

UK Update: Fund Operators Need to Prepare for New UK Overseas Funds Regime

What You Need to Know

- (a) The UK Government will introduce a new regime to enable overseas funds to access the UK market;
- (b) The application process will be more complex and costly, requiring an online submission, a detailed review and approval by the Financial Conduct Authority ("FCA");
- (c) In addition to an annual submission, fund operators will have ongoing notification requirements to the FCA; and
- (d) Fund operators will be subject to enhanced disclosure requirements to UK investors.

What You Need to Do

Review the FCA's consultation paper and provide feedback by Monday, 12 February 2024.

Background

The UK Government will introduce the Overseas Funds Regime ("OFR") to enable overseas funds to access the UK market after the end of the EU passporting regime in December 2025 ("TMPR"). The OFR will allow the UK Treasury to grant equivalence to certain jurisdictions based on their regulatory standards and cooperation arrangements.

The FCA will then be responsible for recognising and supervising the funds from those jurisdictions that wish to market in the

UK. The OFR will have significant implications for overseas fund operators and UK investors, as it will introduce new application processes, on-going obligations and disclosure requirements.

Following our recent market update¹, the FCA issued a consultation paper (CP23/26)² outlining how it intends to implement the OFR. The FCA is seeking feedback from stakeholders by Monday, 12 February 2024.

Below we have summarised the main points of the consultation paper:

Application Process

Unlike the current passporting regime, which simply requires a notification to the FCA, the new OFR regime will require an application to be made through an online submission system and applications must be reviewed and approved by the FCA. The FCA will also have the power to refuse applications where it is *"desirable to do so to protect the interests of UK participants or potential participants in the scheme"*. It is unclear under what circumstances the FCA might refuse an application.

As part of the application process, funds seeking recognition will have to provide certain information to the FCA, such as:

¹ <https://maples.com/en/knowledge-centre/2020/12/distribution-of-foreign-investment-funds-in-the-uk-post-brexit-tpr-and-ofr>

² <https://www.fca.org.uk/publications/consultation-papers/cp23-26-implementing-overseas-funds-regime-ofr>

- identifying information (i.e. name, LEI, domicile, fund structure and type and confirmation that the fund has been authorised in its home jurisdiction);
- profile information (i.e. investment objective, policy and strategy, value of AUM, fund category and main asset classes, use of derivatives, use of benchmarks, liquidity management tools, dealing frequency, target investors and ESG factors);
- fee details (i.e. initial and exit charges, ongoing charges, performance fees and any other relevant fees);
- share class characteristics;
- information on key parties (i.e. ManCo, depositary, portfolio manager, UK representatives, authorised persons who will approve the fund's financial promotions and sponsor); and
- marketing and distribution information (i.e. UK financial promotion approver and details of any promotional payments).

Paragraph 1.7 of the consultation indicates that the UK Government may decide to set "additional requirements for recognised schemes to comply with". It remains to be seen what these additional requirements may be or if items such as the UK Sustainability Disclosure Requirements or COLL Assessment of Value will be applied to overseas funds.

The consultation paper has indicated that the intended review period for such applications will be two months with an application fee of £2,500 (or £5,000 for an umbrella).

Notably, the FCA has flagged that ETFs are marketed and distributed differently than other funds within the OFR and have questioned whether all their information requirement proposals are appropriate for ETFs.

Key Takeaway

The application process under the OFR will be more complex and costly than the current passporting regime, as it will require an online submission, a detailed review and approval by the FCA, and a fee of £2,500 (or £5,000 for an

umbrella). Fund operators will need to ensure they have all the necessary information and documents ready, and that they comply with any additional requirements the UK Government may impose.

On-going Obligations

The FCA will monitor OFR funds on an on-going basis and may suspend or revoke recognition where the fund no longer meets the conditions for recognition, requirements relating to the fund or its operator, is no longer satisfied or where it is desirable to do so to protect the interests of investors or potential investors in the UK.

In order to supervise on an on-going basis, the FCA will require notification of certain changes to the fund which may be material or may directly impact the characteristics of the fund and the conditions under which its OFR recognition is granted.

To assess the impact of certain changes, the FCA will require 30 days' prior notice of changes, such as:

- (a) Change of name;
- (b) Change of legal structure;
- (c) Ceasing of marketing in the UK;
- (d) Sanctions on the Fund or Operator;
- (e) Suspension of dealing;
- (f) Fundamental change to the fund's investment objective, policy or strategy;
- (g) Matters that would cause a significant negative effect on UK investors;
- (h) Change to target investors in the UK; and
- (i) Material change to funds minimum investment amount.

