EVERSHEDS SUTHERLAND

International Funds Net

Country Updates

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EUROPE

Spain

Spain completed MiFID II implementation

The implementation of MiFID II was finally completed on 28 December 2018, by means of the publication of Royal Decree 1464/2018, of 21 December, which develops the provisions of the Spanish Securities Act and represents the last phase of the implementation of MiFID II into Spanish law, following its partial implementation in December 2017 and September 2018.

This last piece of legislation implements, among other things, one of the most significant MiFID II changes in terms of the impact on the Spanish market: the conditions under which investment service providers can receive incentives (in particular, management fee rebates).

The abovementioned Royal Decree includes the same examples of models and type of services that allow an entity to continue to receive rebates such as those foreseen under the MiFID Delegated Directive. However, it also makes it possible for the Spanish National Securities Market Commission (CNMV) to add further specific examples to the list. It also clarifies certain important definitions of related terms (e.g. third party product) and under which conditions it should be understood that a wide range of products is being offered.

The CNMV adopts ESMA's guidelines on suitability requirements

On 21 December 2018, the CNMV notified the European Securities and Markets Authority (ESMA) of its intention to comply with the guidelines relating to certain aspects of the MiFID II suitability requirements and, therefore, the CNMV will start to take into account the application of the provisions established by ESMA in relation to entities which provide advice (whether independent or not) or portfolio management services exercising their supervisory functions.

The following is worth noting:

- regarding the decision-making process when making recommendations or managing portfolios:
  - the introduction of the obligation to evaluate whether equivalent financial instruments can be adjusted to the profile of the client, taking into account the cost and complexity of the products
  - it also addresses the obligation to perform a cost-benefit analysis when entities consider changes in investments, so that they are able to demonstrate that the benefits of the change outweigh the costs
- the guidelines apply to structured deposits insofar as MiFID II has extended the obligations of fit and proper assessment to these products
- they also address, for the first time, the practice of considering the client's environmental, social and governance preferences
- they stress the need for institutions to adopt mechanisms to address the risk of clients overestimating their knowledge and experience by including, for example, specific questions to test the client's level of knowledge about product characteristics and risks. The consideration of age as a relevant factor to be taken into account in the suitability assessment process is maintained.

No need to obtain the consent of the investor, and a tax neutrality regime for reclassification of share classes due to MiFID II

Following requests from the market (in particular, through Inverco, the Spanish Collective Investment Schemes Association), some transitional rules to facilitate and minimise the impact of the reclassification of shares due to MiFID II were included in Royal Decree-Law 27/2018, adopting certain measures for tax and cadastral matters, issued on 28 December 2018.

The new Royal Decree-Law stipulates that all reclassifications of shares or units of collective investment schemes carried out between 3 January 2018 and March 2019, with the sole purpose of complying with the obligations of MiFID II, and in such a way that the participant or shareholder ceases to bear the costs associated with incentives, may be carried out without the need to obtain individual consent from the participants and shareholders, and will also be tax neutral for the investor.

EU management entities acting in Spain through a branch have new reporting obligations vis-à-vis the CNMV

On 26 December 2018, the CNMV approved changes to its Circular 1/2010 on reporting information for entities that provide investment services (which regulates the so called T-forms) in order to gather specific information on the activities carried out by EU management companies that operate in Spain through a branch.

As from 2020, these entities will need to submit new specific forms (called SG forms) to the CNMV on an annual basis. The forms can be submitted until the end of February of each year and refer to the immediately preceding financial year. Entities must submit these statements to the CNMV using the CIFRADOC system.

The CNMV may require more information, detail or further clarification of such statements, and may also require an entity to submit the statements more frequently than once a year.

UK

Flowcharts to help navigate the UK temporary permissions regime – if the Withdrawal Agreement and transition period do not come into effect

The temporary permissions regime (TPR) will enable EEA firms and funds which passport into the UK to continue operating in the UK if the existing passporting regime falls away abruptly when the UK leaves the EU. Firms will need to notify the FCA that they wish to use the TPR via the FCA's Connect system and notifications will need to be submitted between 7 January 2019 and 28 March 2019. We have prepared flowcharts for both firms and funds to help navigate the regime.

What is the TPR?

