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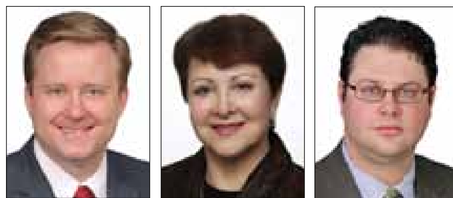
Form PF: Private Fund Systemic Risk Reporting in the United States



by **David A. Vaughan, Jane A. Kanter** and **Michael L. Sherman***

The Securities and Exchange Commission ("SEC") on October 26, 2011 unanimously adopted a new rule ("Rule") and new Form PF under the Investment Advisers Act of 1940 ("Advisers Act") that must be completed by certain SEC registered investment advisers that manage private funds.[1] Among other things, Form PF will provide the new Financial Stability Oversight Council ("FSOC") with information necessary to help it monitor the systemic risk created by private funds and to determine whether particular entities should be designated as "significant financial institutions" ("SIFIs").[2] In addition, the information obtained by the FSOC from Form PF filings is intended to enable the FSOC to consider and recommend to primary financial regulators new regulations designed to mitigate systemic risk.[3]

New Form PF

While those who commented on the proposed rule generally supported the goal of Form PF to serve as part of a regime to monitor systemic risk, many were concerned about the scope, frequency and timing of the proposed reporting. In response to commenters, the SEC sought to tailor the Rule and the Form to ease the reporting burden on private fund advisers without materially impacting the quality of information from a systemic risk monitoring perspective.

As adopted, Form PF seeks a broad array of information, including: identifying information, assets under management, leverage and performance information for each private fund advised; aggregate information regarding fund asset values and portfolio holdings; and fund-specific data about such characteristics as portfolio liquidity, concentration, collateral practices and risk metrics.

Two-Tier Reporting Requirement

Form PF provides for a two-tier reporting requirement, whereby "large" advisers to particular types of funds will be subject to a more detailed reporting requirement than are smaller advisers and large advisers to other types of funds. The largest fund managers are also subject to accelerated initial filing dates for Form PF.

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Advisers to hedge funds having, in the aggregate, at least $1.5 billion in "regulatory assets under management" ("RAUM") in hedge funds will be subject to the more detailed reporting requirements.[4] RAUM consists of the assets of the applicable funds managed by an adviser and is calculated gross of outstanding indebtedness and other accrued but unpaid liabilities. RAUM also includes uncalled capital commitments. Advisers may use the total assets on the fund's balance sheet to determine gross assets. This calculation methodology is the same as that used for determining RAUM for purposes of Form ADV. Advisers to private funds with less than $150 million in RAUM need not file Form PF.

Advisers to liquidity funds having, in the aggregate, at least $1 billion in RAUM in liquidity funds and money market funds will be subject to the more detailed reporting requirements.[5] Liquidity fund advisers must count registered money market fund assets towards the RAUM threshold. Advisers to private equity funds having, in the aggregate, at least $2 billion in RAUM in private equity funds will be subject to the more detailed reporting requirements.[6]

The SEC sought to tailor the Rule and the Form to ease the reporting burden on private fund advisers without materially impacting the quality of information from a systemic risk monitoring perspective.

Aggregation of Assets

For purposes of determining whether an adviser meets any of the asset thresholds described above, an adviser must aggregate assets of accounts that pursue substantially the same investment objective and strategy and invest side-by-side in substantially the same positions as the private funds managed by the adviser ("Parallel Accounts"), unless the value of the Parallel Accounts exceeds the value of the private funds. This provides significant relief to advisers that are not primarily private fund advisers. Further, an adviser must aggregate assets of persons advised by any "related person" that is not operated separately from the adviser.

Liability for the Information Filed

Form PF does not contain an initially proposed certification requiring an authorized individual from the adviser to affirm under penalty of perjury that the statements made in the Form PF are true and correct. Commenters had expressed concern that the estimates and judgment calls required by Form PF would not allow an officer to state with certainty that the Form is true and correct, and officers could not rightly be held liable for perjury in such circumstances. Advisers can still be held liable under the Advisers Act for willful misstatements or omissions of a material fact in any report filed with the SEC.

