International Funds Net

Country updates

January 2022

Europe

European Union

ESMA launches common supervisory action with NCAs on valuation of UCITS and AIFs

On 20 January 2022, the European Securities and Markets Authority (ESMA) published a press release announcing that it is launching a common supervisory action (CSA) with national competent authorities (NCAs) on the valuation of UCITS and open-ended alternative investment funds (AIFs) across the EU.

The CSA will be carried out during 2022 to assess compliance of supervised entities with the relevant valuation-related provisions in the UCITS and AIFMD frameworks, in particular the valuation of less liquid assets. It will focus on authorised managers of UCITS and open-ended AIFs investing in less liquid assets (such as unlisted equities, unrated bonds, corporate debt, real estate, high yield bonds, emerging markets, listed equities that are not actively traded and bank loans).

The CSA aims to ensure consistent and effective supervision of valuation methodologies, policies and procedures of supervised entities to ensure that less liquid assets are valued fairly both during normal and stressed market conditions, in line with applicable rules.

AIFMD II – proposed new directive published

The European Commission has published the conclusions of its review on the scope and functioning of the Alternative Investment Fund Managers Directive (AIFMD) and a proposed new directive, "AIFMD II" (which, if approved, would need to be implemented by Member States within 24 months).

The Commission's conclusion was that the AIFMD's objectives have mostly been met. As such, the proposed amendments in AIFMD II are targeted to specific areas:

- market access for non-EU AIFMs and AIFs – managers or fund vehicles located in third countries which are on the EU's lists of (i) high-risk third countries or (ii) non-cooperative tax jurisdictions will not be able to market to European investors. The relevant third countries must also have signed an agreement with each Member State in which the fund is to be marketed which fully complies with the OECD's Model Tax Convention on Income and Capital and ensures an effective exchange of information on tax matters

- the existing NPPR regimes are to remain for the foreseeable future

- more stringent requirements are proposed where EU AIFMs delegate to third party service providers. In particular, the scope of "delegation" would be widened to include all services listed in Annex I to the AIFMD itself (including administration services such as fund management accounting and ancillary services such as investment advice). The EU AIFM delegating these activities would be subject to more thorough reporting requirements

- the disclosures to be provided under Article 23 of the AIFMD would be expanded to include, among other things, details of the AIF's liquidity risk management and existing redemption arrangements, and any fees and charges connected with the operation of the AIF which would be borne by the AIFM or its affiliates. Quarterly reports would need to detail the AIF's originated loan portfolio (if any), as well as any special purpose entities established in relation to the AIF's investments.

Non-EU AIFMs managing open-ended AIFs should be aware that the proposals would enable competent authorities to require them to activate or deactivate the appropriate liquidity management tools should they deem it in the interests of the public or investors to do so.

Luxembourg

CSSF introduces new reporting requirements

On 22 December 2021, the CSSF issued Circular 21/790 which introduces the obligation to complete and submit an annual self-assessment questionnaire (SAQ) by investment fund managers (IFMs) and Undertakings for Collective Investment (UCIs). The self-assessment questionnaire includes various questions organised using pre-defined themes based on characteristics of the different types of UCIs and their underlying risks.

The key objective of the SAQ is to have IFMs and UCIs self-assess their compliance with legal and regulatory requirements – except for AML matters, which are covered by a separate questionnaire. The SAQ must be submitted to the CSSF by a certain deadline following the end of the financial year:

- within 3 months from the closing date for UCITS
- within 4 months from the closing date for other UCIs.

Where a UCI authorisation is removed or written off during a fiscal year, the questionnaire should be filed within the same timeframe as above, from the date of removal/write-off, depending on the type of UCI.

Circular 21/790 repeals CSSF Circular 02/81 providing guidelines concerning the task of auditors of undertakings for collective investment, as well as chapter P of CSSF Circular 91/75 concerning the obligation of UCIs to inform the CSSF on the audits carried out by the REA.
In regards to the entry into force of the Circular 21/790, the following distinction will have to be made:

- for UCITS and Part II Funds, the provisions of the Circular have to be complied with for the financial years ending on or after 30 June 2022
- for Specialised Investment Funds (SIF) and Investment Companies in Risk Capital (SICAR), the provisions of this Circular have to be complied with for the financial years ending on or after 30 June 2022, except for the provisions relating to the SR. The latter provisions will have to be complied with by the SIF and the SICAR for the financial year ending on or after 30 June 2023.

ESMA updates AIFMD and UCITS Q&As

On 17 December 2021, ESMA updated its AIFMD and UCITS Q&A documents. The updated AIFMD Q&A contains one new question (Section XI, Q.2) concerning whether fund managers investing in crypto-assets were subject to the AIFMD. It notes that it is important to assess, on a case-by-case basis, whether the relevant fund meets the definition of an AIF, and further notes that while AIFs may in principle invest in any traditional or alternative assets as long as the AIFM can ensure compliance with the AIFMD, more specific investment and risk diversification requirements for AIFs investing in crypto-assets, as well as limitations regarding the target investors of such AIFs, may exist at national level.

