EVERSHEDS SUTHERLAND

International Funds Net
Country Updates

March 2020

EUROPE

European Union

ESMA sets out COVID-19's impact on IFRS 9 accounting

ESMA issued a Public Statement on 25 March 2020, concerning the effect that economic support and relief measures adopted by EU Member States may have on financial accounting. The measures put forward include moratoria on loan repayments and are expected to impact the calculation of expected credit losses in accordance with IFRS 9. ESMA provides guidance to issuers and auditors on the application of IFRS 9 Financial Instruments. Particular attention is given to the calculation of expected credit losses and related disclosure requirements. The financial reporting guidance issued by ESMA is consistent with that set out in the EBA's Statement on the application of the prudential framework during the COVID-19 outbreak. For a full review of the European state aid measures, please turn to our dedicated briefing on the topic.

ESMA delays SFTR implementation

ESMA issued a Public Statement on 26 March 2020, urging national competent authorities not to prioritise supervisory actions in respect of firms in-scope for the first phase of the Securities Financing Transactions Regulation (SFTR). The initial phase of the SFTR reporting requirements was set to apply to credit institutions and investment firms from 11 April 2020, but this will now be subject to a three month delay. In addition, ESMA will no longer require Trade Repositories (TRs) to register with them ahead of 13 April 2020, a measure which will allow TRs to focus their efforts on dealing with the effects of COVID-19. For more information please turn to our dedicated briefing on the topic.

ESMA issues new deadlines for EU financial reports

On 27 March 2020, ESMA issued a Public Statement concerning the deadlines for publishing financial reports. These deadlines apply to listed issuers under the Transparency Directive (Directive 2013/50/EU). In light of the challenges facing both issuers and the auditors during the coronavirus outbreak, ESMA has urged NCAs throughout the EU "*to apply forbearance powers towards issuers who need to delay publication of financial reports beyond the statutory deadline*". Issuers who would normally make annual financial reports are eligible for a two month forbearance period. For issuers subject to half-yearly financial reporting obligations, the forbearance period is one month only. ESMA is keen to stress that issuers who delay publication of financial reports are expected to keep investors informed of the expected delay. Market Abuse Regulation requirements will continue to apply. The forbearance period may be extended by ESMA, though no firm commitment has been made at the current time.

Net Short position holders required to report net short positions to ESMA

On 16 March 2020, the European Securities and Markets Authority (ESMA) announced that the holders of net short positions in shares traded on an EU regulated market will have to notify the relevant national competent authority (NCA) if their position reaches or exceeds 0.1% of the issued share capital. The decision took effect on March 16. No end date has been announced. The accompanying press statement can be found here.

Germany

BaFin issues COVID share warning

In its 25 March 2020 Press Release, the Germany's Federal Financial Supervisory Authority (**BaFin**) has urged investors to be wary of recommendations for shares in companies professing to have a means to stop the spread of corona virus. Potential conflicts of interest arising from the promotion of such shares by holders of related financial instruments was highlighted as a particular concern and investors are urged to report suspect recommendations to BaFin.

Ireland

Extended filing deadlines

The Office of the Revenue Commissioners has announced that it will be extending the filing deadline for Form IU(3e) to 30 June 2020. The original deadline was 31 March 2020, but the timeline has been pushed back to allow Irish funds to re-focus on countering the current period of market disruption.

EVERSHEDS SUTHERLAND

Luxembourg

Luxembourg strengthens CRS and FATCA legislation

A new draft law amending legislation relating to the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS) was published on 20 February 2020.

In practical terms, the new bill clarifies Luxembourg Reporting Financial Institutions' (**FI's**) obligations and the applicable statute of limitations of the Luxembourg Tax Authorities' powers of investigation. It is hoped that the new measures will increase confidence in the regulatory regime and align the FATCA and CRS rules to promote a cohesive regulatory approach.

Under the new draft law, Luxembourg reporting financial institutions will be obligated to:

- avoid any practices designed to circumvent FATCA and CRS reporting
- keep records of any action taken, evidence of reporting and any due diligence procedures carried out for 10 years
- maintain controls, procedures, policies, and IT systems appropriate to their size, which will allow the FI to fulfil reporting and due diligence obligations.