The TPR will allow inbound passporting EEA firms to continue operating in the UK within the scope of their current permissions for a limited period after 29 March 2019 (Exit Day), while seeking full UK authorisation. It will also allow EEA funds already reorganised in the UK under a passport to continue temporarily marketing in the UK.

Firms

- the TPR provides for a continuation of the passporting rights of EEA firms currently passporting into the UK under the Financial Services and Markets Act 2000 (FSMA)

- firms must notify the FCA of their interest in taking part in the TPR
  - notification is via the FCA's Connect system
  - ntifications can be made between 7 January 2019 and 28 March 2019 (inclusive of both dates)

- firms in the TPR will be treated as if they have permission under Part 4A of FSMA to carry on the relevant regulated activities in the UK

- to the extent that a firm's passport covers regulated activities, the TPR will allow a firm to continue to undertake all those activities.

Firms which can use the TPR are:

- firms which have passports under Schedule 3 to FSMA in place before Exit Day, including firms with top-up permission

- treaty firms under Schedule 4 to FSMA which qualify for authorisation before Exit Day, including firms with top-up permission

- electronic money and payment institutions who are exercising their passporting rights under the Electronic Money Directive (EMD) or the Payment Services Directive (PSD2) before Exit Day.

These rights could be on a freedom of establishment basis, a freedom to provide services basis or both.

Gibraltar-based firms that passport into the UK will not need to use the temporary permissions regime and will be able to continue to operate as they do now post-Brexit until 2020.

To view our flowchart of how the TPR process will work for firms, including key dates and steps, click here.

- The TPR will:
  - temporarily recognise EEA UCITS funds or sub-funds to allow them to continue marketing to new and existing UK retail investors
  - cover sub-funds added to an umbrella that has used the TPR even if that sub-fund is added after the UK has left the EU
  - allow EEA AIFs (including EuSEF, EuVECA, ELTIFs and MMFs) to be temporarily marketed in the UK on the same basis as they were before Exit Day
- Fund managers must notify the FCA of their interest in taking part in the TPR
  - notification is via the FCA's Connect system
  - notifications can be made between early January 2019 and will close prior to Exit Day
- non-UK domiciled EEA funds will need to either be recognised under s.272 FSMA or registered under the national private placement regime (NPPR) to be marketed in the UK after Exit Day (if temporary permission is not sought)
- fund managers/firms that do not notify the FCA during the TPR notification window must cease to market the fund in the UK at 11pm on Exit Day.

To view our flowchart of how the TPR process will work for funds, click here.

When will it apply?

- from 29 March 2019, if the UK leaves the EU without either a withdrawal agreement that includes a transition period or without any withdrawal agreement at all
- the TPR will initially last for three years, and may be extended by the Treasury for up to a further year
- during that period it is anticipated there will be six "landing slots" of three months each during which funds and firms will be required to obtain full authorisation
  - which slot a firm or fund will get will depend on their size and the risk in their business, with larger firms and funds and firms and funds that carry greater risk to the UK financial system at the front of the queue
  - on that basis we expect most asset managers and funds to be towards the back of the queue
- firms and funds which fail to obtain full authorisation during their landing slot will no longer be covered by the TPR
- it is legitimate to give notice to participate in the TPR with no intention to obtain full authorisation and to use the TPR period to wind down any UK business or sales activity.

UK OVERSEAS TERRITORIES

British Virgin Islands

New substance legislation for the British Virgin Islands

In response to the requirements of the EU Code of Conduct Group, the British Virgin Islands has enacted new legislation setting out an economic substance test for tax-resident entities.

The Economic Substance (Companies and Limited Partnerships) Act, 2018 (the Act) came into force on 1 January 2019 and applies to all companies and limited partnerships (excluding limited partnerships without legal personality) registered in the British Virgin Islands (or foreign companies and limited partnerships doing business in the territory), other than British Virgin Islands registered companies or limited partnerships that are "non-resident" in the British Virgin Islands. The Act applies to existing entities and new entities incorporated or formed from 1 January 2019.

The Act imposes economic substance tests for British Virgin Islands companies and limited partnerships that are "resident" in the British Virgin Islands and carry on "relevant activities".

In order to demonstrate economic substance, a company or limited partnership that falls within the scope of the Act by reason of (i) being resident in the British Virgin Islands and (ii) carrying out a relevant activity, must be "directed and managed" in and carry out "core income generating activities" within, the British Virgin Islands, and must also meet defined standards of "adequacy" and "appropriateness".

