EVERSHEDS SUTHERLAND

International Funds Net
Country Updates

March 2019

ifn

EUROPE

UK

Unravelling the options and next steps for marketing funds into the UK post Exit Day

Our client briefing on 7 January 2019 provided details on the temporary permissions regime (TPR), which 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 now and 28 March 2019. We also provided flowcharts for both firms and funds to help navigate the regime.

To read our 7 January 2019 briefing, click here

To access the FCA's Connect System, click here

To read our flowchart for firms, click here

To read our flowchart for funds, click here

In this briefing, we look at some key practical considerations to help make the process as simple as possible, as well as the contents of the TPR notification forms.

Key initial steps

Before the notification can be completed, firms should take the following steps:

- register on the FCA's Connect system. You are able to include Eversheds Sutherland as an additional user on your behalf to assist with notifications

- update the relevant user details under "My Profile" on FCA's Connect system to ensure all required fields are populated. This will be the application contact for purposes of the notification and this step needs to be completed before the notification can be completed

- confirm that the information on the FCA's Register is correct. If not, and any changes are required, firms should take the necessary steps to notify the FCA through their national competent authority. If information is not on the Register, you should contact the FCA

- confirm which funds you are actively marketing in the UK and fund managers should let the FCA know as soon as possible, through their competent authority, of any changes

Forms

The temporary permission notification – EEA-based firms passporting into the UK form requires the following information and documents:

- firm name
- firm's principal place of business
- postal address in the UK to be used for correspondence
- key contact for queries about authorisation in the UK
- permissions/regulated activities your firm is permitted to undertake in the UK
- firm's main area of business
- number of UK clients by type (i.e. retail, professional, eligible counterparties)
- do you safeguard client financial instruments, client funds or other monies for customers? If so, you will be required to complete a separate Client Assets Questionnaire
- do you provide payment services in the UK through an agent? If so, you will be required to complete a separate Payment Institutions and Registered Account Information Service Providers Agent Annex
- do you provide electronic money services in the UK through an agent? If so, you will be required to complete a separate Electronic Money Institutions Agent Annex
- do you provide MiFID services in the UK through a tied agent? If so, you will be required to complete a separate MiFID Tied Agent Annex
- declaration, which can only be selected (and completed) once the application contact details and the TPR form have been completed.

Once the notification has been submitted, you will not be able to change it. Once you have submitted your notification, you will receive an email from the FCA to confirm that they have received it.

The temporary permission notification – EEA-domiciled investment funds with a passport to market in the UK form requires the following information and documents:

- firm name
- firm's principal place of business
- confirmation that the information currently displayed on the FCA's Register in respect of your firm and funds are correct
- key contact for queries about the funds you wish to market in the UK
- funds you wish to continue to market or cease to market in the UK
- confirmation as to whether any of the funds are European long-term investment funds (ELTIFs)
- declaration, which can only be selected once the application contact details and the TPF form have been completed.

The FCA says on its website that fund managers should submit their notification with a full list of the funds they wish to continue marketing in the UK after exit day. If fund managers think they will add funds to their notification before the window closes, they should wait until they have a full list before submitting it.

Once you have submitted your notification, you will receive an email from the FCA to confirm that they have received it.

UK OVERSEAS TERRITORIES

British Virgin Islands

BVI country-by-country reporting guidance released and updated CRS guidance notes

On 19 February 2019, the British Virgin Islands (BVI) International Tax Authority (ITA), published guidance notes on the Country-by-Country Reporting (CbCR) requirements of entities that are resident in the BVI (CbCR Guidance Notes) and updated guidance notes on the OECD's Common Reporting Standard (CRS).

The CbCR Guidance Notes are intended to aid businesses that may have responsibilities to report information for CbCR. The CbCR Guidance Notes set out key information on the notification and / or reporting requirements of Constituent Entities of an MNE Group and address a number of other technical issues.

Every entity that is resident in the BVI must determine whether or not it is a Constituent Entity of an MNE Group, and if it is, must (i) register individually with the ITA; (ii) appoint a Primary User; and (iii) identify the Reporting Entity of its MNE Group (which may be itself).

The ITA has confirmed that the registration of all Constituent Entities must be done through the BVI Financial Account Reporting System (BVIFARS) which is in the process of being updated to accommodate CbCR. In the interim, all registrations are to be submitted via email to the ITA in the manner set out in the CbCR Guidance Notes. As part of the registration process each Constituent Entity must appoint a Primary User to be the link between the ITA and the Constituent Entity.

For a Constituent Entity of an MNE group with a fiscal year ended on or before 30 April 2019, registration must take place no later than 30 April 2019. For all other Constituent Entities, where the fiscal year of the MNE Group ends on or after 1 May 2019, registration must take place no later than the last day of that fiscal year.