When calculating the data required by Form PF, the rule allows advisers to use the methodologies that they use for internal and investor reporting purposes, rather than detailed formulas initially prescribed by the SEC in the proposed Form. Further, Form PF permits, but does not require, an adviser to explain any assumptions it makes in responding to the Form's questions. Given the opportunity, it could prove useful to an adviser to explain its assumptions in order to demonstrate its good faith in completing the Form, particularly if the SEC or CFTC staff disagrees with the data reported on the Form.

Confidentiality

The CFTC and SEC will share information collected on Form PF with the FSOC to the extent requested by the FSOC in furtherance of its assessment and monitoring of systemic risk. Under amendments to the Advisers Act added by the Dodd-Frank Act, the CFTC, SEC and

FSOC may be compelled to reveal any information provided on Form PF, but only under very limited circumstances. For example, upon proper request, Form PF data may be shared with other federal departments or agencies or with self-regulatory organizations, in addition to the CFTC and FSOC, for purposes within the scope of their jurisdiction. Information may also be shared with Congress, but only in accordance with a confidentiality agreement. Form PF information may be used in examinations as well as enforcement actions brought by the United States or the SEC. The SEC is working to design controls and systems to protect the confidentiality of the information contained in Form PF. If the SEC staff does not believe that such systems are adequate by the compliance date for required Form PF filings, the SEC will consider delaying the compliance date.

Ultimately the scope and frequency of the reporting and the data required to be reported on Form PF does differ from the reporting proposed by ESMA in its recently published advice.

International Coordination

The Dodd-Frank Act requires the FSOC to coordinate with foreign regulators in monitoring systemic risk. Therefore, the SEC staff consulted with the UK's Financial Services Authority ("FSA"), the European Securities and Markets Authority ("ESMA"), the International Organization of Securities Commissions and Hong Kong's Securities and Futures Commission, to develop a consistent regime for hedge fund reporting. The collection of comparable information regarding private funds in each regulator's jurisdiction will better allow for the coordinated assessment of systemic risk on a global basis. ESMA has published its advice on implementing these requirements. Although the SEC staff did draw on ideas from the FSA's voluntary semi-annual survey of hedge funds and ESMA's draft guidance on the form of systemic risk reporting that may be required under the Alternative Investment Fund Managers Directive, ultimately the scope and frequency of the reporting and the data required to be reported on Form PF does differ from the reporting proposed by ESMA in its recently published advice. The differences in these systemic risk reporting regimes will present challenges for managers and funds that are subject to both sets of reporting requirements. For further information, see **Harmony or Dissonance: A Comparison of Form PF and the Template Reporting Form Proposed in ESMA's Level II Advice** in this Quarterly Report.

Compliance Date

The SEC adopted a two-stage phase-in period for compliance with the Form PF filing requirements. Advisers with at least $5 billion in RAUM attributable to hedge funds, liquidity funds or private equity funds as of the last day of the fiscal quarter most recently completed prior to June 15, 2012 must begin filing for periods on or after June 15, 2012. Advisers who do not meet that threshold must begin filing for periods on or after December 15, 2012. All other advisers must file their first Form PF for the first period ending after December 15, 2012.

Conclusion

The final Form PF incorporates many significant revisions that should ease the burden on reporting advisers. The SEC staff clearly considered the comments it received and implemented suggestions, such as increasing the threshold for advisers subject to the detailed reporting requirements, delaying the compliance date for the rule, increasing the amount of time after the end of the fiscal period for filing, eliminating the certification under penalty of perjury and allowing advisers to use their internal methods for calculating the information required by Form PF. These revisions allowed Form PF to be unanimously adopted by the SEC, which praised the SEC staff's efforts to reduce the reporting burden while still gathering the information required by the FSOC.

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* Robert H. Ledig, Gordon L. Miller and Eric D. Simanek also contributed to this article.