In the absence of reportable accounts, FIs currently have the option of carrying out CRS nil reporting. If the draft law is enacted in its current form, CRS nil reporting would be mandatory from the 2020 reporting year onwards. The legal reporting deadline of 30 June would remain unchanged.

Steeper penalties are proposed for late, incomplete or wrong reporting under the draft law, which would raise the fine from a minimum of EUR 1,500 (with a maximum of 0.5% of the amount not reported), to a fixed EU 10,000 fine. The EUR 10,000 fine will also apply to FIs that fail to file CRS or FACTA returns by the reporting deadline (this will apply even to those reporting a nil return).

Under the new draft law, the Luxembourg tax authority will be explicitly authorised to access records of action taken and evidence of compliance, including policies, controls and procedures. They will also gain the right to access an FIs IT systems. However, the draft law clarifies that tax authorities information collected during audits, or reported by eligible FIs may only be used for CRS purposes.

Audits by the tax authority will be carried out within a 10-year time limit and evidence of non-compliance with CRS or FATCA rules will be punishable by a maximum penalty of EUR 250,000. In addition, where reportable accounts have been non-reported or under-reported, additional fines up to a maximum of 0.5% of the non-reported amount could be added to the final bill.

CSSF issues updated UCITS FAQs

On 10 March 2020 the *Commission de Surveillance du Secteur Financier* (**CSSF**) issued an update to its Frequently Asked Questions (**FAQs**) regarding undertakings for collective investment, with a particular focus on undertakings for collective investment in transferable securities (**UCITS**). The FAQs aim to highlight key aspects of the laws and regulations governing UCITS from a Luxembourg perspective. The most recent version of the FAQs can be found here.

CSSF extends deadline for annual AML survey

The CSSF published a circular-letter on 17 March 2020, announcing an extension to the 2019 AML survey deadline. The online survey helps the CSSF monitor the money laundering and terrorist financing risks which professionals under supervision are exposed to in the course of business. The survey was first announced on 31 January 2020, but the CSSF has acknowledged that teething issues with the newly established CSSF's eDesk portal and the of COVID-19 pandemic may have delayed industry responses. As a result the CSSF has decided to extend the deadline for investment fund managers, specialised professionals of the financial sector and investment firms. These figures now have until 10 April 2020 to submit their responses for 2019.

Luxembourg brings in defensive measures

On 25 March 2020, the Luxembourg Government Council published a new draft law (the **Draft Law**) which looks set to increase the tax burden for enterprises based in jurisdictions on the EU's list of non-cooperative countries and territories for tax purposes (**Annex 1**, also known as the 'blacklist'). The Draft Law proposes amendments to Article 168 of the Luxembourg Income Tax Law which would refuse the tax deductibility of interest and royalties paid or due to Annex 1-domicled businesses.

For background, Annex 1 currently includes the following jurisdictions: American Samoa, Cayman Islands, Fiji, Guam, Oman, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands, and Vanuatu.

Switzerland

FINMA contributes to Swiss liquidity drive

Accompanying the Federal Councils adoption of new liquidity measures on 25 March 2020, the Swiss Financial Market Supervisory Authority (**FINMA**) issued a Press Release encouraging Switzerland's banks to adopt sensible and cooperative policies to enable the rapid provision of Government-backed credit to Swiss businesses and consumers. As part of this wider package of measures, FINMA announced a temporary exclusion of central bank reserves from the calculation of the leverage ratio. This measure frees up around CHF 20 billion of Tier 1 capital, which will now be available to supply further liquidity. FINMA also took the opportunity to encourage company boards to consider restricting dividend payments, concluding firmly that: *"Acting to preserve strength is not a sign of weakness".*

UK

BoE and PRA announce COVID-19 relief measures

The Bank of England (**BoE**) and the Prudential Regulatory Authority (**PRA**) issued a joint Statement on 20 March 2020 announcing additional supervisory and prudential policy measures to address the challenges of COVID-19. The measures announced include:

- the cancellation of 2020 stress tests for the eight major UK banks and building societies
- the postponement of the joint BoE-Financial Conduct Authority (**FCA**) survey into open-ended funds until further notice
- delays to the application of certain reforms to banks' internal ratings based (**IRB**) models until 1 January 2022.