In respect of the UCITS Q&A, three new questions have been published. Section 1, Q.5c on issuer concentration clarifies that if a UCITS holds more than six issues in transferable securities and money market instruments issued or guaranteed by a Member State, one or more of its local authorities, a third country or a public international body to which one or more Member States belong, all the issues should respect the 30% limit, i.e. even if the UCITS holds more than 6 issues. Q5.d clarifies that where a UCITS has a hedged share class in a different currency, unrealised FX profits and losses should be counted towards the NAV of the hedged share class and accordingly be taken into account when calculating the counterparty risk limit of Article 52(1) of the UCITS Directive in respect of the NAV of the hedged share class. Section IV, Q.8 clarifies that if a UCITS intends to market a new share class in a Member State where it has already been notified for marketing, the UCITS should give written notice to the competent authorities of both the UCITS home and host Member State, at least one month before the marketing of the new share class starts, in accordance with article 93(8) of the Directive.

Switzerland

FinSA: Fundamental changes for the cross-border provision of financial services

The Swiss Financial Services Act (FinSA) entered into force in January 2020. With a transition period of two years, most of the requirements will be applicable as of January 2022. Fund Managers (FM), along with other Financial Service Providers (FSPs), may need to review the way they distribute their funds in Switzerland. The following FinSA provisions are applicable:

- **Client segmentation:** FINSA requires that, prior to marketing a fund to Swiss Clients, the FM classifies the Swiss Clients under one of the following categories:
  - Institutional: FINMA regulated entities.
  - Professional: Entities with

"professional treasury operation" (including Elective professional – HNWIs and professional investment structures without professional treasury operation (with opt-out)

- Private/Retail: can only invest in UCITS funds registered with FINMA.

- **Code of conduct:** The FM must have internal rules at least equivalent to those provided for by FINSA.
- **Organisational rules:** The FM must have internal rules at least equivalent to those provided for by FINSA.
- **Registration to the client advisor register (CAR):** Duty to register employees with the CAR of the FM providing a financial service to Swiss clients. The three official CARs are Regservices, RegFix and ARIF.
- **Affiliation with an ombudsman:** Duty to join a local mediation body. Presently, there are 7 existing bodies. This is only required if the FM is targeting elective professional clients, e.g. HNWIs (with opting-out).

UK

FCA issues stark warning for TPR firms

On 18 January 2022, the FCA issued a statement on its temporary permissions regime (TPR) webpages setting out its approach to TPR firms which do not meet its expectations. The FCA stressed that the TPR is only for use by firms who want to operate in the UK in the long term. TPR firms should be seeking to meet the required standards for full UK authorisation in preparation for authorisation. The FCA will take appropriate action if TPR firms do not meet the required regulatory standards, including removing them from the TPR.

The statement confirmed that the FCA will take action in the following circumstances:

1) FSMA firms that miss their landing slot:

A FSMA firm is an EU firm which passported into the UK under Schedule 3 or Schedule 4 Financial Services and Markets Act 2000 (FSMA) prior to entering the TPR. The FCA expects FSMA firms to submit their application for authorisation during their allotted landing slot. The FCA considers a FSMA firm missing its landing slot as failing to meet FCA expectations.

2) Failure to respond to mandatory information requests

The FCA may consider TPR firms which do not respond to mandatory information requests as not fit and proper or incapable of being effectively supervised. Such firms may struggle to demonstrate that they meet the FCA's threshold conditions for full authorisation. So far the FCA has removed 4 firms from the TPR for failure to respond to mandatory information requests.

3) Firms which do not intend to apply for full authorisation

The FCA expects TPR firms which want to expand their UK businesses to want to become authorised. The FCA accepts that there are some valid circumstances in which a TPR firm will not apply for full authorisation. It gives the following examples:

- a firm which is completing a merger with another entity
- a firm which is transferring its UK business to a UK legal entity in order to continue to serve the UK market, for instance if it is unable to carry on its business under the UK's on-shored regime
- a firm which is becoming an appointed representative (AR) of a UK authorised person.

For TPR firms merging or becoming ARs, the FCA expects the firms to cancel their TPR status once the relevant action is concluded. On concluding a transfer of business, unless a TPR firm has remaining business for which it is seeking full authorisation, it too will be expected to cancel their TPR status.

If a TPR firm does not have a valid reason not to apply for full authorisation, the FCA expects the firm to voluntarily enter supervised run-off (SRO) (if it has remaining UK business) or cancel its TPR status (if it does not).