[1] The Commodity Futures Trading Commission ("CFTC") simultaneously adopted new Rule 4.27 under the Commodity Exchange Act, which requires private fund advisers that are registered with the SEC and registered as commodity pool operators or commodity trading advisors with the CFTC to file Form PF with the SEC. Because the CFTC's rule adds no reporting requirements, this article addresses the SEC's rule only.

[2] The Rule and Form implement provisions of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The Dodd-Frank Act gave the FSOC a range of responsibilities including: (i) monitoring for potential threats to U.S. financial

stability; (ii) designating non-bank financial companies for supervision by the Board of Governors of the Federal Reserve System ("FRB") as SIFIs; (iii) making recommendations to the FRB as to the heightened capital and other prudential standards that will apply to SIFIs and bank holding companies with consolidated assets of $50 billion or more; and (iv) making recommendations to primary financial regulatory agencies to apply heightened prudential standards for activities and practices that are deemed to pose significant risks. The SEC and CFTC consulted extensively with the member agencies of the FSOC in developing Form PF to tailor the information to what the FSOC requires to exercise its responsibilities.

3 For additional information, please refer to "SEC and CFTC Adopt Private Funds Systemic Risk Reporting on Form PF," available at http://www.dechert.com/SEC_and_CFTC_Adopt_Private_Fund_Systemic_Risk_Reporting_on_Form_PF_12-06-2011/.

4 Form PF defines "hedge fund" generally to include any private fund having any one of three common characteristics of a hedge fund: (i) a performance fee that takes into account market value (instead of only realized gains); (ii) high leverage; or (iii) short selling. This definition excludes private equity funds that calculate currently payable performance fees in a way that takes into account unrealized gains solely for the purpose of reducing such fees to reflect net unrealized losses. It also excludes funds that use short selling solely to hedge currency exposure or to manage duration. Lastly, it excludes vehicles established for the purpose of issuing asset-backed securities. A commodity pool that is required to be reported on Form PF is treated as a hedge fund for such purpose.

5 A "liquidity fund" is defined in Form PF as any private fund that seeks to generate income by investing in a portfolio of short-term obligations, in order to maintain a stable net asset value per unit or minimize principal volatility for investors. Essentially, a liquidity fund is an unregistered money market fund.

6 A "private equity fund" is defined in Form PF as any private fund that is not a hedge fund, liquidity fund, real estate fund, securitized asset fund or venture capital fund and does not provide investors with redemption rights in the ordinary course.

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Harmony or Dissonance: A Comparison of Form PF and the Template Reporting Form Proposed in ESMA's Level II Advice

by **Jennifer Wood***

On 26 October 2011, the Securities and Exchange Commission ("SEC") adopted Form PF, the form to be used by SEC-registered investment advisers to provide the new Financial Stability Oversight Council, the systemic risk oversight body created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, with information necessary to help it monitor the systemic risk created by private funds, among other things. For further information, see **Form PF: Private Fund Systemic Risk Reporting in the United States** in this Quarterly Report.

Just days later, on 11 November 2011, the European Securities and Markets Authority ("ESMA") published its final report containing ESMA's technical advice to the European Commission (the "ESMA Advice") on possible implementing measures of the Alternative Investment Fund Managers Directive (the "Directive"). This final report contains a pro-forma "template" for reporting by alternative investment fund managers ("AIFMs") to competent authorities in compliance with Article 24 of the Directive in respect of the alternative investment funds ("AIFs") that they manage (referred to in this article as the "ESMA Form").

Both the SEC and ESMA, in accordance with their respective mandates, have taken into account the systemic risk reporting initiatives of various regulators around the world, including each other's initiatives. Both the SEC and ESMA mention the desirability of globally harmonised reporting requirements. However, despite (or perhaps because of) the common goal of harmonisation, and having advance knowledge of the requirements the other was considering, the SEC and ESMA have developed tantalisingly similar yet frustratingly different reporting forms and filing requirements.[1] For ease of reference, persons providing investment advice or investment management services (discretionary and non-discretionary) to clients are referred to in this article as "investment advisers".

