EVERSHEDS SUTHERLAND

International Funds Net
Country Updates

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EUROPE

Luxembourg

CSSF sends request to all credit institutions

On 29 October 2019, the Luxembourg regulator, the CSSF, issued a circular to all credit institutions requesting information for the calculation of 2020 contributions to the Single Resolution Fund (SRF).

Under EU law, Member States are obliged to establish financing arrangements that ensure their respective financial regulators can operate effectively. In Luxembourg this 'financing arrangement' takes the form of the SRF. All credit institutions established in Luxembourg are obliged to make annual contributions to the fund. There are exceptions to this rule. Offices established in Luxembourg by credit institutions with head office outside the EU do not have to participate, while the compliance of Luxembourg branches of credit institutions with head offices in other Member States will be covered by the arrangements that apply to that head office.

The circular requests impacted institutions to supply all information necessary for the calculation of their ex-ante 2020 contribution by midnight 14 January 2020. The necessary information and a submission template are both attached as appendices to the circular. Credit institutions that directly (or indirectly as part of a group) fall under direct ECB supervision will be required to supply additional assurance documentation. The deadline for the submission of assurance documentation is 17 February 2020. Again, further details for impacted entities can be found in the appendices of the circular.

Switzerland

Regulatory changes impact FSPs and foreign asset mangers

On 6 November, the Swiss Federal Council resolved to implement long anticipated changes to the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). The changes are set to take effect on 1 January 2020, but transitional regimes will apply in most cases.

The new rules introduce authorisation requirements for asset managers, along with some specific rules which apply directly to financial service providers (FSPs). The licence requirement for fund distribution has been also abolished, though financial service providers must have opted in to the new regime and have fulfilled the new rules of conduct and organisation to benefit from these changes. The ordinances also introduce minor definition changes, though their impact will be limited for foreign funds.

The authorisation requirement will apply to all asset managers – this includes foreign asset managers with a Swiss presence. The ordinances maintain Swiss registration requirements for foreign funds offered or advertised to non-qualified investors in Switzerland (though English will become a permissible language). However, under the new rules, asset managers offering or advertising foreign funds to qualified investors in Switzerland will only require a Swiss representative and paying agent if such activities are directed at high net worth individuals who have opted not to be protected as private clients. A transition period of two years has been announced, to allow financial service and fund providers to implement new conduct and organisation requirements. Existing rules, including the Swiss representative and paying agent requirements which currently apply to asset managers, will remain in force during this period.

These changes introduce general duties of conduct and organisation that apply to all FSPs. In addition to these new duties, FSPs will have to affiliate themselves with the ombudsman's office and meet specific client segmentation requirements (now broken down into private, professional and institutional segments). Firms offering client advisory services will have to meet further registration requirements on top of these new conduct and affiliation obligation. However, as the corresponding client advisor register is not yet in place, the exact date of implementation remains unclear. Affected firms will have to take action by 30 June 2020, while FSPs offering client advisory services will be required to fulfil their obligations within six months of the launch of the new register.

At the fund level, there have been changes to certain definitions. Particularly significant is the replacement of the notion of 'distribution' with the separate notions of 'offer' and 'advertising'. There are some minor differences between the two terms, though in general the FinIA states that 'advertising' foreign funds triggers the same Swiss registration, representation and paying agency duties as the offering of foreign funds.

UK OVERSEAS TERRITORIES

Cayman Islands

Voluntary liquidations

Year end is when to start planning the liquidation of any Cayman Islands entities that are at the end of their lifecycle, in order to avoid unnecessary fees.

To avoid annual 2020 government registration fees, an appointed liquidator must hold a final general meeting for a company or file a final dissolution notice for an exempted limited partnership no later than 31 January 2020. Funds registered with the Cayman Islands Monetary Authority (CIMA) under the Mutual Funds Law (2019 Revision) should consider submitting documentation by 31 December 2019 to have their CIMA status changed to license under termination / liquidation so as to be eligible for a reduction in their 2020 annual fee.

Funds will most likely be required to complete a final stub audit, either up to the date of the appointment of a liquidator or the date of the full payment of the final redemptions. Funds should allow for this, both regarding the necessary preparation required to prepare and submit audited financials, and the costs thereof.

Guernsey

Guidance on income tax substance requirements

On 1 January 2019, the new Income Tax (Substance Requirements) (Implementation) Regulations (the Regulations) came into force. The Regulations require all Guernsey tax-resident companies to confirm – for tax periods from 1 January 2019 onwards – whether the substance requirements apply to them, and if so how they meet these requirements.

Fund managers are in scope of the Regulations if they have income in relation to their fund management activities. Apart from self-managed funds, fund vehicles themselves are out of scope, although their subsidiaries may be caught if they are carrying on relevant activities.

The substance requirements establish economic substance tests that require companies to show that:

- they are 'directed and managed' in Guernsey in relation to that activity
- have adequate employees, expenditure and physical presence
- all 'core income-generating activities' (CIGA) undertaken are carried out in Guernsey.

The Regulations do not prohibit outsourcing activities to other entities, as long as the board oversees and maintains its ability to control the activities of service providers, and the outsourced activities are performed in Guernsey.