For more information please turn to our dedicated briefing on the UK regulatory response.

FCA, FRC and PRA issue joint Statement

In response to the ongoing market disruption caused by COVID-19, the FCA, Financial Reporting Council (**FRC**) and PRA issued a joint Statement on 26 March 2020. The Statement stresses the importance of ensuring information continues to flow to investors and is accompanied by further measures aimed at supporting the continued functioning of the UK's capital markets.

This package of measures includes:

- an FCA Statement allowing listed companies an extra 2 months to publish their audited annual financial reports – this includes a commitment to forebear from suspending the listing of companies if they publish financial statements within 6 months of their year-end
- FRC Guidance for companies preparing financial statements in the current environment
- PRA Guidance regarding the approach that should be taken by banks, building societies, and PRA-designated investment firms in assessing expected loss provisions under IFRS9
- FRC Guidance for audit firms seeking to overcome challenges in obtaining audit evidence.

Alongside the promotion of active measures, the Statement recognises that market practices relating to the timing and content of financial information and the audit work that is done may have to be adjusted in light of the ongoing COVID-19 outbreak.

Examples of acceptable changes to market practice include:

- the modification of audit opinions where auditors have been unable to complete the audit in full (this might involve limits to the scope of the audit opinion)
- the issuance of more audited financial statements with disclosures explaining that management is aware of material uncertainties related to events or conditions that may cast significant doubt upon the entity's ability to continue as a going concern
- changes to timetables for publication of financial information that had been set before the full implications of coronavirus were clear.

For more information and legal commentary on this extensive raft of measures, please turn to our dedicated briefing on the topic.

BoE issues new guidance on UK COVID corporate financing facility

Following on from the BoE and HM Treasury's joint launch of the COVID Corporate Financing Facility (**CCFF**) on 17 March 2020, Eversheds Sutherland has released its guide to the new facility, exploring the original announcement and putting subsequent clarifications into context.

CMA issues guidance on COVID-19 cooperation

On 25 March 2020, the UK's Competition & Markets Authority (**CMA**) published a 12 page guidance note on its approach to business cooperation in response to COVID-19. This followed a series of shorter announcements by the CMA and other European authorities that they do not intend to intervene against companies cooperating to avoid support shortages, and will permit retailers to cooperate with each other to ensure continued food supply. For more information, please turn to our dedicated briefing on the CMA's guidance note.

FCA confirms that LIBOR transition to proceed as planned

In its 25 March 2020 Statement the FCA confirmed that – in spite of market disruption – there are no plans to extend publication of the London Inter-Bank Offered Rate (**LIBOR**) past 2021. The Statement acknowledges that some "*interim milestones*" may be missed, but maintains that the transition away from LIBOR will proceed as planned as far as this is possible in the current climate. The announcement followed discussions between the FCA, BoE and members of the Working Group on Sterling Risk-Free Reference Rates and will be subject to regular re-assessment in the coming months. Read our dedicated briefing for more background on the LIBOR transition and its implication for financial institutions.

UK OVERSEAS TERRITORIES

British Virgin Islands

New amendments enacted for open-ended funds

On 17 March 2020, the British Virgin Islands (**BVI**) enacted amendments to the Mutual Funds Regulations and Securities and Investment Business (Incubator and Approved Funds) Regulations. Both measures were initially passed by the legislature last year. The new rules will apply immediately to all new structures, however, a transitional period has been put in place until 1 July 2020 for open-ended funds that were in existence prior to 31 December 2019.

The key takeaways for BVI-domiciled or recognised funds are summarised below.

Valuation

Open-ended funds will now have to maintain a clear and comprehensive fund valuation policy, which must include procedures to ensure that the policy is implemented effectively. The valuation policy and procedures must:

- be appropriate for the nature, size, complexity, structure and diversity of the fund and its property
- be consistent with the valuation provisions set out in the fund's constitutional and offering documents
- require annual valuations to be carried out
- set out procedures for preparing reports on the valuation of fund property
- establish and clearly specify what mechanisms are in place for the dissemination of valuation information and reports to investors.