For other changes, notification will be required within 30 days of the change.

Further notifications, as set out in section 2711 of FSMA, must also be notified to the FCA. These notifications should be made as soon as reasonably practicable and include the following:

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- (a) Change to the operator, trustee or depositary of the fund;
- (b) Change to the name or address of the above entities;
- (c) Change to the address of the place in the United Kingdom for service of notices, or other documents, required or authorised to be served on the operator; and
- (d) If the operator becomes aware that it has contravened or expects to contravene a requirement imposed on it under FSMA.

It should also be noted that operators will be required to provide a confirmation on an annual basis that all information on the FCA system is up-to-date.

It is expected that a periodic fee will be charged by the FCA and that fees for OFR-recognised funds will be in line with those charged to UK-authorized funds.

Key Takeaway

The on-going obligations under the OFR will require fund operators to notify the FCA of certain changes to the fund that may affect its recognition status or the interests of UK investors. Fund operators will also have to provide an annual confirmation that the information on the FCA system is up-to-date and will pay a periodic fee in line with UK-authorized funds. Fund operators will need to monitor and report any changes to the fund and its key parties and be prepared for the possibility of suspension or revocation of recognition by the FCA.

Enhanced Disclosures

The UK Government has indicated the OFR will operate outside the scope of the Financial Ombudsman Service ("FOS") and the Financial Services Compensation Scheme ("FSCS"), and so UK investors may not have access to these redress schemes. The FCA has proposed that investors be made aware of redress arrangements by way of prospectus disclosures. The prospectus must:

- (a) Explicitly state that a UK investor may not have access to redress under the UK regulatory system;
- (b) Explain whether a UK investor will have access to an ADR scheme in the jurisdiction of the OFR fund, its operator or depositary; and
- (c) Explain whether a UK investor will be able to claim compensation in the jurisdiction of the OFR fund, its operator or depositary, if these entities were unable to meet its obligation to return money to the investor.

Key Takeaway

The enhanced disclosures under the OFR will require fund operators to inform UK investors of the lack of access to the UK redress schemes (FSCS and FOS) and the availability of any alternative dispute resolution or compensation schemes in the fund's jurisdiction. Fund operators will need to update their prospectuses to include these disclosures and ensure they are clear and accurate.

Financial Promotions

UCITS ManCos will no longer be deemed 'authorised persons' in the UK and as such can no longer approve or issue financial promotions in the UK under their own name.

Any financial promotions issued in the UK must be made or approved by a UK-authorized person (unless it falls within the scope of an exemption under the Financial Promotions Order). Firms should consider how this requirement will be met once their funds are recognised under the OFR.

Key Takeaway

Financial promotions under the OFR will require fund operators to have their marketing materials approved by a UK-authorized person, unless they fall within an exemption under the Financial Promotions Order. Fund operators will need to identify and appoint a suitable UK-authorized person to approve their financial

promotions and ensure they comply with the UK rules and standards.

Facilities in the UK

Operators of OFR funds will continue to be required to provide UK facilities, however the FCA intends to allow for these facilities to be provided within the EEA without a physical presence in the UK on the condition that the terms and conditions of investment foresee all interactions taking place via electronic media, or where the customer has individually consented to such arrangements.

It is proposed to retain the requirement for a physical address where direct investors have not previously used electronic means of communication and do not consent to do so.

Key Takeaway

The facilities in the UK under the OFR will allow fund operators to provide electronic facilities within the EEA without a physical presence in the UK, subject to certain conditions. Fund operators will need to assess whether their terms and conditions of investment and their customer preferences allow for such arrangements, and whether they need to maintain a physical address in the UK for some direct investors.

How the Maples Group Can Help

The Maples Group GRS supports UCITS³ and AIFMs³ in their multi-market distribution strategies by providing an integrated global network of experts coordinated by a dedicated central team supporting all legal and regulatory aspects governing the cross-border marketing of investment funds on both a private placement and public offer basis.

Further Information

If you would like further information, please liaise with the below or your usual Maples Group GRS contact.

The Maples Group will continue to monitor the progress of the consultation and the issuance of the final rulebook and guidance. Further updates will be issued once these are available.

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The Maples Group's Irish legal services team is independently ranked #1 among legal service providers in Ireland in terms of total number of funds advised (based on the most recent Monterey Insight Ireland Fund Report, as at 30 June 2022).

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³ Domiciled in Ireland and Luxembourg