Despite (or perhaps because of) the common goal of harmonisation, and having advance knowledge of the requirements the other was considering, the SEC and ESMA have developed tantalisingly similar yet frustratingly different reporting forms and filing requirements.

Private Funds vs. AIFs

Both private funds and AIFs are collective investment vehicles that raise capital from multiple investors with a view to investing it in accordance with a defined investment policy for the benefit of the investors. Both definitions also carve out certain publicly offered funds under their own legal regimes.

Specifically, a "private fund" is any issuer relying on the exception from the definition of "investment company" under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940, as amended (the "Investment Company Act"). This will include most types of funds offered on a private placement basis in the United States and excludes SEC-registered investment companies such as mutual funds and exchange traded funds ("ETFs"). Because they are not permitted to be SEC-registered investment companies, non-US funds (including UCITS, discussed below) offered in the United States will be considered "private funds" regardless of the fact that they may be publicly offered elsewhere.

The definition of "AIF" specifically excludes open-ended funds available to the public and organised as Undertakings for Collective Investment in Transferable Securities ("UCITS"). However, in addition to privately offered AIFs, the definition of AIF includes non-UCITS publicly offered funds such as UK investment trusts and investment companies admitted to trading on regulated markets.

Thus, funds that are not private funds in the United States (e.g., mutual funds and ETFs) can be AIFs in the European Union ("EU") and funds that are not AIFs in the EU (e.g., UCITS) can be private funds in the United States.

Who Has to File and Which Funds Have to be Reported on?

Form PF

Form PF must be filed by an investment adviser that:

- is registered with the SEC as an investment adviser (each a "Registered Adviser");
- advises one or more "private funds" (as defined in the sidebar); and
- has reportable assets under management attributable to private funds of at least $150 million (about €111 million at current exchange rates).

Accordingly, investment advisers relying on the "foreign private adviser" exemption, the "private fund adviser" exemption (the exemption most likely to be used by non-US investment advisers to private funds) or the "venture capital fund adviser" exemption (each an "Exempt Adviser"), as well as Registered Advisers who do not manage any private funds and Registered Advisers with less than $150 million of reportable assets under management attributable to private funds, do not have to file Form PF.

The Form PF will have to cover all private funds advised by the Registered Adviser, subject to some limited exceptions. Registered Advisers based outside the United States will be permitted to omit any private funds that: (i) are not US-domiciled entities; (ii) were not beneficially owned by one or more US persons; and (iii) were not offered in the United States during the preceding 12 months.

ESMA Form

The ESMA Form is intended to be the means by which AIFMs will report and provide the information required pursuant to Article 24 of the Directive in respect of each AIF that they manage.

The extent of the required reporting/information provision and its frequency varies depending on a number of factors, including, *inter alia*, an AIFM's overall AIF assets under management, whether such assets under management include assets acquired by way of leverage, and whether or not the relevant managed AIF invests in non-listed companies and issuers in order to acquire control.

An AIFM is a legal person whose regular business is "managing" one or more AIFs. In this context, "managing" consists of performing at least one of either portfolio management or risk management (although an AIFM may perform other functions in the course of the "collective management" of an AIF, e.g., administration and marketing).

For the purposes of the Directive, each AIF, regardless of whether (i) it is domiciled inside or outside the EU, and (ii) whether it receives services from an EU or non-EU investment adviser, will have a single AIFM. In certain circumstances, an AIF may qualify to be self-managed, making the AIF itself the AIFM.

The obligation to report/provide information under the ESMA Form pursuant to Article 24 will apply to:

- EU investment advisers in respect of all EU AIFs as to which they are treated as the AIFM;
- EU investment advisers in respect of all non-EU AIFs as to which they are treated as the AIFM, regardless of whether those AIFs are marketed in the EU;
- non-EU investment advisers in respect of all EU AIFs as to which they are treated as the AIFM; and
- non-EU investment advisers in respect of all non-EU AIFs as to which they are treated as the AIFM which are marketed in the EU.