4) Firms refused authorisation

The FCA expects TPR firms which will fail to meet the Threshold Conditions to voluntarily enter SRO or withdraw its authorisation application and cancel its TPR status. If an application is refused or withdrawn, firms should not reapply.

Actions the FCA may take against a TPR firm which does not meet their expectations include:

- removing the firm from the TPR
- asking the firm to voluntarily stop undertaking new business. If a firm does not comply voluntarily, the FCA will use its powers to prevent firms from undertaking new business
- directing a FSMA firm to apply in an earlier landing slot
- contacting the firm's home state regulator and publishing a notice in the UK.

UK overseas territories

Cayman Islands

De-registration of private funds

On 1 December 2021, the Cayman Islands Monetary Authority (CIMA) issued a Notice advising industry members that the de-registration procedures for registered private funds are being revised following industry consultation. In the meantime, private funds seeking to de-register should continue to refer to:

- CIMA's Regulatory Procedure relating to the cancellation of mutual fund registrations and
- CIMA's Regulatory Policy on exemption from the audit requirement for a private fund.

AML/CFT updates from CIMA

In December 2021, CIMA highlighted the following requirements for financial service providers (FSPs) (including regulated entities):

- FSPs must understand the risks involved in environmental crimes, take note of the 'red flags' for potential illegal logging, mining and waste trafficking and consider how to incorporate these into their AML/CFT/CPF compliance framework
- in addition to compliance with targeted financial sanctions on criminal operations undertaking ransomware attacks, FSPs should strengthen their detection and alert systems to prevent and detect against ransomware attacks. This includes:
  - reporting ransomware attacks immediately to law enforcement
  - filing related suspicious activity reports
  - conducting regular ransomware awareness training with staff
  - continually reviewing and updating new 'red flag' indicators of ransomware.

FATF upgrades Cayman's AML/CFT compliance

On 21 October 2021, the Cayman Islands Government issued a Press Release noting that the Cayman Islands' technical compliance with the 40 Recommendations of the Financial Action Task Force (FATF) was upgraded in February and October 2021. The FATF's October 2021 Follow-up Report and Technical Compliance Re-Rating concluded that the Cayman Islands is now rated Compliant or Largely Compliant in relation to all of the 40 Recommendations. The Press Release also noted that the International Convention for the Suppression of the Financing of Terrorism was extended to the Cayman Islands in August 2021. This Convention requires signatories to criminalise the financing of terrorism, as well as to take measures to identify, detect and freeze assets related to terrorism, and to prosecute terrorism financing offences.

Beneficial Ownership Enforcement Manual updated

On 25 October 2021, the General Registry issued a reminder regarding the obligation to file adequate, accurate and up-to-date beneficial ownership information, and to file updated information when relevant changes have taken place. The notice also informed industry that over 300 administrative fines were imposed by the General Registry between October 2020 and September 2021 in relation to breaches of the beneficial ownership regime. The General Registry updated the Beneficial Ownership Enforcement Manual with effect from 26 November 2021. The updates include:

- an outline of the definition of a single breach and that single breaches can occur multiple times, in the case where a corporate service provider fails to file information for multiple entities. Failure to file for each entity is a breach

- clarification on the investigative process that will be taken prior to a fine being levied. The use of warning notices has been removed.

Americas

Chile

Proposed amendments to the Pension Fund Investment Regime

From December 24 2021 to January 10 2022, the draft of the General Applicability Rule (NCG) No. 425 issued by the Superintendency of Pensions was under consultation. The NCG seeks to allow some flexibility to the investments that Chilean pension funds may make. The amendment proposes the following:

- to allow investment into shares of domestic closely-held corporations, domestic joint stock companies and domestic limited partnerships, that invest in alternative assets with only one independent valuation report. To date, two independent economic valuation reports were required

- to apply the same terms as those provided for investment in foreign alternative assets to the excess investment in shares of domestic investment funds not approved by the CCR. Consequently, the resulting excess of the investment in such fund shares may be maintained until the fund manager deems to obtain an adequate return for the fund. Previously, if investments in shares of domestic investment funds not approved by the CCR exceeded the investment limits, action had to be taken to remedy the situation within a limited time frame

- to account for 60% of future promises or commitments in the alternative asset limits, giving pension funds room to invest in other instruments that may offer better risk-return combinations

- to incorporate an amendment introduced to Article 45 of D.L. No. 3,500 by Law No. 21,13, which allows the investment limit in bonds with no fixed maturity issued by banking companies at 5% for Type A and B Funds and 2% for Type C Funds.

Two draft General Applicability Rules (NCG) released for consultation

Between the 3 to 28 January 2022, the Financial Market Commission (CMF) opened two draft NCGs for consultation. The first draft aims to govern the procedure for obtaining the 'existence authorisation of Special Corporations' (SAE) and the second draft aims to establish the necessary background information that General Fund Managers (AGFs) must acquire in order to request authorisation to initiate operations.

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.

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