EVERSHEDS SUTHERLAND

International Funds Net

Country updates

November 2022

Europe

European Union

Update to ESMA's Prospectus Regulation Questions and Answers

On 12 October 2022, ESMA's Questions and Answers ("**Q&A**") on the Prospectus Regulation were updated with one additional Q&A. The additional Q&A regards the meaning of 'approval', as referred to in Article 1(6a), point (b), of the Prospectus Regulation.

It clarifies 'approval' in this instance refers to the approval process applied by the relevant supervisory authorities designated in accordance with Directive 2004/25/EC and that have the competence, where applicable, to review the offer document under that directive.

Information kindly provided by Mamo TCV Associates in Malta.

International Organization of Securities Commissions publishes review on Liquidity Risk Management Recommendations

IOSCO have published the findings of their thematic review assessing the implementation of their 2018 recommendations which aimed to strengthen liquidity practices in funds.

The review covered 10 of the 2018 recommendations over the fund life cycle (design, day-to-day and contingency planning). They found that generally there had been "a high-degree of implementation of regulatory requirements consistent with the objectives of the recommendations" in larger jurisdictions and that the vast majority of Responsible Entities reported a "high level of implementation of all the recommendations in their policies and practices". However, it was also noted that there are still some challenges and gaps that require improvement for both. Ireland's regulatory framework was found to be fully consistent with 9 of the 10 recommendations reviewed, and that recommendation 7 (around liquidity risk investor disclosures) was broadly consistent.

It is worth noting Money Market Funds and Exchange-traded Funds were excluded from the scope of the review.

ESMA consults on use of ESG or sustainability-related fund names

ESMA has issued a consultation paper with draft guidelines on funds' names using ESG or sustainability-related terms. The draft guidelines impose new qualitative thresholds on portfolios for the use of such names.

- If a fund has any ESG-related words in its name, a minimum proportion of at least 80% of its investments should be used to meet the environmental or social characteristics or sustainable investment objectives in accordance with the binding elements of the investment strategy.

- If a fund has the word "sustainable" or any other term derived from the word "sustainable" in its name, it should allocate within the 80% of investments above at least a 50% minimum proportion of sustainable investments as defined under SFDR.

Funds designating an index as a reference benchmark would only be able to use ESG and sustainability-related words in their name if the relevant thresholds above are met. Furthermore, funds using the word "impact" in their name should meet the proposed thresholds and additionally make investments with the intention to generate positive and measurable social or environmental impact alongside a financial return.

The guidelines will become applicable from 3 months after the publication of their translation on the ESMA website, with the addition of a 6-month transition period for funds launched prior to the application date.

Responses to the consultation are requested by 20 February 2023.

Information kindly provided by the Irish Funds Industry Association in Ireland.

Bosnia & Herzegovina

Federation of Bosnia & Herzegovina adopts new rulebook on investment fund asset values

In the Federation of Bosnia and Herzegovina, the Rulebook on Determining the Value of Investment Fund Assets and Calculating the Net Value of Investment Fund Assets ("**Official Gazette of FBH**", No. 81/2022) was adopted, which repealed the Rulebook on Valuation and Calculation of Investment Fund Assets from 2009 (Official Gazette of FBH, No. 42/2009).

The new Rulebook regulates in detail the calculation, frequency, method and deadlines for calculating the net value of the investment fund's assets which will be a basis for calculating the fund management fee. The

definition of a regulated and organised market has been determined in terms of the liquidity conditions for the proper formation of market prices, on the basis of which the fair value of certain forms of investment fund assets is determined as well.

This Rulebook determines the obligations of investment funds in terms of the manner and deadlines for reporting on the calculation of the net value of the fund's assets.

Information kindly provided by Karanovic & Partners in Bosnia & Herzegovina.

Ireland

Central Bank ONR to portal transition update

In June 2022 the Central Bank advised that firms should transition to the Central Bank Portal before the year-end, after which time their ONR log-in would be disabled. Ahead of this Irish Funds requested an update from the Central Bank who advised that the login and access through the ONR will remain in place until the next release of the Portal. There is no set date for this release yet, but it is expected to be around June 2023.