Challenges

For investment management groups with potential reporting exposures under Form PF and/or the ESMA Form, there are some obvious reporting challenges.

An EU-based Registered Adviser may have to report to the SEC on Form PF with respect to funds for which it is not obligated to file an ESMA Form. For example, a Registered Adviser to a UCITS, which is outside the scope of the Directive, will still have to report on Form PF if the UCITS is privately placed in the United States. Another example is where an Exempt Adviser serves as the AIFM for an AIF being offered in the United States and that Exempt Adviser appoints a Registered Adviser to provide portfolio management services. In such a case, the Registered Adviser would have to report on Form PF regarding the fund, even though the Registered Adviser is not the AIFM and so would not be responsible for filing the ESMA Form for that fund.

Some administrators providing administration services to UCITS, and entities providing outsourced middle/back office functions to investment advisers of UCITS, may not be attuned to supporting Registered Advisers' reporting obligations in respect of Form PF, or have processes to assist with these filings since (i) the requirements attach solely because the investment adviser is registered with the SEC, and (ii) the UCITS will not be required to make the similar filings with ESMA under the Directive on the ESMA Form. Registered Advisers in this position will need to organise/outsource the effective collation of the necessary information in a format and at the times required for them to be able to make the required filings.

An EU-based Registered Adviser to an SEC-registered investment company, such as a mutual fund or ETF (whether or not such fund is marketed in the EU), will have an obligation to file an ESMA Form covering such fund if there is no other AIFM appointed and regardless of where (and whether) the fund is marketed in the EU, even though there is no similar obligation to make a filing on Form PF with respect to such fund.

What Information Needs to be Reported?

Form PF

Registered Advisers that advise private funds with aggregate reportable assets under management of at least $150 million are required to complete Sections 1a and 1b of Form PF in respect of the private funds they advise, regardless of the category of private fund. These Sections request basic information about the Registered Adviser and its assets under management and basic information about each private fund advised.

Whether a Registered Adviser is required to file other sections of the Form PF depends on the categories of private fund the Registered Adviser advises. The categories of funds for this purpose are: (i) hedge funds; (ii) liquidity funds; and (iii) private equity funds. The amount and types of information required in these additional Sections vary. Sections 1b, 1c, 2a and 2b are the parts of Form PF most closely analogous to the ESMA Form.

Those same differences present opportunities for administrators who are seeking to differentiate their service offering or increase their market share.

ESMA Form

AIFMs managing portfolios of AIFs whose total AIF assets under management are under certain specified thresholds, i.e.:

- do not exceed €100 million (including assets acquired by way of leverage); or
- do not exceed €500 million (where the AIF portfolios are unleveraged and have no redemption rights within five years),

will be required to report to the competent authority of the AIFM's home Member State the information required in Sections 1 and 2 of the ESMA Form with respect to each EU AIF they manage and with respect to each AIF they market in the EU. AIFMs falling below the reporting thresholds are not required to complete the entire ESMA Form; they are permitted to omit certain detailed breakdowns by asset type otherwise required in some questions.

AIFMs managing portfolios of AIFs whose assets under management exceed the above thresholds will be required to report to the competent authority of the AIFM's home Member State the information required in Sections 1, 2 and 3 of the ESMA Form with respect to each EU AIF they manage and with respect to each AIF they market in the EU.

The ESMA Form is broken down into three sections based on the type of information required.

Section 1 of the ESMA Form requires information about the main instruments traded and individual exposures, including information about investment strategy, geographical focus, individual exposures and portfolio turnover.

Section 2 of the ESMA Form requires information regarding principal markets in which AIFM trading represents a significant proportion of daily market volume, investor concentration, portfolio concentration and controlling influence exercised by the AIF.

Section 3 of the ESMA Form asks for data regarding market risk, counterparty risk, liquidity risk, borrowing risk, exposure risk, operational risk and other risks.

