MAPLES GROUP

UPDATE

Distribution of Foreign Investment Funds in the UK post Brexit: TPR and OFR

Background

The UK Financial Services Bill 2020 (the "Bill") was recently introduced to ensure that the UK's regulatory framework continues to function effectively following the UK's exit from the EU. As contemplated in our March 2020 update, the Bill introduces new equivalence regimes for both retail investment funds and money market funds ("MMFs") and aims to simplify the process for distribution of foreign investment funds to UK investors following the UK's withdrawal from the EU.

On 9 November 2020, HM Treasury also published their conclusions on their UK consultation on the Overseas Funds Regime (the "OFR").

TPR – Act Now to Guarantee Access to Market

We have discussed in previous updates that the ability to market foreign investment funds cross border to UK investors through the existing UCITS and AIFMD passport processes will cease once the Brexit transition period ends on 31 December 2020.

Before transitioning to the OFR, any eligible foreign investment fund which is to be marketed in the UK, is required to be opted into the Temporary Permissions Regime ("TPR") by no later than 30 December 2020. The UK FCA notification window to make an application to opt into the TPR will re-open on 14 December 2020 allowing firms and foreign investment funds to file before closing to applications on 30 December 2020.

Most managers have already opted into the TPR during previous windows and these remain valid. If, however, new funds and/or sub-funds have been passported into the UK since any previous TPR notification, those new fund and/or sub-funds will not be included in the TPR. In these circumstances, the manager must submit a written request to the FCA by no later than 9 December 2020 notifying them of their intention to update the notification to include any newly passported funds and/or sub-funds.

Therefore, with the upcoming cessation of the cross border UCITS and AIFMD marketing passports into the UK at the end of the transitional period, it is important for any manager wishing to market an already passported fund(s) in the UK after 31 December 2020 must either:

- review and/or update any prior TPR notification filings prior to 30 December 2020; or
- prepare and complete a TPR filing prior to 30 December 2020.

Otherwise any fund and/or sub-fund not included in the TPR by the deadline will generally no longer be permitted to market in the UK.

It is worth noting, however that in the case of a new UCITS sub-fund established after 31 December 2020, but where the UCITS umbrella was registered under the TPR, the FCA will permit the notification of new sub-funds to be added to the TPR in order to facilitate marketing to UK retail investors. In the event of a no deal Brexit, any AIFs established, but not notified and opted into the TPR, will be permitted to market under temporary transitional powers granted to the FCA. The FCA has stated that in the case of an EU AIFM marketing an AIF in the UK may continue to market that AIF in accordance with the current UK AIFM regulations for a transitional period up to 31 March 2022.

OFR

As noted in our previous update (link above), the OFR proposal incorporates two sets of rules for foreign retail investment funds and foreign MMFs. The rules will be based on the principles of regulatory equivalence and adequate reciprocal supervisory co-operation between the FCA and the national competent authority ("NCA") in the jurisdiction seeking equivalence.

Following the determination of equivalence, foreign retail funds and MMFs marketing to UK retail clients will have to apply to the FCA for recognition.

The OFR Consultation provides that foreign investment funds that seek to be recognised for marketing in the UK would need to ensure appropriate disclosure regarding access to the UK Financial Ombudsman and the role of alternative dispute resolution; regular ongoing reporting to the FCA regarding changes to fund governance arrangements; the maintenance facilities in the UK for investors and the use of authorised persons in the UK to make or approve financial promotions. Additionally, the FCA will also be enabled to make rules to set registration and periodic fees which would be imposed on overseas investment funds for the purposes of maintaining recognition under the OFR.

HM Treasury's response also notes that the UK would be permitted to withdraw equivalence decisions at a future date "*if the UK judges that the overseas jurisdiction no longer delivers equivalent outcomes (or an equivalence decision is no longer compatible with the UK's policy priorities including the rule of law, international sanctions, human rights and efforts to combat money laundering)*". HM Treasury noted that "*in the event that equivalence is withdrawn, the government's policy is that investors should not be forced to divest their investments in the fund, and the fund should continue to service them*". Foreign investment funds from a country that is no longer recognised as equivalent would instead need to apply to the FCA for approval to continue distributing in the UK under the Section 272 procedure.

The Consultation acknowledged that the existing recognition process for foreign non-UCITS retail investment funds under Section 272 is not suitable for the significant volume of foreign investment funds expected to seek recognition at the end of the TPR. While the Section 272 regime will not be repealed under the Bill, some enhancements will be made to streamline the process and it will remain available for individual foreign retail funds that are not eligible to be recognised through the equivalence determination of the OFR.

Key OFR Takeaways

- The OFR will allow EU UCITS to market in the UK based on a comparison of HM Treasury's overall view of the other country's regulatory regime. We expect that both Ireland and Luxembourg will qualify with the equivalence regime and that the OFR will be the immediate route to allow Irish and Luxembourg domiciled UCITS to target retail investors. In the unlikely event of this not being the case, they can still target retail investors through Section 272.

- While the position regarding allocation of "landing slots" has yet to be clarified, the TPR transition period is to be extended from three years to five years. Following allocation of a "landing slot" by the FCA, those funds opted into the TPR will be required to apply to the FCA for permanent recognition under the OFR; this extension is to facilitate a smooth transition process. An EU UCITS opted into the TPR can request a more immediate "landing slot" within this transition period.

- The timeframe for the FCA to recognise an EU UCITS who makes application to them to market under the OFR will be two months.

- Changes are also to be made to the PRIIPS Regulation, which are included in the Bill, alongside the OFR. This will include a power to extend the exemption for UK and EEA UCITS from the Packaged Retail and Insurance-based Investment Products ("PRIIPs") Key Information Document ("KID") disclosure. HM Treasury will consider the most appropriate timing for the transition of UCITS funds into the PRIIPs regime, or any domestic successor that may result from the planned review of the UK framework for investment product disclosure.

We are monitoring this situation as the Bill makes its way through Parliament and will continue to keep you updated.

How can the Maples Group help?

The Maples Group Global Registration Services ("GRS") team supports UCITS[1] and AIFMs[1] 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 your usual Maples Group GRS contact or:

Dublin

Emma Conaty
+353 1 619 2708
emma.conaty@maples.com

Sarah Ennis
+353 1 619 2743
sarah.ennis@maples.com

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 2019).

[1] Domiciled in Ireland and Luxembourg.