They are asking firms in advance of the next release to register their users for the Portal and have them link their ONR account to the Portal. They also noted that once an account is linked the user will have the option of accessing returns via both the Portal and ONR until the next release. At that stage access to the ONR system will be removed and firms will have to access returns via the Portal system.

Macroprudential Policy Framework for Irish Property Funds

On 24 November 2022, the Central Bank published its Macroprudential Policy Framework for Irish Property Funds, which is the output from the November 2021 Consultation Paper 145 - Macroprudential measures for the property fund sector, which Irish Funds responded to in February 2022.

The policy measures will apply to Alternative Investment Fund Managers ("**AIFMs**") of Alternative Investment Funds ("**AIFs**") that are domiciled in Ireland, authorised under domestic legislation, and investing fifty per cent or more directly or indirectly in Irish property assets.

The framework notes the choice of policy instruments available are:

1) Leverage

A total debt-to-total asset value limit is the simplest, most direct approach to guard against the risk of excessive leverage in property funds, with the Central Bank applying a single limit across the sector and only prepared to authorise new property funds with leverage below a sixty percent limit.

2) Liquidity Mismatch

The framework notes that the regulatory framework for AIFMs already includes provisions to limit the degree of liquidity mismatch in funds.

In principle, there are a number of means through which liquidity mismatch in property funds could be mitigated, but it is the view of the Central Bank that vulnerabilities would be best mitigated by better aligning redemption terms with the liquidity of the assets.

In the context of the size and illiquid nature of property assets, the Central Bank is issuing Guidance with respect to how Regulation 18 of the Irish AIFM Regulations should be applied for property funds in the context of liquidity timeframes.

Information kindly provided by the Irish Funds Industry Association in Ireland.

Liechtenstein

EEA Securitization Implementation Act enters into force

On 1 November 2022, the EEA Securitization Implementation Act entered into force, which serves to implement Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation. Until it is incorporated into the EEA Agreement, Regulation (EU) 2017/2402 is considered national legislation, providing for a uniform and cross-sector regulatory framework for securitisations.

Information kindly provided by Gasser Partner in Liechtenstein

Netherlands

Non-EU fund managers will be required to submit Annex IV reports from 2023

The Dutch Authority for the Financial Markets ("**AFM**") has announced in a newsletter published on 8 November 2022, that fund managers marketing non-EU funds in the

Netherlands will need to start submitting Annex IV reports in 2023. This is a departure from the AFM's stance to date which has been not to require the submission of Annex IV reports.

The AFM states that "notified" fund managers will be obliged to report to the AFM with effect from Q1 2023, with a deadline of 30 April 2023. It is not clear if all managers marketing non-EU funds in the Netherlands will be required to submit reports. In line with other EU regulators, the submission of the reports is to be done via the AFM's own reporting portal "AFM Portal".

Information kindly provided by Langham Hall in the Netherlands.

Switzerland

FINMA confirms UK UCITS will not be accepted following the transition to PRIIPs KID

As of 1 January 2023, FINMA will require a Swiss key information document or a document recognized as equivalent pursuant to Annex 10 FIDLEV (i.e. a PRIIPs KID) to be submitted for all unit/share classes of all UCITS approved in Switzerland without exception. This includes non-retail classes for which a UCITS KIID may continue to be used abroad, such as in the case of UK UCITS.

Deviation from this requirement is only possible for unit/share classes of UCITS which have not yet been launched and which due to this circumstance do not have to prepare a UCITS KIID or PRIIPs KID in their home country.

Information kindly provided by our Eversheds Sutherland office in Switzerland

UK overseas territories

Guernsey

Guernsey Financial Services Commission publishes updated fees for 2023

On 11 November 2022, the Guernsey Financial Services Commission published its feedback to the consultation on the proposition to increase fees by approximately 9%, which closed on 14 September 2022. Ultimately the paper only includes a revised fee increase of 8%.

