MAPLES GROUP

Global Registration Services Market Update

Q3 Update | July to September 2024

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Europe

Publication of the Translations of the Guidelines on Funds' Names Using ESG or Sustainability-Related Terms

Referring to our last Funds & Investment Management Update Q2 2024, the ESMA published on 21 August 2024 the *Guidelines on funds' names using ESG or sustainability-related terms* (the "Guidelines") in all official languages on their website. This means that the Guidelines will apply to new funds from 21 November 2024, i.e. three months after the publication date, and to existing funds from 21 May 2025, i.e. nine months after the publication date. Therefore, existing funds using an ESG or sustainability-related term in their name will have a six-months transitional period to comply with the Guidelines.

The use of an ESG or sustainability-related name will trigger mandatory quantitative investment requirements and investment exclusions applicable to the fund. In case of unwillingness or inability of a management company to comply with these restrictions, it will need to change the name of the fund and stop using the ESG or sustainability-related term that triggers the restrictions.

The above is of relevance for UCITS that have been notified for marketing on a cross-border basis, since, in this case, the competent authorities of both the UCITS home Member State and the UCITS host Member States will need to be given at least a one-month written notice before the implementation of the name change.

Germany

Abolition of the Requirement of Pre-payment of UCITS and AIFs Cross-Border Marketing Notification and De-notification Fees

On 15 August 2024, the BaFin updated their Guidance Notice (2013) on marketing of EU UCITS in Germany pursuant to section 310 of the German Investment Code. According to this update, UCITS are no longer required to pre-pay the relevant fee and to include the proof of payment thereof in the notification file for the BaFin to process a cross-border marketing notification or de-notification. Since then, the BaFin are issuing a fee notice for the processing fee, which is sent electronically together with the payment details to the UCITS management company and / or the contact point for invoicing or for communicating any applicable regulatory fees or charges as indicated in the notification letter in accordance with Article 93(1) of the Directive 2009/65/EC as amended by the Directive (EU) 2019/1160 ("CBDF Directive"). The processing fees remain unchanged and still amount to EUR 322 for a marketing notification and EUR 637 for a marketing de-notification (in the case of an umbrella fund, each sub-fund is subject to the duty to pay the fee).

The BaFin also updated their Guidance Notice (2013) on marketing of EU AIFs or German special AIFs managed by an EU AIFM to semi-professional and professional investors in Germany pursuant to section 323 of the German Investment Code, i.e. based on Article 32 AIFMD, for the same reasons as above. As such, the requirement to pre-pay the relevant fee and to attach the proof of payment thereof for the BaFin to process a cross-border marketing notification or de-notifications no longer applicable. Like for UCITS, the BaFin are now issuing by electronic means a fee notice together with the payment details to the AIFM and / or the contact point named in the notification letter for the invoicing or for the communication of any applicable regulatory fees or charges in accordance with Annex IV of the AIFMD as amended. The processing fees remain unchanged here as well and amount to EUR 466 and EUR 284 for a marketing notification and de-notification, respectively (in the case of an umbrella fund, each sub-fund is subject to the duty to pay the fee).

France

Summary of SPOT Inspections on the Marketing Materials of French and Foreign CISs Marketed by Distributors with a Focus on ESG Aspects

On 24 July 2024, the AMF published their findings of their Supervision of Operational and Thematic Practices ("SPOT") inspections on the marketing materials of French and foreign collective investment schemes ("CISs"), with a particular focus on the integration of ESG characteristics. These inspections were part of a broader initiative to ensure that investment services providers ("ISPs") comply with regulatory requirements for clear, accurate, and non-misleading information. Six ISPs, who either elaborate their own marketing materials or use those created by the portfolio asset management companies ("AMCs"), were inspected. Consequently, the inspection focused on the distributors, which are in direct contact with investors, rather than on the producers.

The AMF in their inspection placed a particular focus on the definition of the term 'marketing material'. Although there is no definition provided by law, the AMF Position-Recommendation 2011-24 defines the term as meaning "*any information of a promotional nature sent directly to potential/existing subscribers, or likely to be passed on by distributors to their clients, either in writing or verbally.*" However, none of the ISPs have adopted this definition and, instead, they established a list of documents that they consider as marketing materials. The AMF noted they consider this to be a poor practice, because, as a consequence, some marketing materials may not be identified as such by institutions and therefore may not be covered by their system. The AMF cited as an example, monthly reports, which most institutions appear to dismiss from the scope of marketing materials, but some reports actually go beyond simple reporting of facts. It is advisable for firms to treat all materials utilized by employees to present a CIS to a client as marketing materials, regardless of whether these materials are intended to be provided to the end client. The AMF highlighted that the lack of a clear and formal definition of marketing materials by market participants may indicate a fundamental weakness in the entire system, including preparation, approval, and monitoring processes.