Provided a company has taken the strategic decisions and limits within which investment decisions may be made by entities outside Guernsey, and it monitors and controls the outsourcing, outsourced activities will mean CIGA is not being conducted in Guernsey.

The sanctions for non-compliance include fines, strike-off from the register of companies and reporting to relevant tax or regulatory authorities.

AMERICAS

USA

SEC updates regulatory regime for exchange-traded funds

On 25 September 2019, the Securities and Exchange Commission (SEC) adopted Rule 6c-11 (Rule) which modernises the regulatory regime that currently applies to exchange-traded funds (ETFs). It is intended to increase the speed at which ETFs can be brought to market and reduce costs by replacing the existing network of individual exemptive orders with a single rule. The SEC also voted to issue an exemptive order to harmonise related relief for broker dealers.

All ETF's organised as open-ended funds will be eligible for the Rule, which sets out new standardised conditions for impacted entities and lists applicable exemptions. ETFs organised as unit investment trusts (UITs), leveraged or inverse ETFs, ETFs structured as a share class of a multi-class fund, and non-transparent ETFs will not be eligible for the new framework. The SEC is simultaneously amending existing forms to introduce stricter disclosure requirements – which will affect all ETFs.

The Rule comes into effect 60 days after publication in the Federal register and existing exemptive orders held by eligible funds will be rescinded 12 months thereafter. Non-eligible ETFs will be able to continue operating under existing exemptive orders, apart from master-feeder ETFs, which will have their exemptive relief rescinded.

Following the end of the 12 month transition period, the SEC hopes that eligible ETFs will begin operating on a level playing field under the revised framework.

ASIA PACIFIC

Cambodia

New service fees for the registration of trusts

On 30 September 2019, the Ministry of Economy and Finance (MEF) issued a new regulation, Prakas No. 854 (Prakas). The Prakas details the registration and renewal fees that will apply to different trusts depending of their type. Four categories of Cambodian trust are set out in the Prakas, ie social, commercial, public and individual. Each category of trust must have its value assessed by an expert in the relevant field. Such expert must be recognised and accredited by the relevant Cambodian regulators.

A Certificate of Trust Registration (CTR) will allow trusts to continue operating for up to five years, subject to the duration determined in the trust document.

The MEF has also set its service fees for the prior approval of trust documents and any amendments made to the trusts documents or registration documents. Under the terms of the Prakas a fee of KHR 5 million (approximately USD 1,230) will apply in each case.

Hong Kong

SFC issues new external data storage requirements

On 31 October 2019, the Securities and Futures Commission (SFC) issued a new 'Circular to Licensed Corporations' (the 'Circular'), setting out new guidance on the use of external data storage.

The Circular reminds firms of their existing obligations under Hong Kong law – most notably the Securities and Futures Ordinance and the Anti-Money Laundering and Counter-Terrorist Financing Ordinance – stressing that these apply even in cases where licenced companies use external data storage providers (EDSPs) to meet all, or part, of their record keeping requirements. This new regulatory category casts a wide net and explicitly covers cloud-based systems. For regulatory purposes, the SFC is defining EDSPs as any external provider of:

- public and private cloud services
- servers or devices for data storage at conventional data centres
- other forms of virtual storage of electronic information
- technology services where information is generated in the course of using the services, and the information is stored at such technology service providers or other data storage providers, or the information generated and stored can be retrieved by such technology service providers.

Under the terms of the new Circular, companies relying exclusively on EDSPs (ie, those that do keep duplicate copies in-house) will have to meet a number of additional requirements. These include obligations to:

- designate two Managers-in-Charge, these figures will be effectively responsible for overseeing the use of EDSPs
- ensure that the SFC has ready access to any regulatory copies kept by EDSPs, where the EDSPs is based outside Hong Kong they must provide the SFC with a signed undertaking guaranteeing the same
- maintain 'a detailed audit trail of information' for all regulatory records stored with the EDSP
- ensure that regulatory records are stored only with suitable and reliable EDSPs
- notify the SFC 30 days prior to the termination, expiration, novation or assignment of any service agreement with an EDSP.

India

Securities and Exchange Board of India introduces Foreign Portfolio Investors Regulations 2019 and Operational Guidelines

On 23 September 2019, the Indian financial services regulator – the Securities and Exchange Board of India (SEBI) – introduced its new Foreign Portfolio Investors (FPI) Regulations (the Regulations) replacing the existing framework. This is followed by the release of SEBI's consolidated operational guidelines for FPIs (the Guidelines) on 5 November 2019. The Guidelines aim to ensure an efficient transition to the new regulatory framework, by consolidating and replacing all existing circulars, frequently asked questions, operating guidelines, and any other guidance which has been issued by the FPI division of SEBI.

The Guidelines are wide reaching and FPI's should take particular note of changes to the Categorisation system, including the retirement of the Category III classification (existing Category III FPIs will be reclassified as Category IIs). The Guidelines also set a hard limit for a single FPI (including its investor group) investing in companies. Under the new Regulations, the total level of investment may not exceed 10% of a company's total paid up equity capital. If this aggregate limit is breached, the FPI must sell the excess holdings to domestic investors, as per the guidelines. Once the holding crosses the limit, the depositories will only be able to sell their holding to domestic investors. Depositaries now have a duty to inform stock exchanges about any breach.