Going forward, affected funds must ensure that fund's assets are valued in accordance with the valuation policy.

Accounting Standards

The new amendments now specify which auditing standards may be used to prepare the fund's financial statements. Eligible standards include:

- US GAAP
- International Standards on Accounting (UK)
- International Standards on Auditing
- Hong Kong Standards on Auditing
- Canadian Auditing Standards.

Other recognised international auditing standard may be approved by the BVI Financial Services Commission on a case by case basis.

For most open-ended funds the effect of these new amendments will be minimal. Maintaining effectively valuation policies and making use of international accepted accounting standards is standard practice. However, affected funds are nonetheless encouraged to ensure that they are in full compliance with the finer detail of the amendments before the end of the transitional period.

Guernsey

Director issues guidance

As the COVID 19 pandemic continues to impact businesses and ordinary citizens across the world, the Director of the Revenue Service in Guernsey has confirmed that it will take a pragmatic approach to economic substance legislation for the foreseeable future. In its 16 March 2020 Statement (issued through the Guernsey Institute of Chartered Accountants), the Director clarified that the pragmatic approach would only apply for measures prompted by the current crisis. Companies are still expected to maintain and retain appropriate records where flexibility has been extended.

AMERICAS

Chile

Chilean Tax reform

On 1 March 2002, the Chilean tax reform approved by the National Congress in January was published. The overhaul introduces a new 40% income tax bracket for high earners, establishes a progressive real estate property tax and a new VAT for digital platforms. A newly integrated tax regime is also likely to benefit small- and medium-sized companies who will enjoy a lower tax burden.

Shareholders meeting can now be held virtually

Responding to the current period of disruption, the Chilean securities, insurance and banking regulator has issued guidance authorising shareholders meetings of regulated firms to be held virtually.

USA

Five US agencies promote small-dollar loans

On March 26 2020, five agencies issued a joint Statement, encouraging banks, savings associations and credit unions to offer responsible small-dollar loans to consumers and small businesses affected by COVID-19. The agencies have also called for work-around strategies to be offered to borrowers who cannot repay a loan as structured, which will allow them to repay the principal of the loan without taking on further debt.

DOJ takes its first enforcement action to combat COVID-19 fraud

The US Department of Justice has taken its first enforcement action against COVID-19 fraud, delivering on its commitment to prosecute *"bad actors"* attempting to exploit the global health crisis. On 22 March 2020, the DOJ announced that it had filed a civil complaint in the US District Court for the Western District of Texas alleging that the operators of the website *"coronavirusmedicalkit.com"* are engaged in a predatory wire fraud scheme and are attempting to profit from consumer anxiety related to COVID-19. More information can be found in our most recent Legal Alert.

Federal Reserve sets out new approach

On 24 March 2020, the Federal Reserve issued a Statement setting out how its supervisory approach would be adjusted to account for the effects of coronavirus. For the foreseeable future the Federal Reserve will:

- focus on monitoring and outreach to help financial institutions of all sizes understand the challenges and risks of the current environment
- temporarily reduce its examination activities to minimize disruption and to focus on outreach and monitoring (smaller institutions are likely to see the greatest reduction in examination activity)
- grant additional time to resolving non-critical existing supervisory filings.

However, large banks are still expected to submit their capital plans developed in accordance with the Federal Reserve Board's Comprehensive Capital Analysis and Review (**CCAR**) by 6 April 2020. The Federal Reserve plans to use these plans to monitor how firms are managing their capital in the current environment.

Federal Reserve offers forbearance for small financial institutions

The Federal Reserve unveiled a regulatory reporting relief package for small financial institutions affected by coronavirus in its 26 March 2020 Press Release. Under the relief measure, financial institutions with USD 5 billion or less in total assets will be not be prosecuted for submitting their 2020, FR Y-9C or FR Y-1 up to 30 days after official filing deadline. However, institutions are strongly encouraged to contact their Reserve Bank if they anticipate a delayed submission. The Federal Reserve has signalled that its forbearance period will be applied in the same way as the FFIEC relief package announced on 25 March 2020 (see below).