Information kindly provided by Walkers Global in Guernsey.

Americas

Canada

Ontario Securities Commission releases reports for investment funds and asset managers

During October 2022, the Ontario Securities Commission ("**OSC**") released two summary reports relevant to the investment funds and asset management industry.

On 14 October 2022, OSC published Staff Notice 33-752 – Summary Report for Dealers, Advisers and Investment Fund Managers (Summary Report).

The report provides information to help registrants comply with requirements under Ontario securities law.

The report discusses the following points:

- important matters impacting registration;
- outcomes from compliance reviews; and
- areas of focus for the OSC's Compliance and Registrant Regulation Staff in the coming fiscal year.

The report also outlines critical policy initiatives affecting registration, including the implementation of the Client Focused Reforms and recent rule amendments to enhance the protection of older and vulnerable clients. Additionally, the report provides an update on the registration of crypto asset trading platforms.

On 19 October 2022, the OSC also published Staff Notice 81-733 - Summary Report for Investment Fund and Structured Product Issuers. The summary report covers the activities of the Investment Funds and Structured Products Branch ("**IFSP**") of the OSC during the 2021-2022 fiscal year, and provides information on prospectus filings and exemptive relief applications, issues identified during continuous disclosure reviews and critical policy initiatives that impact investment funds.

Ontario pilots new prospectus exemption

On 25 October 2022, an 18 month pilot was announced for the "Self-Certified Investor" prospectus exemption.

This new prospectus exemption allows Ontario investors with qualifying education or industry experience to purchase exempt-market

securities, where they may not otherwise be able to rely on another existing prospectus exemption (such as the Accredited Investor prospectus exemption). Reliance on the new prospectus exemption is capped at $30,000 per calendar year.

Deadline for comments on proposed access-based model for delivery of financial statements and management reports of fund performance

Comments on the proposed amendments to National Instrument 81-106 – *Investment Fund Continuous Disclosure* to provide an "access-based" model for the delivery of annual and interim financial statements and management reports of fund performance by investment fund reporting issuers are due December 26, 2022.

More information on the proposed changes may be found in our previous October update at the following link.

New transparency rules for corporations come into force in Ontario

On 1 January 2023, The new transparency register rules under Ontario's Business Corporations Act come into force. Schedule 2 requires certain corporations prepare and maintain a register of individuals with significant control over the corporation.

Information kindly provided by McMillan LLP in Canada.

Chile

CCR modifies agreement on foreign fund registrations

On 19 October 2022, the CCR published a modification to its agreement number 32, which regulates the registration of foreign funds and ETFs, as well as other foreign securities.

The modifications are mostly intended to reflect a change in criteria for the application of the requirements to the manager of the fund. Prior to these modifications, the CCR considered that the manager (the management company in Luxembourg, the manager in Ireland, the ACD in the UK and the advisor in the US, for example) of a fund was the appropriate entity and the requirements on risk rating, minimum AUM, years of experience and those applicable to the holding company of the manager, were applied to it.

These recent modifications reflect a change in criteria and a distinction between the manager and a fund's investment manager. Focus has now shifted to the investment manager of a fund, so that the minimum AUM (USD 10 billion) and years of experience (at least 5 years managing third-party assets) are applied to the investment manager, and the group to which it belongs.

Both the fund and its manager must still be regulated, but the relevant country's risk rating must be A- or higher (previously AA- or higher). The exception for a BBB rated country subject to special circumstances evaluated on a case-by-case basis by the CCR, is still in place.

The requirement for minimum risk rating of the country in which the holding company of the fund's manager is domiciled, has been eliminated, but each regulation in which a fund seeking approval and/or its manager is domiciled, must be approved by the CCR.

Information kindly provided by Guerrero Olivos in Chile.