A Reporting Entity of an MNE Group that is resident in the BVI must file a CbCR Report with the ITA even if it has similar reporting obligations in another jurisdiction. BVI CbCR Reports will be required to be filed for all accounting periods commencing on or after 1 January 2018. The CbCR Report shall be filed no later than 12 months after the last day of the fiscal year of the MNE Group. For example, if the fiscal year commenced on 1 January 2018 a CbCR Report must be filed by no later than 31 December 2019.

The updated CRS Guidance Notes have clarified a number of points, including:

- all existing FIs, i.e. those in existence as at 17 September 2018, are required to have registered with the ITA by 30 April 2019, unless they have previously registered with the ITA through the BVIFARS. The registration deadline for Non-Reporting FIs only has been extended to 28 June 2019

- FIs will not be considered to be in breach of the requirement to establish, implement and maintain written policies and procedures provided that such policies and procedures are in place by 31 March 2019.

AMERICAS

Chile

Quasi–equity: new Chilean investments instrument for AFPs and Insurance companies incorporated by recent banking reform

Law No. 21,130, which modernises banking legislation, also incorporates amendments to Decree Law 3500 (Pension Funds Managers Act) and to Law-ranking Decree 251 (Insurance Law), by incorporating a new investment instrument for said entities that may be issued by banks – Quasi-equity.

One of the amendments of this Law to the General Banking Law, entitles banking companies to issue, prior authorization from the Chilean securities and insurance regulator (and also future banking regulator), *Comisión para el Mercado Financiero* (Commission or "CMF), bonds with no fixed maturity term, which may qualify as part of the effective equity of the issuing bank and known as quasi-equity.

Although the Law states that it will be the Commission who will establish, by means of a general applicability rule, prior favourable resolution from the Chilean Central Bank, the requirements and conditions that such instrument must meet, the same law gives certain guidelines regarding the characteristics that must be considered for purposes of enacting such regulation.

Thus, it states that such bonds must be issued without a fixed maturity term for the amortization of the principal, adding that the amortisation of the principal can only occur through the advance payment or voluntary redemption of the issuing bank. Likewise, the Law establishes that this type of bonds, for all legal purposes, shall be deemed a public offering debt instrument.

The creation of this instrument has not only intended to benefit banks in that it may be considered as part of the issuing bank's effective equity, but also sought to expand the catalogue of instruments in which Pension Funds and Insurance Companies may invest their funds.

Article 45(b) of Decree Law 3500 states that pension fund assets may be invested in term deposits, bonds and other securities representing deposits issued by financial institutions. Thus, the bond incorporated into the General Banking Law is included in the catalogue of permitted investments for pension funds.

The express inclusion of such instrument occurs through the incorporation of a number ten to the list of instruments or operations for which the Investment Regime (regulation issued by the pension regulator, *Superintendencia de Pensiones* (SP)) must establish investment limits, stating that with respect to bonds without fixed maturity issued by banking companies, the limit may not exceed 5% of the value of the Pension Fund, for each A, B, C, D and E Class Fund.

The same applies to the Insurance Law, Article 21 of which states that the technical reserves and regulatory capital of insurance and reinsurance entities must be backed by investments made in the instruments and assets indicated therein, including in paragraph b) the bonds with no fixed maturity, as described in the General Banking Law.

The Commission is given the task of establishing, by means of a general applicability rule, the limits, terms, requirements, characteristics, rules and procedures that must be complied with in order to be representative of technical reserves and regulatory capital, providing as a guideline, on the one hand, that the investment limit per instrument will be between 5% and 10% of the total for bonds with no fixed maturity term and, on the other hand, that the diversification limit per issue, for investments that support technical reserves and regulatory capital, may be established by the Commission in a range between 20% and 30% for bonds with no fixed maturity term.

The amended statutes, as it is possible to understand, will now require the corresponding regulatory amendments by the relevant regulators to make effective the incorporation of this new bond in both the catalogue of investment instruments allowed for pension funds, as well as in the list of investments that can support the technical reserves and regulatory capital of an insurance company.

First, the CMF (to be merged with the banking regulator) will be required to issue a general applicability rule governing the requirements and conditions to be met by the bond. And then, the amendment to the Investment Regime by the SP and of General Applicability Rule No. 152 regulating insurance company investments, by the CMF.

Therefore, there is still a long way to go to determine what the advantages that investment in such instrument may bring to pension funds and insurance companies will ultimately be.

New thresholds will become effective from August 2019

On 29 March 2019, the Chilean antitrust prosecutor (FNE) published in the Official e new thresholds as of which it is mandatory to notify a concentration to the FNE.

