

Global Registration Services Market Update – Q2 2022

Europe

ESMA Consultation on Notifications for Cross-Border Marketing and Management of Funds

On 17 May 2022, ESMA issued a consultation¹ on the information to be provided and templates to be used by firms when informing regulators of their cross-border marketing and management activities under the UCITS Directive² and AIFMD³ ("CP").

Purpose of the Consultation

The CP is the first stage in the development of draft implementing technical standards ("ITS") and regulatory technical standards ("RTS"). The ITS and RTS will specify the information to be provided, as well as the content and format of notification letters to be submitted, by UCITS management companies and alternative investment fund managers ("AIFMs") to their national competent authorities ("NCAs") when seeking to undertake cross-border marketing; and / or cross-border management activities in host Member States.

The ITS and RTS will also clarify the procedure for the communication of the relevant notification file by the relevant home NCA to the host NCAs of the Member States where these activities are envisaged.

¹ <https://www.esma.europa.eu/press-news/consultations/consultation-notifications-cross-border-marketing-and-management-aifs-and>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0065&from=EN>

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0065&from=EN>

Consultation Process

The CP sets out: (a) the text of the draft ITS and RTS which are submitted to public consultation; (b) detailed explanations on the content and background of the proposals; and (c) a list of 15 questions to stakeholders.

The CP will be of interest to AIFMs, internally managed alternative investment funds ("AIFs"), UCITS management companies, internally managed UCITS, and their trade associations, as well as professional and retail investors investing into UCITS and AIFs, and their associations.

In particular, the draft ITS contain template notification letters ("NLs") on both cross-border marketing and cross-border management of UCITS and AIFs, which are intended to ensure that notifications are consistent, and to avoid discrepancies between national approaches. The draft template NLs for marketing UCITS and AIFs would necessitate the provision of very detailed information including, for example, on the entities that will carry out marketing in the host / home Member State and the name, address and contact details of each third party distributor in the host / home Member State.

Furthermore, to give NCAs a more precise idea of the anticipated level of marketing, ESMA asks if respondents would be able to provide information regarding minimum and maximum capital-raising targets and the expected duration of the marketing. If not, respondents are asked to explain why this information would not be available when notifying the intention to market the UCITS / AIF.

UPDATE

The draft template NLS for cross-border management of UCITS and AIFs are supplemented by the draft RTS, which set out specific information to be provided by UCITS management companies and AIFMs to NCAs on their structure and activities when notifying their intention to carry out their activities in other Member States.

Next Steps

The closing date for responses to the CP is 9 September 2022. ESMA expects to publish a final report by the beginning of 2023. Following the consultation period, the draft RTS and ITS will be finalised and submitted to the European Commission.

If you would like to contribute to the CP, please get in touch with us.

Germany

BaFIN updates its FAQ on the Marketing and Acquisition of Investment Funds pursuant to the KAGB

On 5 July 2022, BaFIN issued an updated version of its "Frequently asked questions about the marketing and acquisition of investment funds pursuant to the German Investment Code (Kapitalanlagegesetzbuch – KAGB)" ("FAQ").

In the updated FAQ, BaFIN has clarified that during the period after a pre-marketing notification has been submitted for an AIF (or a particular investment strategy or idea) but before approval to market the particular AIF has been provided, the fund manager may still only carry out pre-marketing in respect of the particular AIF. To assist with this, a combined application by both EEA AIFMs and non-EEA AIFMs covering both pre-marketing and marketing may be provided to BaFIN.

In addition, the FAQ provides clarity on what is considered a "material change" under Article 31(4) of AIFMD and include changes to the core fund information such as changes to the

investment principles, changes to the AIFs names or the AIFs financial years. In this context, AIFs are EU-AIFs managed by a German AIFM and which have been notified for marketing to semi-professionals in Germany.

Italy

Italy introduces a new Category of Non-Professional Investors for AIFs

On 30 March 2022, the Italian Ministry of Economy and Finance ("MEF") issued a new decree (Decree no. 19/2022) which redefines the conditions for investing in AIFs classified as reserved for professional investors in Italy.

The decree introduces a new category of non-professional investor which is eligible to invest in a reserved Italian AIF under the following conditions:

- The investor invests at least EUR 100,000 in the reserved AIF;
- The amount of EUR 100,000 does not represent more than 10% of the investor's assets; and
- The investment is made in the context of provision of investment advisory services (i.e., investment recommendations by authorised intermediaries).

The decree can be accessed in Italian [here](#)⁴.

Sweden

Updated Industry Standards on Fund Marketing

New industry standards on fund marketing came into effect on 1 May 2022 (the "Fund Marketing Standards"). The Fund Marketing Standards, which go further than EU rules, are part of the self-regulation maintained by the Swedish Investment Fund Association and while not directly applicable to foreign funds, they are generally considered 'good practice' in accordance with Swedish law.