FFIEC announces forbearance period for financial institutions

On 25 March 2020, the Federal Financial Institutions Examination Council (**FFIEC**) issued a Press Release, stating that financial institutions will be not be prosecuted by federal banking agencies for submitting their 2020 Call Reports up to 30 days after official filing deadline. However, institutions are strongly encouraged to contact their primary federal regulator if they anticipate a delayed submission.

SEC extends relief for public companies

In its 25 March 2020 Press Release, the Securities and Exchange Commission (**SEC**) announced that it would be providing public companies with a 45-day extension period to file certain disclosure reports that would otherwise have been due between 1 March and 1 July 2020. This announcement supersedes and extends a previous extension issued on 4 March 2020. The SEC has also granted investment funds and investment advisers additional time to hold in-person board meetings and meet certain filing and delivery requirements. Again, this announcement supersedes and extends a previous extension order issued on 13 March 2020. For more information see our Legal Alert on the SEC's announcement.

SEC announces fresh relief package

On 26 March 2020, the SEC announced that it will be providing additional regulatory relief to market participants in response to the ongoing disruption caused by COVID-19. The package of measures includes relief from the Form ID notarisation requirement which will last from 26 March 2020 through to 1 July 2020, subject to certain conditions. Responding to Regulation A Crowdfunding issues, the SEC has also granted affected companies an additional 45 days to file certain disclosure reports. Finally the SEC has introduced a temporary conditional exemptive order that grants affected municipal advisors an additional 45 days to file annual updates to Form MA. The SEC notes that it may extends the time-period of these relief measures, or provide additional relief if this proves necessary.

ASIA PACIFIC

Australia

New licensing regime for foreign financial service providers

On 10 March 2020, the Australian Securities and Investments Commission (**ASIC**) released the revised licensing framework for foreign financial services providers (**FFSPs**). The new regime will take effect on 1 April 2020, though a two year transition period will run to 31 March 2022. Licensing relief, which will allow providers of funds management financial services to induce some types of professional investors without a license, will come into effect from 1 April 2022.

Hong Kong

Hong Kong regulator issues fresh COVID guidance

On 27 March 2020, Hong Kong's Securities and Futures Commission (**SFC**) issued further COVID-19-related guidance to the fund industry. The guidance comes in the form of two circulars. The first circular is directed at managers, trustees and custodians of SFC-authorized funds and places particular emphasis on their obligation to ensure the fair treatment of investors. Authorised funds are also urged to report any material issues affecting them at the earliest opportunity. The second circular is directed at intermediaries and focuses on their responsibility to perform proper due diligence, take full account of a product's liquidity and credit quality, and take the client's current circumstances into account when promoting a financial product. The SFC has also reminded intermediaries to disseminate notices and other communications about investment products in a timely manner where they hold them directly or indirectly on behalf of their clients. Further guidance will be issued by the SFC as it is needed.

Singapore

Enhancements to the Listing Rules of the Singapore Exchange

The Singapore Exchange Securities Trading Limited (**Singapore Exchange**) recently introduced amendments to the listing rules (**Listing Rules**) which came into effect on 7 February 2020 (**Latest Amendments**).

The Latest Amendments introduced, inter alia, enhancements to the disclosure obligations and in this client update, we explore some of the key changes introduced by the Latest Amendments.

Enhancements to disclosures of acquisitions/disposals

Chapter 10 of the Listing Rules deals with the acquisition or disposal of assets by an issuer (**Chapter 10 Transactions**) and prescribes a mechanism under Rule 1006 of the Listing Rules to calculate the relative size of a transaction (**Relative Figures**) to determine whether it should be disclosed to the shareholders or requires the approval of the shareholders.

Previously, in a situation where a Relative Figure is negative, the Listing Rules prescribed that the issuer should consult with the Singapore Exchange. This unavoidably created uncertainty and inconsistency as the Singapore Exchange was inundated with such applications.

To address this issue, the Singapore Exchange has introduced new rules to guide issuers in situations where a Relative Figure is negative. This may arise when (a) the issuer has a negative net asset value; (b) the asset to be disposed has a negative net asset value; (c) the issuer is loss-making; and/or (d) the asset to be acquired/disposed is a loss-making asset. Generally, for transactions with a negative Relative Figure, the Relative Figures computed under Rule 1006 of the Listing Rules that are positive will continue to apply as per usual, while guidance will be given on how to apply the negative Relative Figure in a meaningful manner.