This is the first time that the FNE made a change to the thresholds it initially determined back in December 2016. As with the old thresholds, the new thresholds are a two pronged test based on turnover, not on market share: aggregate turnover of UF 2,500,000 (approx. US$ 100 million), up from 1,800,000 (approx. US$ 70 million), of the merging market players, on the one hand and individual turnover of UF 450,000 (approx. 17.5 million), up from US$ UF 290,000 (approx. US$ 11.3 million), of at least two of the merging players, on the other.

If one of the two elements of the test is not met, then it will not be mandatory to notify the proposed concentration.

The relevant turnover is only that of sales in Chile of the relevant entities. Sales made outside of Chile are not considered for the calculation of the turnover for the purposes of these thresholds.

The explanation that the new head of the FNE, Ricardo Riesco, gave for this adjustment upward was that out of the 72 transactions that have been notified to the FNE under the mandatory pre-merger control regime, 61 were approved with no remedies, another 9 were approved with remedies and only 2 were blocked. Thus, in the opinion of the FNE, the great majority of the transactions that were approved did not represent a substantial lessening of competition. On the other hand, according to the FNE, all of the transactions that were approved with remedies would have been caught by the new thresholds.

In any case, the FNE may again adjust these thresholds with just 90 days' notice, without the need of any congressional action, in case it becomes apparent that they were set either too high or too low.

On another front, the FNE has made a call for comments on the current implementing regulations of the pre-merger notification regime to see whether it would make sense to reduce the amount of information being requested under the current rules, in particular under the simplified notification mechanism.

ASIA PACIFIC

India

The banning of Unregulated Deposit Schemes Ordinance

On 21 February 2019, the President of India has promulgated the Banning of Unregulated Deposit Schemes Ordinance, 2019 (Ordinance).

The Ordinance comes against the backdrop of numerous scams (eg Ponzi, pyramid and chit fund schemes) that have surfaced in the recent years. The Ordinance, amongst other things, bans solicitation and receipt of unregulated deposits, creates a framework for reporting and monitoring of deposit schemes, and sets out a prosecution and penalty mechanism for its enforcement.

Key aspects of the Ordinance include:

- imposing a comprehensive ban on unregulated deposit taking activities by nipping such unregulated deposit schemes or arrangements at inception
- making the soliciting, inciting, or accepting of deposits pursuant to an unregulated deposited scheme a punishable offence
- creating a mechanism for repayment to duped depositors by attaching the assets of deposit takers
- implementing a reporting, monitoring and enforcement mechanism to curb unregulated and fraudulent deposit taking.

Taiwan

Amendments to Encouragement Plan for SITE and Incentive Plan for Offshore Funds

On 27 February 2019, the Financial Supervisory Commission (FSC) announced the amendments to the Encouragement Plan for Securities Investment Trust Enterprises (SITEs) and the Incentive Plan for Offshore Funds.

The key points can be summarised as follows:

EVERSHEDS SUTHERLAND

- Encouragement Plan for SITEs
  - adding two favourable treatments for SITEs meeting the encouragement requirements, including: launching a securities investment trust fund without being subject to restrictions under applicable laws and regulations; and launching a feeder fund (ETF Feeder Fund) underlying to the ETF managed by the SITE (Master Fund) and the Master Fund is not limited to ETF of domestic component securities.
  - in addition, certain new items have been added as indicators, including: "evaluation of investment and research capability", "training of personnel", and "other matters which can be considered having concrete contribution to operation and development of domestic assets management industry" (eg issuance of green funds that invest domestically).
- Incentive Plan for Offshore Funds
  - adding a new favourable treatment that (1) within the one (1) year period, all of its offshore funds may invest in China securities for up to 40% of the net asset value of the offshore funds, or (2) on a permanent basis, a specific single offshore fund may invest in China securities for up to 40% of the net asset value of the offshore fund.

In addition, the new item "increase of domestic assets scale" has been added as one of the indicators.

Amendment to Principle of Review on Investment and Technical Cooperation in Mainland China

On 12 March 2019, the Ministry of Economic Affair (MOEA) announced the amendment to the Principle of Review on Investment and Technical Cooperation in Mainland China (Principle).

The key points can be summarised as follows:

- where an investor holding more than 10% of shares in a foreign company listed on the Taiwan Stock Exchange or TPEx or traded on the emerging market in Taiwan, or acting as the director, supervisor, or manager of such foreign company, and such the foreign company has made investment in Mainland China as set forth in Paragraph 1 of Article 4 of the Regulation on Investment or Technical Cooperation Permission in Mainland, the investor is not subject to the limit for investment in Mainland China.
- where an investor receives stock dividend from the invested Mainland China enterprise for less than one (1) million USD every year, he/she/it may handle the matter by a report to the competent authority.

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