⁴ <https://www.gazzettaufficiale.it/eli/id/2022/03/15/22G00028/sg>

UPDATE

The Fund Marketing Standards were updated to confirm and align the existing version with the new ESMA Guidelines on Marketing Communications⁵.

The following additional changes were also made:

Past Performance:

- The Fund Marketing Standards allow for complementary use of quarterly data for the current year, as long as performance based on complete 12-month periods is featured;
- Previous time recommendations for various products were removed;
- If past performance is present, this is considered as a benefit, meaning risk information must be shown in an equally prominent manner; and
- The Fund Marketing Standards allow for simulated past performance of new funds, as long as the simulation is based on a referenced benchmark or target rate of return.

Risks:

The Fund Marketing Standards previously included a request to indicate that any investment involves a risk. For shorter messages (e.g. social media), the inclusion of the following warning must now be shown prominently: "Investeringar innebär en risk" ("Investments involve a risk", in English).

For longer communications and communications featuring past performance, the previously specified risk warning should continue to be used.

Fees:

The Fund Marketing Standards now specify that the management fee cannot be indicated alone. Ongoing charges is referenced as a more important measure and entry / exit charges

⁵ https://www.esma.europa.eu/sites/default/files/library/esma34-45%201272_guidelines_on_marketing_communications.pdf

should be indicated as well. Should fees be indicated in a currency other than SEK (and not, for example, in percentage form), this currency is to be specified and a warning of the effect of currency fluctuations must be included.

The new agreement can be accessed in full here⁶ and the updated consolidated industry standards can be accessed in full here⁷ (both only available in Swedish).

UK

FCA Final Approach to PRIIPS Regulation

The Financial Conduct Authority ("FCA") has issued their final position⁸ on the Packaged Retail and Insurance-based Investment Products ("PRIIPs") Regulation. Since 25 March 2022, firms must apply the Handbook rules and the PRIIPs Regulatory Technical Standards. The transition period ends on 31 December 2022.

Based on industry feedback received from the Consultation Paper⁹ the FCA issued in July 2021, the following changes will be made:

- Rules to clarify the scope of the PRIIPs Regulation for corporate bonds;
- Interpretative guidance to be provided on what it means for a PRIIP to be "made available" to retail investors; and
- Amend the PRIIPs Regulatory Technical Standards to:
 - (i) Replace the requirements and methodologies for presentation of performance scenarios in the Key Information Document ("KID") with a requirement for narrative information on performance to be provided;

⁶ <https://mb.cision.com/Public/16395/3554910/b679bdc4bea96043.pdf>

⁷ <https://www.fondbolagen.se/globalassets/regelverk/foreningsriktl.kod/riktlinjer-for-fondbolagens-marknadsforing-och-information-maj-2022.pdf>

⁸ <https://www.fca.org.uk/publications/policy-statements/ps22-2-final-scope-rules-amendments-regulatory-technical-standards>

⁹ <https://www.fca.org.uk/publication/consultation/cp21-23.pdf>

UPDATE

- (ii) Address the potential for some PRIIPs to be assigned an inappropriately low summary risk indicator in the KID; and
- (iii) Address concerns about certain applications of the 'slippage' methodology when calculating transaction costs.

Updates to Disclosure Requirements for EEA UCITS

The FCA confirmed on 14 July 2022¹⁰ that UCITS funds marketing in the United Kingdom must continue to provide UK investors with the traditional UCITS Key Investor Information Document ("KIID"). This applies to UCITS registered under the UK's Temporary Marketing Permissions Regime ("TMPR") and UCITS approved to market in the UK under section 272 of the Financial Services and Markets Act 2000 ("FSMA").

As outlined in our recent update¹¹, the PRIIPs Regulation (EU) 1286/2014¹² introduced a mandatory key information document ("PRIIPs KID") for UCITS which are made available to retail investors in the EEA with effect from 1 January 2023.

The European Union (Undertakings for Collective Investment in Transferable Securities) (Amendment) Regulations 2022¹³ provide that the production of a PRIIPs KID by a UCITS will satisfy the obligation to produce a UCITS KIID, thus avoiding duplication.

However, for those UCITS funds which are marketed in both the UK and EEA, this duplication will in fact be necessary and those UCITS funds will be required to produce both a UCITS KIID (for the UK) and a PRIIPs KID (for the EEA) from 1 January 2023.