<u>Enhancements to the continuous disclosure regime</u>

The Singapore Exchange has adopted a disclosure based regulatory regime and the Listing Rules are interspersed with specific disclosure obligations. In addition, issuers are also expected to comply with the general disclosure obligations set out in Chapter 7 of the Listing Rules.

The Latest Amendments have expressly provided that the continuous disclosure obligations set out in the Listing Rules are given statutory backing under the Securities and Futures Act (Cap. 289) of Singapore (**SFA**) and any breach may be considered an offence under the SFA and may have serious legal consequences for the issuer and its officers.

The Latest Amendments also seek to clarify certain gaps in the general disclosure obligations of an issuer. For example, and as an indication of the Singapore Exchange's attitude towards errant issuers and their directors, any public reprimand or public sanction relating to non-compliance with applicable laws or regulations, including any applicable accounting standards and any investigation on a director or an executive officer of the issuer must be disclosed.

In addition, the Latest Amendments have also provided guidance on what constitutes material information. Previously, the primary focus was directed on whether a piece of information is price sensitive i.e. the information would be likely to materially affect the price or value of the securities of the issuer, also known as "materially price-sensitive information". The Latest Amendments clarified that not only materially price-sensitive information should be disclosed, but trade sensitive information should be disclosed as well.

The test of trade-sensitive information does not focus on the potential price impact of such information, but rather the likelihood that the omission or failure to disclose such information will result in the market trading on an uninformed basis. Such test is an objective test and the question to ask is, whether the information is expected to influence an investor who "commonly invests" in securities to trade in the securities of the issuer in reliance of such information, if it had been known beforehand. Therefore, the test for trade-sensitive information is broader than the test for materially price-sensitive information. The Singapore Exchange may consider a piece of information to be "trade sensitive" even if there is no significant market reaction to the information when disclosed.

<u>Revamp to the quarterly reporting regime</u>

Prior to the Latest Amendments, only issuers who meet the minimum market capitalisation had to report its financials every quarter (**QR**). This has since been replaced with a risk-based approach whereby only issuers who fall under a prescribed category will be subject to QR.

Under the new risk-based approach, an issuer will have to undertake QR if it:

- it has received a disclaimer of opinion, adverse opinion or qualified opinion from its auditors on its latest financial statements
- its auditors have expressed a material uncertainty relating to going concern in its latest financial statements
- it is the subject of regulatory concerns of the Singapore Exchange.

Issuers subject to QR must include prominently a statement on the cover page of its QR announcement that it is subject to QR under the Listing Rules. For all other issuers not subject to QR, they have the choice to report their quarterly financials in any form so long as its half-year financials are reported in a prescribed form.

This new regime is a welcome one as the focus of regular disclosure has been shifted from size to risk. Issuers with a higher risk should be subject to more effective monitoring to ensure that the concerns of the investors and/or regulators are being addressed on a regular basis. Issuers with a lower risk are now rewarded by lowered compliance costs.

The Latest Amendments form part of the Singapore Exchange's efforts to safeguard investors' interests whilst balancing the commercial objective of being business-friendly, careful to not overburden issuers with compliance costs, where possible. In this regard, the Latest Amendments are a step in the right direction as not only do they enhance disclosure obligations, they aim to seek to address issuers’ concerns on relevant and accurate disclosure.

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.

For more information on these updates or about IFN, our specialist solution for global AIFs and UCITS distribution activities, please contact:

Lindi Rudman
Legal Director

Dir: 0207 919 0837
Int: +44 20 7919 0837
lindirudman@
eversheds-sutherland.com

Michaela Walker
Partner

Dir: 0207 919 0541
Int: +44 20 7919 0541
michaelawalker@
eversheds-sutherland.com

Ronald Paterson
Partner

Dir: 0207 919 0578
Int: +44 20 7919 0578
ronaldpaterson@
eversheds-sutherland.com

eversheds-sutherland.com