- "Resident" companies and limited partnerships are those registered in the British Virgin Islands under the Business Companies Act, 2004 or defined as such by the Limited Partnerships Act, 2017 (including foreign companies and foreign limited partnerships that are captured by such legislation but excluding limited partnerships that do not have legal personality), and which are not resident for tax purposes in a jurisdiction outside the British Virgin Islands (such companies or limited partnerships tax resident outside the British Virgin Islands being "non-resident" entities). An entity cannot however, claim to be non-resident in the British Virgin Islands by reason of being a tax resident in a jurisdiction which is included on the EU list of non-cooperative jurisdictions.

- "Relevant activities" are defined as: banking business; insurance business; fund management business; financing and leasing business; headquarters business; shipping business; holding business; intellectual property business; and distribution and service centre business.

- The meaning of core income generating activities varies by industry and sector but generally includes the following:

  - distribution and service centre business: transporting and storing goods; managing stocks; taking orders; and providing consulting or other administrative services

  - fund management business: taking decisions on the holding and selling of investments; calculating risk and reserves; taking decisions on currency or interest fluctuations and hedging positions; and preparing regulatory and other reports for government authorities and investors

  - headquarters business: provision of senior management; assumption or control of material risk; or the provision of substantive advice in connection with risk, as each relate to any entity in the same group.

In order to have economic substance in the British Virgin Islands, an entity which falls within the scope of the Act must demonstrate that:

- the relevant activity it carries out is directed and managed in the Virgin Islands

- it carries out core income generating activities in the jurisdiction

- it has economic substance in terms of adequacy and appropriateness and

- in the case of income generating activity carried out for the relevant legal entity by another entity, no core income generating activity (as related solely to the relevant legal entity) is carried on outside the Virgin Islands, and the relevant legal entity is able to monitor and control the carrying out of the activity performed.

AMERICAS

USA

The International Stock Exchange Authority now recognised by the SEC as a Designated Offshore Securities Market

The International Stock Exchange Authority has been successful in its application to the US Securities and Exchange Commission (SEC) and the TISE is now recognised by the SEC as a Designated Offshore Securities Market (DOSM).

The US Securities Act prohibits the offer or sale of a security in the US unless it is registered with the SEC. This means that issuers and sellers of securities need to ensure that the security is registered with the SEC (and thereby permit offers and sales in the US) or, where not registered, that there are sufficient provisions in place to ensure that they are not offered or sold to US investors. However, there are some exemptions available, including Regulation S.

The DOSM recognition means that issuers of securities listed on TISE can avail of the Regulation S exemption which permits securities to be issued outside the US without the need for them to be registered with the

SEC and without the seller having to undertake the onerous diligence to be able to form a reasonable belief that the buyer is outside the US.

ASIA PACIFIC

Singapore

MAS releases FAQs on opt-in regime for accredited investors

On 18 December 2018, the Monetary Authority of Singapore (MAS) issued a set of Frequently Asked Questions on the Definition of Accredited Investor and Opt-In Process (FAQs). The FAQs provide clarity on the interpretation of the term "accredited investor" (AI) under the Securities and Futures Act (SFA) and the Securities and Futures (Classes of Investors) Regulations 2018 (Regulations), as well as on the opt-in regime as effected by the Regulations. In particular, MAS stated that it is looking to extend the transition period for financial institutions (FIs) to implement the opt-in regime for existing clients by three months, such that FIs will have up to 7 April 2019, instead of 8 January 2019, to provide existing clients with the option to opt out of being treated by the FI as an AI, subject to these clients meeting the revised definition of an AI.

Previously, individuals qualified as AIs under the SFA if: (a) their net personal assets exceeded in value S$2 million (or its equivalent in a foreign currency), or (b) their income in the preceding 12 months was not less than S$300,000 (or its equivalent in a foreign currency). With the amendments introduced by the Securities and Futures (Amendment) Act 2017, which came into effect on 8 October 2018, the definition was changed in two ways:

- first, in determining an individual's net personal assets, the value of the individual's primary residence (net of any secured loan) can only contribute up to S$1 million of the S$2 million threshold

- secondly, individuals may also qualify as AIs if they have more than S$1 million (or its equivalent in a foreign currency) of financial assets (such as bank deposits) net of any related liabilities.