There are key differences between the UCITS KIID and the PRIIPs KID particularly in the disclosures relating to performance data and costs and charges. For example, while UCITS KIIDs disclose up to 10 years' past performance, with a risk warning as to its limited value as a guide to future performance, a PRIIPs KID must include forward looking projected returns based on historic performance. Similar to the "Charges" section in the UCITS KIID, the PRIIPs KID must include information on costs in the "Composition of Costs" section. However, additional data will be required for the PRIIPs KID including "portfolio transaction costs" not currently factored into the UCITS KIID charges disclosure.

Producing and maintaining both UCITS KIIDs and PRIIPs KIDs will likely result in additional burdens and costs for UCITS managers, particularly around managing the associated distribution of the appropriate KIID or KID to the relevant investor(s).

While the exemption in the UK from the requirement for EEA UCITS to produce a PRIIPs KID lasts until 31 December 2026, the FCA have not provided any guidance on whether the obligation to produce the UCITS KIID will continue once the TMPR expires on 31 December 2025 (and at which stage the UK's Overseas Fund Regime ("OFR") will replace the TMPR).

Hong Kong

Proposed Changes to Hong Kong Securities Law on Enforcement Provisions

On 10 June 2022, the SFC issued a consultation paper ("Consultation Paper") on proposed enforcement related amendments to the Securities and Futures Ordinance ("SFO"), the principal legislation that regulates the securities and futures industry in Hong Kong and which came into force in 2003.

The provisions of the Consultation Paper seek to further consolidate and strengthen the SFC's enforcement powers and is expected to have potentially far-reaching implications for Hong Kong's regulatory landscape. The Consultation

¹⁰ <https://www.fca.org.uk/brexit/temporary-permissions-regime-tpi/rules-apply-firms-fund-operators#revisions>

¹¹ <https://maples.com/en/knowledge-centre/2022/6/preparing-for-the-priips-kid-for-ucits>

¹² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R1286>

¹³ <https://www.irishstatutebook.ie/eli/2022/si/262/made/en/pdf>

UPDATE

Paper is a significant step towards aligning Hong Kong's regulatory regime with other major common law jurisdictions.

The proposed enhancements relate to the following areas:

Expansion of basis to Grant Remedial Orders against Regulated Persons

Currently, there are huge limitations on the SFC's power to obtain such investor compensation, which have largely protected licenced corporations and registered institutions from the sort of significant investor compensation claims that have been awarded in other jurisdictions.

The Consultation Paper proposes an expansion of the basis on which the SFC may request the court to grant remedial orders against a regulated person under section 213 of the SFO. This would make it far easier for the SFC to obtain orders compelling licensed corporations / registered institutions that are found guilty of engaging in misconduct under the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission ("Code of Conduct") to provide investor compensation in relation to that misconduct.

Amendment to the Professional Investor Exemption for Advertisements

Section 103(1) of the SFO criminalises the issue of advertisements and other documents containing an invitation to the public to enter into agreement to deal in securities or any other structured products without getting the authorisation of the SFC.

The professional investor ("PI") exemption is available where the advertisements of investment offers are disposed of, or intended to be disposed of, only to PIs. With the construction by the Court of Final Appeal, the PI exemption applies to any advertisement having some connection or relation to investment products that are or are intended to be disposed

of only to PIs, even though the intention is not clearly stated in the advertisements.

This means that a mere intention to sell products to PIs would suffice, which may expose retail investors to unauthorised offers or solicitations to invest in risky products unsuitable for them. In addition, enforcement action in practice has to be taken until the sale of investment products has taken place to determine to whom the products have been sold and whether the PI exemption applies. The difficulty in enforcement contradicts the intention and purpose of Section 103.

The proposed amendments make the PI exemption only available where the advertisements are issued only to PIs who have been identified in advance by an intermediary through its know-your-client and related procedures.

Amendment to Insider Dealing Provisions

The Consultation Paper looks to extend the scope of the insider dealing provisions in Hong Kong to address insider dealing in Hong Kong with regard to overseas-listed securities or their derivatives, and to address conduct outside of Hong Kong in respect of Hong Kong listed securities or their derivatives.

The SFC is of the opinion that such amendments are necessary in order to ensure that they have the power to tackle cross-border insider dealing and market misconduct in order to preserve the integrity and reputation of Hong Kong's financial industry and market.

The Consultation Paper is open until 12 August 2022.

How the Maples Group Can Help

Maples Group GRS supports UCITS¹⁴ and AIFMs¹⁴ 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

¹⁴ Domiciled in Ireland and Luxembourg.

governing the cross-border marketing of investment funds on both a private placement and public offer basis.

Further Information

Should you require any further information or assistance in this regard, please contact the following or any member of the Maples Group GRS team.

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The Maples Group's Irish legal services team is independently ranked first 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 2021).

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