Government of Chile presents overhaul of the pension system

The President of Chile sent a bill to Congress on 7 November 2022 in order to completely overhaul the pension system (the "**Bill**"). This reorganisation would require all mandatory pension contributions to be paid into a government owned entity called the *Administrador Previsional Autónomo* ("**APA**") who will be in charge of keeping the individual accounts and performing all support functions that are not strictly investment management.

This will entail a "de-integration" of the system, whereby the current private pension fund managers will be required to turn into *Inversores de Pensiones Privados* ("**IPPs**") whose sole remit will be to act as investment managers. Likewise, a government owned pension manager ("**IPPA**") will be created to compete with the IPPs in relation to the management of the current 10% (which would be raised to 10.5% under the Bill) mandatory contribution withheld from pay checks of employees.

The Bill provides for an additional 6% mandatory contribution to be funded by employers and which shall be managed exclusively by the government owned IPPA.

The types of funds that will be managed by the IPPs and the IPPA in relation to the aforementioned 10.5% will now be target-date funds, called *Fondos Generacionales*.

The 6% contribution will go into a special so-called Integrated Pension Fund that will be used in part to fund different social security programs and only in part be used to fund the

pension of the relevant employee.

The main changes are as follows:

1) Mutual Fund and Private Fund Fees – the IPPs and the IPPA will have to bear in full the amount of the fee load of the mutual funds that the Target Date Funds they manage will invest in. The same applies to the Integrated Pension Fund.

As to private funds (i.e. alternative investment funds), only up to 0.1% in fees of such funds may be borne by the Target Date Funds or the Integrated Pension Fund. The excess over said 0.1% will have to be borne by the relevant IPPs and IPPA.

2) The CCR is abolished and discretion under the Investment Regime is broadened – a very high degree of discretion is granted to the pension regulator ("**SP**") and Ministry of Finance (with or without regard to the recommendations of the Investments Technical Committee) in determining what instruments are eligible investments for pension funds. Individual approval of instruments would no longer be required, and it would suffice that the relevant instrument comply with the requirements to be set forth in the regulation to be issued by the SP and Ministry of Finance. Thus, the CCR would cease to exist.

Information kindly provided by Alessandri in Chile.

Asia Pacific

Myanmar

Global Financial Action Task Force blacklists Myanmar

On, 21 October 2022, the global Financial Action Task Force ("**FATF**") placed Myanmar in the category of "High-Risk Jurisdictions Subject to a Call for Action," commonly referred to as the "blacklist," due to its failure to implement its action plan that expired in September 2021.

FATF members and non-members are called upon to apply enhanced due diligence to business relations and transactions with Myanmar. In effect, financial institutions may ask for additional paperwork to be produced pertaining to customer identification and verification. However, the impact is unlikely to extend beyond existing impediments to business activities in the country and investments made by foreign entities.

Some of the pertinent practical implications of the FATF blacklisting are as follows:

- Enhanced due diligence proportionate to the risk arising from Myanmar will be asked of members and all other jurisdictions while entering a business transaction with Myanmar.
- FATF will expect Myanmar to implement the remaining steps of its 40 point action plan. At present, Myanmar has implemented 24 of the 40 recommendations.
- Local banks will be under increased scrutiny from foreign corresponding banks participating in financial transactions.

Information kindly provided by DFDL in Myanmar.

Singapore

Monetary Authority of Singapore issues circular on Anti-money Laundering and Combating the Financing of Terrorism in the Variable Capital Company sector

On 22 September 2022 MAS published a circular on the Anti-money Laundering and Combating the Financing of Terrorism ("**AML/CFT**") controls in the Variable Capital Company ("**VCC**") sector. Specifically, the circular sets out supervisory expectations that VCCs and their eligible financial institution ("**EFI**") should note.

VCCs are required to appoint an EFI that is regulated and supervised by MAS to conduct the necessary AML/CFT checks and perform measures. However, VCCs are still required to:

i) maintain oversight in relation to the appointed EFI; and

ii) have in place money laundering and terrorism financing ("**ML/TF**") risk assessment frameworks and processes.