In addition, from 8 January 2019, under the Regulations, the following persons will also qualify as AIs:

- the trustee of a trust:
  - all the beneficiaries of which are AIs
  - all the settlors of which: (a) are AIs, (b) have reserved to themselves all powers of investment and asset management functions under the trust, and (c) have reserved to themselves the power to revoke the trust
  - the subject matter of which exceeds S$10 million (or its equivalent in a foreign currency) in value

- a corporation the entire share capital of which is owned by one or more persons, all of whom are AIs (no longer limited to a corporation, the sole business of which is to hold investments and the entire share capital of which is owned by one or more persons, each of whom is an AI) and

- a person who holds a joint account with an AI, in respect of dealings through that joint account (joint accountholder).

Corporations and other entities with net assets exceeding S$10 million in value (or its equivalent in a foreign currency), as well as partnerships (other than limited liability partnerships) in which every partner is an AI, continue to qualify as AIs.

In addition, the Regulations will implement a new opt-in regime for AIs, scheduled to come into force on 8 January 2019. Under this regime, a person (whether an individual or otherwise) may only be treated as an AI for the purpose of certain provisions of the SFA and the Securities and Futures (Licensing and Conduct of Business) Regulations if that person had opted to be treated by the counterparty as an AI in accordance with the procedures set out in the Regulations. Notwithstanding the opt-in requirement, counterparties may continue to treat as AIs existing clients which satisfy the revised definition of AI, provided that certain disclosures have been provided to them in writing and they have not opted out thereafter. In addition, if these existing clients are individuals or joint accountholders, from 8 July 2020, they must opt in in order to continue to be considered to be AIs.

The definition of "institutional investor" under the SFA was also amended on 8 October 2018. The definition now includes persons professionally active in the capital markets such as financial institutions regulated by foreign regulators and sovereign wealth funds.

However, statutory boards, other than prescribed statutory boards, are no longer deemed as institutional investors.

As set out above, under the Regulations, if an FI is able to confirm that an existing client satisfies the revised definition of AI, the FI will be able to treat the client as an AI on or after 8 January 2019 (but only until 8 July 2020 for AIs that are individuals or joint accountholders) so long as the client has been given the option to opt out of being treated as an AI.

FIs have up to 7 April 2019 to provide existing clients with the option to opt out of being treated by the FI as an AI, subject to these clients meeting the revised definition of an AI. MAS clarified that there will be no further extension after 7 April 2019.

For new clients, the changes to the definitions of AIs with respect to individuals under the SFA, and with respect to other clients under the Regulations, will continue to take effect from 8 October 2018 and 8 January 2019 respectively. Accordingly, FIs that are on-boarding new clients must ensure that the clients meet the revised definitions of AI from the above-mentioned dates.

MAS also clarified that the transition time for obtaining opt-in from new clients who are AI-eligible to be treated as AIs will similarly be extended by three months, ie FIs need only obtain explicit opt-in as AIs from AI clients onboarded from 8 April 2019.

International business centre initiative

In an effort to support Thailand's aim to be a regional and global hub for international business centres, the Board of Investment of Thailand (BOI) has announced a new International Business Centre (IBC) initiative. This is provided for in Regulation No. Sor. 6/2561, which grants certain incentives for IBCs and lays down the criteria and conditions for IBCs, as detailed below.

Investors in the IBC category receiving incentives from the BOI will be granted "B1 privileges":

- import duty exemptions on equipment used for research, development and training
- permits for skilled foreign workers and experts to work in investment promoted activities
- permits to own land and
- permits to send or remit funds abroad in foreign currency.

From now on, investors may apply for the IBC initiative, subject to meeting the relevant criteria and conditions:

- the promoted entity must provide services to affiliates engaging in certain activities, including. For example, marketing and sales promotion, financial advisory, economic and investment strategic analysis, international trade activities
- the promoted entity must have registered capital of at least THB 10 million
- the promoted entity must permanently hire at least 10 knowledgeable and skilled staff members for the IBC
- for international trade activities, the promoted entity must engage in at least one of the specified activities
- duty exemptions on raw and essential materials imported for manufacturing and export are not granted and
- the promoted entity is not eligible for merit-based privileges.

The official law governing IBCs is expected in the near future.

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:

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