Focusing on the systems implemented to prepare, review and approve marketing materials, no matter if the distributors disseminate marketing materials drawn up by the AMCs or themselves for the CIS they distribute by relying on data from the AMCs. In both instances, the distributors are responsible for ensuring the marketing materials they disseminate are clear, accurate and not misleading. In the same sense, while responsibilities may be organised contractually between distributors and AMCs, such division of responsibilities does not exempt distributors from their professional obligation to disseminate clear, accurate and non-misleading information. Regarding specifically ESG characteristics, the AMF in their inspection found that almost none of the ISPs integrated the requirements of the AMF Position-Recommendation 2020-03 in their analysis for the preparation, review and approval of marketing materials. In terms of good practice, the AMF suggested, among others, conducting training sessions for employees to familiarise them with the requirements for integrating ESG criteria into the marketing materials, providing operational teams responsible for drafting the marketing materials with a checklist of mandatory verification points, and arranging for the validation by AMCs of all marketing materials prepared by the distributors, especially those related to the management of the relevant fund.

In the final step of their investigation, the AMF analysed, on the basis of a sample of marketing materials, whether the marketing materials of CIS integrating ESG characteristics and distributed to retail clients were clear, accurate and not misleading, the result of which showed that almost all the marketing materials analysed presented one or more anomalies.

Ireland

New Submission Process for Cross-Border Marketing Notifications and De-notifications

The CBI changed their process for receiving certain cross-border notifications for UCITS and AIFs via email to receiving them via their portal. This change was effective from 11 September 2024 and as of this date the following cross-border notifications must be submitted to the CBI via the online CBI Portal:

- UCITS Outward Marketing submissions - notifications and denotifications;
- AIFMD Article 31 Inward submissions (i.e. Irish AIFMs marketing EU AIFs in Ireland - notifications and denotifications); and
- AIFMD Article 32 Outward submissions (i.e. Irish AIFMs marketing EU AIFs in EU Member States (excluding Ireland) – notifications and denotifications).

UCITS and AIFs cross-border notifications other than the ones mentioned above, such as share class notifications, amendment notifications, material change notifications and pre-marketing notifications, must continue to be submitted to the CBI via email.

The CBI made available on their website a guide on how to get set up on the portal and on how to submit the relevant cross-border notifications on the portal.

An Irish AIFM managing an unregulated Irish AIF and / or non-Irish EU AIF to be marketed in the EU should ensure it has obtained a C-Code from the CBI in sufficient time in order to be able to complete an application through the portal system.

CBI's Process Clarification for UCITS and AIFs in Respect of ESMA's Guidelines on Funds' Names Using ESG or Sustainability-Related Terms

To ensure a smooth implementation of the Guidelines, the CBI introduced a simplified filing procedure for UCITS and AIFs that need to change their names and update their fund prospectuses, supplements, and SFDR annexes in line with the Guidelines' requirements. The simplified filing procedure is exclusively for name changes necessary for UCITS and AIFs to comply with the Guidelines and any other changes related to SFDR disclosures and / or involving the reclassification of funds, will be subject to review under the standard post-authorisation processes.

As a reminder, notwithstanding the simplified filing procedure, in the event of a name change of an UCITS notified for marketing on a cross-border basis, the UCITS must give written notice thereof to the competent authorities of both the UCITS home Member State and the UCITS host Member States at least one month before implementing the change.

Norway

Entry into Force of the PRIIPs Regulation and CBDF Directive

Making reference to our last Global Registration Services Market Update Q2 2024, the Act on Key Information for Packaged Retail and Insurance-Based Investment Products entered into force on 1 October 2024 pursuant to the Norwegian Ministry of Finance's Resolution No.1912 of 9 August 2024.

Other than that, the Parts II and III of the Act 79 of 22 June 2022, which implement the provisions of the CBDF Directive, also entered into force on 1 October 2024 pursuant to the Resolution No.1913 of 9 August 2024 from the Norwegian Ministry of Finance.

