled investment business have been amended. In addition, the enforcement powers of the Commission have been moved from the 1987 POI Law and the other regulatory laws into a new law called the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 which makes the enforcement process consistent across all regulatory laws and also now houses the market abuse provisions previously found in the 1987 POI Law.

The key amendments to the 1987 POI Law brought about by the 2020 POI Law can be characterised broadly as those:

(A) affecting the obligations of licensees and other regulated entities to notify and/or report to the Commission on a periodic or event-driven basis;

(B) further defining the Commission's role with respect to supervising controlled investment business carried on in or from Guernsey and broadening the Commission's supervisory powers; and

(C) clarifying or codifying current practices.

Summary of the key amendments to the 1987 POI Law

Part A: key changes to licensees' ongoing obligations

1. Vetted supervised persons

The categories of key personnel of licensees that need to be vetted by the Commission have been expanded to now cover (a) directors, (b) controllers (which itself has been expanded – see below), (c) partners of general partnerships, (d) GPs of limited partnerships, (e) members of LLPs, (f) MLRO, (g) MLCO and (h) compliance officers.

The definition of 'controller' in this context has been expanded to now cover managing directors/CEOs of parent companies, shareholder controllers (which has itself been expanded to cover not only those shareholders holding at least 15% of the voting control of the company directly or indirectly, but also beneficial holders of at least 15% of the issued shares in a cell of a protected cell company that is a licensee), indirect controllers (broadly, persons on whose instructions directors are accustomed to act) and 'any person who has the power, alone or with another, to appoint or remove a director of a board or a member of the committee or other similar governing body of that body or (where that body is a company) of any other company of which that body is a subsidiary'.

2. Notified supervised persons

The categories of key personnel whose appointment requires notification to the Commission has been expanded to cover: (a) a significant shareholder (a shareholder holding at least 5% of the voting shares, but not more than 15% of the voting shares of a licensee that is a company), (b) a company secretary; and (c) an 'other supervised manager', that is to say, a person appointed – '(i) otherwise than as a chief executive, to exercise, under the immediate authority of a director or partner (or general partner, in the case of a limited partnership, or member, in the case of a limited liability partnership), day-to-day managerial functions in relation to controlled investment business in respect of which the body is or will be licensed, (ii) to any other role in order to enable the body to fulfil the requirements of paragraph 3 of Schedule 4 (business to be directed by at least two individuals)', but not including a person who falls into any other category of supervised role.

3. Annual return

The 2020 POI Law provides for the Commission to be able to make rules regarding the submission by licensees and authorised and registered collective investment schemes of an annual return, containing such information as may be prescribed by the Commission, including:

- (a) audited accounts and auditors' management letters (or confirmation that the auditors have confirmed that no auditors' management letter is required to be issued),
- (b) an up-to-date business plan,
- (c) a 12-month financial forecast,
- (d) a certificate signed by a prescribed person confirming -
 - (i) compliance throughout the period covered by the annual return with the provisions of this Law, the appointed Laws and any other prescribed enactment,
 - (ii) that accounts have been prepared and deposited in accordance with the provisions of this Law,
- (e) the names of and other prescribed particulars in respect of -
 - (i) the holders of supervised roles in respect of, or the officers or employees of, a licensee, or
 - (ii) the holders of supervised roles in respect of, or the officers or employees of, or the designated administrator or designated trustee or custodian of, an authorised or registered collective investment scheme,
- (f) the number of staff employed,
- (g) the number of investors and clients, whether in total or whether in respect of different classes or descriptions of controlled investment business,
- (h) the licensee's or authorised or registered collective investment scheme's estimate of the value of assets under administration,

Part B: supervisory role

4. Rulemaking powers expanded

There are various provisions allowing for the Commission to make rules including with respect to:

- (a) the provision of information to the Commission about vehicles that are ancillary to a collective investment scheme but which do not, in and of themselves, constitute a collective investment scheme. This provision is expected to provide for the disclosure of certain details in respect of co-investment/carried interest limited partnership and single investor vehicles to the Commission that may be formed alongside a principal fund and sits parallel to the exemptions from licensing for GPs of such vehicles in the 2020 Fiduciary Law.

(b) the circumstances in which they may make declarations as to whether a particular vehicle is a collective investment scheme or whether a particular activity constitutes controlled investment business.

(c) the power of the Commission to charge interest on late fees.

The revision also puts the Commission's power to issue codes of practice and guidance on a statutory footing.

5. Statutory obligation to keep the Commission informed codified

The 2020 POI Law requires, as a direct statutory obligation, that licensees must deal with the Commission on an open and cooperative manner and that the licensee must keep the Commission promptly informed of any matter which ought reasonably to be disclosed to the Commission; this was previously contained in the minimum requirements for licensing.

6. Expansion of powers

There are a number of provisions in the 2020 POI Law which broadened by the Commission's supervisory powers, including:

(a) Section 30 of the 2020 POI Law provides the Commission with broad powers to issue directions to all persons who are, were or should be regulated under the 2020 POI Law or who are exempt under the provisions of the 2020 POI Law, persons who hold key roles in such businesses and any person suspected of having contravened any provision of the 2020 POI Law.

(b) Section 32 expands the categories of person from whom the Commission may require the production of information or documentation.

(c) Section 35 expands the persons in relation to whom an auditor must whistle blow to include associated entities of any audited party.

(d) Section 36 gives the Commission broad investigative powers which allow them to question service providers to regulated entities in respect of the regulated person's conduct of business.

(e) Section 38 of the law broadens the powers of the Commission to appoint an inspector (now referred to as a 'skilled person') and codifies the powers and responsibilities of that skilled person.

Part C: ancillary changes

7. Clarification of period for document retention by service providers

Section 37 of the 2020 POI Law contains a useful clarification in respect of the retention of documents. It provides that a service provider to a regulated entity is required to keep all relevant documentation in relation to that regulated client for a minimum period of 6 years following the service provider ceasing to provide services to the regulated entity.

8. Voluntary surrender of license now permitted

A licensee can now surrender their license rather than being required to seek it being revoked or cancelled.

Please do be aware that the above is a summary only of certain selected changes for information and does not constitute advice. The full scope of changes made by the 2020 POI Law include items not covered in this note. We recommend licensees and other regulated entities carrying on controlled investment business should contact their usual Ogier contact or the author to discuss any changes that may impact them.

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