In a statement SEBI confirmed this new stance: 'In the event of a breach of the sectoral cap/aggregate FPI limit/aggregate NRI limit, the foreign investors shall divest their excess holding within 5 trading days from the date of settlement of the trades, by selling shares only to domestic investors'.

Japan

Changes to Foreign Exchange and Foreign Trade Act (FEFTA)

On 18 October 2019, the cabinet approved changes to Japan's Foreign Exchange and Foreign Trade Act (FEFTA). As drafted, the amendments would significantly curtail foreign investment in Japanese companies operating in 'strategically sensitive industries'. This is likely to include companies with interests in nuclear energy, arms production, agriculture and aeronautics, though the exact extent is unclear in some cases. Under the new rules, foreign investors will have to seek government approval before acquiring a total vote share of 1% or more in affected companies. This is a significant reduction from the 10% threshold for issued shares that applies under current rules. The new amendments would also introduce new requirements for foreign investors. In particular, stake holding companies would face mandatory prior notification requirements for any significant changes to management.

If accepted by the National Diet (Japan's bicameral legislature), the new rules could come into force as early as March 2021. The proposed amendments are framed as a direct response to similar steps taken by the United States and the European Union in response to growing concerns about Chinese influence. There has been some backlash to the move, with many businesses (eg small cybersecurity firms) unclear about the scope of the proposed changes. Concern about the possible repercussions on the Tokyo market's ability to continue attracting foreign capital are being voiced in some quarters.

Singapore

Offshore economic substance requirements and Singapore businesses landscape

In order to address alleged concerns on unfair tax practices, the European Union has put pressure on offshore jurisdictions to introduce economic substance requirements. As a result, many of the traditional offshore jurisdictions, including the British Virgin Islands (BVI) and the Cayman Islands, have recently introduced substance legislation. This legislation came into effect for new entities from 1 January 2019 and has applied to existing entities from 1 July 2019.

While each offshore jurisdiction has introduced its own economic substance legislation and guidance, the key requirements are broadly similar across the different territories.

Economic substance legislation introduces certain reporting and economic substance requirements for 'legal entities' or 'relevant entities' conducting 'relevant activities'. The scope of 'legal entities' or 'relevant entities' is very broad and includes both domestic and foreign companies and partnerships incorporated or registered and deemed to be tax resident in the BVI or Cayman Islands respectively.

'Relevant activities' generally comprise the following:

- Banking
- Distribution and service centres
- Finance and leasing
- Fund management
- Headquarters
- Holding company
- Insurance business
- Intellectual property holding
- Shipping

How do businesses satisfy the Economic Substance Requirements?

The economic substance requirements focus on the following criteria:

- adequate physical presence
- adequate full time employees in the BVI / Cayman Islands with suitable qualifications

- the relevant activity is directed and managed in the BVI / Cayman Islands
- core income generating activities are undertaken in the BVI / Cayman Islands with respect to the relevant activities
- adequate operating expenditure incurred in the BVI / Cayman Islands

Currently, economic substance legislation does not define 'adequate' under the economic substance requirements. As a result, the determination of what is 'adequate' is fact sensitive. Pure equity holding companies will be subject to a reduced economic substance test and only have to satisfy the first two conditions listed above.

For legal entities carrying on fund management business, the core income generating activities to be undertaken in the BVI / Cayman Islands include:

- taking decisions on the holding and selling of investments
- calculating risks and reserves
- taking decisions on currency or interest fluctuations and hedging positions
- preparing relevant regulatory or other reports for government authorities and investors

Failure to comply with substance requirements could lead to significant fines or being struck off by local registries.

What it means for Singapore businesses

As the trend is moving towards requiring more substance as more countries seek to meet the European Union's requirements, businesses with entities incorporated or intending to be incorporated in traditional offshore jurisdictions may wish to re-evaluate their group structures. It may be more sustainable for businesses to either incorporate companies in Singapore or re-domicile eligible foreign corporate entities (FCE) onshore to Singapore.

General requirements for incorporation of Singapore entity

Company incorporation in Singapore is a straightforward process with the following requirements:

- at least 1 shareholder
- minimum initial paid-up capital of SGD 1
- at least one resident director
- at least one company secretary
- local registered address.

General requirements for inward re-domiciliation to Singapore

- eligibility requirement – a FCE must first be authorised to transfer its incorporation under the laws of its place of incorporation
- size requirement – at least 2 of the following criteria must be satisfied:
  - total assets exceeding S$10 million
  - annual revenue exceeding S$10 million
  - more than 50 employees
- Solvency requirement – the FCE must also be balance-sheet solvent and able to pay all debts (including for the period of 12 months immediately after the date of the application) as they fall due.

Please note that this update on recent legal developments is not designed to provide legal advice and it is advisable to consult with local legal counsel before any actual undertakings.

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