It is worth noting that the Act 79 of 22 June 2022 goes beyond the CBDF Directive by extending the scope of the provisions on pre-marketing by EEA AIFMs to retail investors. It is also noteworthy that it explicitly prohibits non-EEA AIFMs from carrying out pre-marketing activities in Norway as well as the pre-marketing of non-EEA AIFs or EEA feeder funds with non-EEA master funds.

United Kingdom

Confirmation of the Opening Date of the OFR Gateway for Non-TMPR Funds

Referring to our latest client update on the OFR, the FCA updated on August 2024 their dedicated OFR webpage to confirm that the gateway to new schemes, that is, those that are currently not operating under the TMPR, will open on 30 September 2024 and that, hence, new schemes will be able to apply for recognition at any time from this date without and do not need a landing slot.

The update also included the inclusion of the OFR landing slots table for operators of funds in the TMPR. The landing slots for stand-alone schemes in the TMPR started on 1 October 2024, whereas the landing slots for umbrella schemes with sub-funds in the TMPR will start on 1 November 2024 by alphabetical order of the fund operators' names.

Publication of OFR How-to-Guides and Other OFR Guidance Documents / Information

On 11 September 2024, the FCA added to their OFR webpage Connect user guides to help fund operators with the following:

- Apply for recognition under the OFR of a stand-alone scheme that is or that is not in the TMPR;
- Apply for recognition under the OFR of an umbrella scheme that is or that is not in the TMPR; and
- Apply for recognition of an additional sub-fund of an umbrella scheme that has already been recognised under the OFR.

Any of the aforementioned applications must be accompanied by the following supporting documents:

- The latest prospectus and any relevant addenda / supplements;
- Instrument constituting the fund, as amended;
- The latest annual report and, if more recent, the half-yearly report;
- KIID / consumer composite information document (although one KIID for each share class intended to be marketed must be submitted, the FCA allow for the KIIDs, in case of several share classes to be marketed, to be combined into a single document for upload); and
- Portfolio statement for the fund(s).

The FCA also made available on their OFR webpage the application form questions, including the FCA's expectations in terms of answers to help fund operators with the preparation of the submission of an application. They published for the same purpose the document titled "Approach to Recognition", which sets out details of the application process and possible outcomes as well as explains some of the factors the FCA will look at when deciding whether an overseas fund meets the conditions for being recognised under OFR.

To become recognised under the OFR, the prospectus of a scheme must include disclosures on whether consumer redress schemes are available in the UK and overseas. To assist fund operators, the FCA provided some example disclosures that fund operators may consider using. The FCA expect these disclosures to be contained in either the main body of the fund prospectus, an addendum to the prospectus or an UK country supplement. It is important for fund operators to consider in the planning stage of the application preparation if the addition of these disclosures to any of the above documents will require approval from the national competent authority responsible for authorising and supervising the fund, as such approval would need to be obtained prior to submitting

the application. In Ireland, for example, such addition would require the amended fund document to be noted by the CBI. There are two options, one is to add the relevant disclosure to the UK country supplement and to file the document via the CBI Portal, and the other is to amend the main body of the prospectus / supplement and to submit the amended document to the Funds Post-Authorisation team via the CBI Portal, noting that the latter option would be subject to a lengthier and more detailed review process.

The FCA also added to their OFR webpage information on considerations that may have an operational impact for operators of TMPR funds. Such a consideration is that, after a fund operator has received its landing slot and until a decision has been taken by the FCA on the application, the FCA cannot account any change of operator for a fund within the TMPR. Another consideration in the planning stage of the application preparation is that, after two weeks before the opening of an umbrella landing slot, it will no longer be possible to add new sub-funds of that umbrella to the TMPR.

For any questions on the OFR application process or if you wish to receive our assistance with the transition of your fund from the TMPR to the OFR, please do not hesitate to get in touch with any member of the Maples Group GRS team.

Argentina

Establishment of a Regulatory Framework for the Private Offering of Securities

On 18 September 2024, the Argentine Securities and Exchange Commission (CNV) issued Resolution No. 1016 (the Resolution), which establishes a regulatory framework for the private offering of securities to a limited number of investors, the private offering of securities to employees and the cross-border offering of securities that lacks sufficient connection with Argentina.