With regard to the obligation to maintain oversight of the appointed EFI, the circular highlights the following:

- Although VCCs should appoint an EFI to conduct AML/CFT checks, VCCs remain ultimately responsible for fulfilling their AML/CFT obligations.

- VCCs should indicate that an EFI has been appointed.
- To maintain oversight, a VCC should:
  - Conduct adequate due diligence over EFIs;
  - Formally appoint the EFI before the commencement of business operations and activities by the VCCs;
  - Ensure that the AML/CFT policies and procedures implemented by their EFIs to mitigate ML/TF risks are appropriate, and subjected to the approval of the directors of the VCCs; and
  - Ensure that there are arrangements to oversee the ongoing implementation of AML/CFT controls by their EFIs. Such arrangements include:
    - **i)** having an agreed escalation process between the EFI and the VCC to ensure pertinent issues are escalated to the VCC in a timely manner; and
    - **ii)** having sufficient details (i.e., the type of issues that should be escalated, the frequency of updates, and the persons to be updated to assess needful mitigation measures) in the policies and procedures.

With regard to the requirement for money laundering and terrorism financing risk assessment frameworks and processes, the circular highlights the following:

- VCCs should have a framework to assess customers' ML/TF risks (i.e., what are the factors that will be considered, how the risk profile of customers will be determined).
- In identifying higher risks countries, apart from considering countries that the FATF has identified to have weak measures to combat ML/TF risks, VCCs should also consider other country risk factors such as corruption, tax evasion, terrorism financing, etc.
- VCCs should document customer risk assessments.
- VCCs should perform enhanced customer due diligence ("**ECDD**") measures on all customers who are identified to pose higher ML/TF risks. This includes ascertaining customers' source of wealth ("**SOW**") and source of funds ("**SOF**") for higher risk customers.
- VCCs should have the relevant policies & procedures in place for ongoing monitoring, as well as ECDD, to ensure that appropriate and timely risk mitigating measures are taken, should any customer's risk become elevated. When the risk rating of a customer is subsequently revised to higher risk post-onboarding, VCCs should obtain information to corroborate the customer's SOW and SOF.

Information kindly provided by CNPLaw LLP in Singapore.

Taiwan

Directions for the conduct of wealth management business by securities firms amended

On 7 November 2022, the FSC announced the amendments to Directions for the Conduct of Wealth Management Business by Securities Firms. The amendments are summarised below:

- To allow securities firms to perform financial planning and execution or asset allocation on behalf of the customer by means of a trust;
- To remove duplicated requirements for operation and control procedures for anti-money laundering and countering the financing of terrorism as they have been regulated in other applicable laws and regulations; and
- To amend the scope of the fees that securities firms may charge for wealth management business.

Regulations Governing Responsible Persons and Associated Persons of Securities Firms amended

On 28 October 2022, the FSC announced the amendment to "Regulations Governing Responsible Persons and Associated Persons of Securities Firms". The amendments are summarised below:

- To specify that the chairman shall be of upstanding character and possess the ability to effectively lead and manage a securities firm with required qualifications;
- To require that the board of directors shall

be responsible for the selection and supervision of managerial officer, and shall supervise the company to implement and establish a managerial officer accountability system;

- To add regulations governing the control of concurrent position of responsible persons, the presumption of conflict of interest, and the adjustment period; and
- To provide that securities firms may apply for their own on-job training in accordance with the "On-Job Training Practice Guidelines" proposed by the Taiwan Securities Association.

Information kindly provided by Lexcel Partners in Taiwan.

Middle East and Africa

Philippines

Renewable Energy Act amended to allow full foreign equity in renewable energy projects

On 15 November 2022, the Secretary of the Department of Energy ("**DOE**") signed DOE Department Circular ("**DC**") No. 2022-11-0034 which amends the Implementing Rules and Regulations of Republic Act No. 9513 (otherwise known as the Renewable Energy Act of 2008). The amendment removes the nationality restrictions on the exploration, development, and utilisation of renewable energy resources such as solar, wind, biomass, ocean or tidal energy.