The aforementioned private and cross-border offerings that meet the requirements set forth by the Resolution enjoy safe harbour from being considered to be public offerings and thereby exempting them from the rules governing public offerings. In case of non-compliance with the safe harbour requirements, an offering will not automatically be considered as an irregular or unauthorised public offering, nor will it automatically be subject to sanctions, as each case of non-compliance must be reviewed individually to determine whether the offering qualifies as a public offering.

The conditions for an offering to fall under the regime for the private offering of securities to a limited number of investors include that the maximum number of permitted investors is not exceeded, that the dissemination is carried out exclusively through authorised means, that certain information is provided to the investors upon their request, and that the restrictions on the transfer of securities are respected.

A private offering of securities to employees must be directed to eligible individuals only, using exclusively authorised communication channels. At the request of the investor, the latest financial statements and / or any other information that is relevant for the purpose of the offer, must be provided. Securities acquired through the private offering of securities to employees are also subject to some transfer restrictions.

For a cross-border offering to be considered to lack sufficient connection with Argentina it must be made by a foreign resident in a manner so as not to generate sufficient connection with Argentina. The Resolution provides for a list of prohibited and permitted dissemination means.

Australia

Extension of the Transitional Relief Period for Foreign Financial Services Providers

Making reference to our Global Registration Services Market Update Q4 2023, the ASIC decided to extend the transitional relief period for foreign financial services providers ("FFSPs") by an additional 12 months. This extension pertains to the requirement for FFSPs to hold an Australian Financial Services ("AFS") license when offering financial services to wholesale clients in Australia.

Initially, the transitional arrangements for the ASIC's sufficient equivalence relief and limited connection relief were set to expire on 31 March 2025. To ensure that FFSPs currently benefiting from the ASIC's relief measures have certainty for the future, the transitional relief period has now been extended until 31 March 2026. After this extended period, FFSPs will need to inform the ASIC if they intend to rely on the new licensing exemption regime, unless they opt to notify the ASIC earlier.

The new licensing exemption regime is scheduled to commence on 1 April 2025, provided that the bill aiming to establish this regime passes through the Parliament of Australia. Entities that are not currently benefiting from the ASIC's relief will be able to rely on the new licensing exemption regime by notifying the ASIC once it becomes effective. There will be no change for FFSPs that have been or are granted a foreign AFS license as they will be able to continue to operate their financial services business in Australia under the license issued by the ASIC.

Canada

Announcement of Temporary Exemptions from Some Business Conduct Obligations of Derivative Dealers and Derivative Advisers

On 25 July 2024, the Canadian Securities Administrators announced coordinated local blanket orders (the "Blanket Orders") introducing temporary exemptions from certain obligations under the National Instrument 93-101 Derivatives: Business Conduct (the "Business Conduct Rule"), which regulates the business conduct of dealers and advisers in the OTC derivatives market. The Blanket Orders grant temporary relief to derivatives firms from specific obligations when dealing with certain investment funds as well as senior derivatives managers from certain reporting obligations. The Blanket Orders and the Business Conduct Rule have become effective starting from 28 September 2024.

How the Maples Group Can Help

The Maples Group's Global Registration Services is integrated within our Funds & Investment Management Group and provides cross-border fund registration services in all key distribution markets. Our core services provide support throughout the distribution chain to include market intelligence, market entry (through private placement or public offering) and maintenance of ongoing reporting and filing obligations.

Further Information

Should you require any further information or assistance in relation to marketing your fund products on a cross-border basis, please visit our dedicated webpage or contact the following or any member of the Maples Group GRS team.

Contacts

Dublin

Emma Conaty
Head of Global Registration Services
emma.conaty@maples.com

About the Maples Group

The Maples Group is a leading service provider offering clients a comprehensive range of legal services on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg, and is an independent provider of fiduciary, fund services, regulatory and compliance, and entity formation and management services. The Maples Group distinguishes itself with a client-focused approach, providing solutions tailored to their specific needs. Its global network of lawyers and industry professionals are strategically located in the Americas, Europe, Asia and the Middle East to ensure clients gain immediate access to expert advice and bespoke support, within convenient time zones.

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 2023 Monterey Ireland Fund Report). Our sizeable and fast-growing Luxembourg legal services team cover the whole range of funds and investment management services. For more information, please visit maples.com


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