This development follows the September 2022 Opinion of the Department of Justice that the exploration and development of solar, wind, hydro and ocean or tidal energy should NOT be subject to the 40% foreign equity limitation under the Constitution. It must be noted, however, that the nationality restriction continues to apply to the exploration, development and utilization activities that appropriates water direct from a natural source, and geothermal resources (except those covered by financial or technical assistance agreements for large-scale exploration, development and utilization of geothermal resources).

DOE DC No. 2022-11-0034 is expected to be published by the fourth week of November 2022. It shall take effect 15 days upon its publication in 2 newspapers of general publication and filing with the University of the Philippines Law Center – Office of the National Administrative Register.

Information kindly provided by DFDL in the Philippines.

South Africa

Financial Sector Conduct Authority declares crypto assets to be financial products

Following the publication of a draft declaration in November 2020, the Financial Sector Conduct Authority ("**FSCA**") has finally declared crypto assets as 'financial products' in terms of the Financial Advisory and Intermediary Services Act 2002 ("**FAIS**"), effective from 19 October 2022.

According to the Crypto Asset Declaration published on the same date, 'crypto asset' means 'a digital representation of value that:

- is not issued by a central bank, but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility;
- applies cryptographic techniques; and
- uses distributed ledger technology.

The effect of the Crypto Asset Declaration is that any person providing financial services (comprising the furnishing of 'advice' and/or the rendering of 'intermediary services,' each as defined in FAIS) in relation to crypto assets is required to be appropriately licensed as a financial services provider ("**FSP**") under FAIS.

To ensure a smooth compliance transition, the FSCA has published, together with the Crypto Asset Declaration, a Crypto Asset FSP Exemption (FSCA FAIS Notice 90 of 2022) in terms of which providers of financial services related to crypto assets are currently exempt from the FAIS licensing requirement (and, by default, from all FAIS-related requirements applicable to FSPs) as long as those providers submit FSP licence applications to the FSCA between 1 June 2023 and 30 November 2023. In respect of such providers, the Crypto Asset FSP Exemption will apply until such time as the FSCA has made a final determination on the relevant FSP licence application.

The Crypto Asset FSP Exemption indefinitely and unconditionally exempts crypto asset miners, node operators and persons rendering financial services in relation to non-fungible tokens from the FAIS licensing requirement (and, by default, from all FAIS-related requirements). For the avoidance of doubt, such persons are not required to submit an FSP licence application to the FSCA between 1 June 2023 and 30 November 2023.

In terms of the Crypto Asset FSP Exemption, exempted Crypto Asset FSPs must comply with:

- chapter 2 of the Determination of Fit and Proper Requirements for Financial Services Providers, 2017 ("**Determination**"), with effect from 19 October 2022;
- section 2 of the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003 ("**General Code**"), with effect from 19 October 2022; and
- all other requirements in the General Code with the exclusion of section 13 of the General Code by 1 December 2023.

While chapter 2 of the Determination requires Crypto Asset FSPs to comply with fit and proper requirements relating to honesty, integrity and good standing, section 2 of the General Code generally imposes a duty of care on Crypto Asset FSPs.

The FSCA has also published a 'Draft Exemption of Persons rendering Financial Services in relation to Crypto Assets from Certain Requirements'. This proposes to exempt licensed Crypto Asset FSPs and their key individuals and representatives from certain requirements of the General Code of Conduct for Authorised Financial Services Providers and their Representatives and the Determination of Fit and Proper Requirements, 2017.

The Draft Exemption from Certain Requirements is currently open for public comment until 1 December 2022. Submissions are to be made to the FSCA using the submission template available on the FSCA's website.

Information kindly provided by Bowmans Law in South Africa.

Your contacts

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 FundsNet, our specialist solution for global AIFs and UCITS distribution activities, please contact:

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