Challenges

The ESMA Form will require significantly more data for all types of funds (other than hedge funds) than the Form PF. However, with respect to liquidity funds and private equity funds reported on the ESMA Form, the Form PF information will be a burden that is different in form and nature.

Since the ESMA Form does not generally distinguish between types of funds, much of the data requested will not be the type of information that certain types of funds (e.g., private equity funds) are collecting or monitoring currently in the regular course.

But on the Bright Side . . .

Although the differences between the reporting forms will create challenges for investment advisers and funds, those same differences present opportunities for administrators who are seeking to differentiate their service offering or increase their market share. Those administrators who are able to provide easy full service solutions to assist with these filings should be able to leverage this opportunity to grow their businesses.

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* Declan O'Sullivan, Stuart Martin and David A. Vaughan also contributed to this article.

1 This article is an excerpt from a more detailed *DechertOnPoint*, available at http://www.dechert.com/Harmony_or_Dissonance_A_Comparison_of_Form_PF_and_the_Template_Reporting_Form_Proposed_in_ESMAs_Level_II_Advice_on_the_Alternative_Investment_Fund_Managers_Directive_12-13-2011/.

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Germany: Transparent Investments in Hedge Funds via a Managed Account Platform

by **Achim Pütz**

Introduction

During the financial crisis of 2008, many hedge fund managers ("HF Managers") exercised their rights to restrict fund liquidity, using their frequently underestimated legal powers to put in place gates, suspend redemptions and even segregate illiquid fund assets for years in closed-end vehicles (so-called "side pockets"). Among other factors, this resulted in a substantial deterioration of liquidity for investors.

Single security deposit accounts held in trust (so-called "segregated managed accounts") emerged from the crisis as a favored structural solution, as they not only offer investors full transparency but also an effective protection against the above-mentioned liquidity constraints. In a segregated managed account, the portfolio's liquidity derives from the liquidity set by the underlying financial instruments, rather than by conflicting activities of other investors who may force the HF Manager to liquidate securities positions and thus take measures to restrict liquidity.

Structural Solutions

The experiences gained from the financial crisis caused *Bayerische Versorgungskammer* ("BVK"), the largest German Public Pension Scheme – with €50 billion AuM – to carry out an internal analysis of their existing hedge fund investments. This analysis indicated that it may be reasonable for a large investor such as BVK to invest in single hedge fund strategies via "managed accounts" ("MACs").

BVK established the following requirements for a managed account solution and a managed account platform ("MAP"), which differ from the traditional investment structures in hedge funds (offshore/onshore):

- As a single investor, BVK shall – as in the case of a German specialized fund – be the sole indirect or beneficial owner of the assets.
- BVK shall be provided with full disclosure of all current positions of the HF Managers and the resulting market risks.
- Within the scope of a limited power of attorney, the HF Managers shall be granted management authority, which may be terminated by BVK at any time.
- With regard to the implementation of their trading strategy, the HF Managers shall have the greatest flexibility possible within the framework of applicable regulatory and supervisory provisions.
- BVK may individually negotiate the investment and liquidity guidelines with the respective HF Managers and may even carry out the cash management of investments via future contracts.
- In addition to selecting the HF Managers, BVK shall also select the other service providers, such as administrators, prime brokers and the custodian bank.

In order to meet the previously mentioned requirements, BVK decided to structure and launch its own BVK-controlled MAP solution. This involved the setting up of a structure legally independent from the platform operators, and the contractual integration of all service providers. Such integration was established by entering into agreements with the service providers, the terms of which provided maximum flexibility to BVK while contractually binding the service providers.

This analysis indicated that it may be reasonable for a large investor such as BVK to invest in single hedge fund strategies via "managed accounts".

The MAP's ongoing activities are coordinated and supervised by a specialized service provider, the MAP operator. The MAP operator is thus the most important service provider to BVK and responsible, among other things, for the following:

- Legal and operational launch of the MAP and new MACs on the MAP (as well as their liquidation);
- Legal and operational integration of fund infrastructure into the MAP and the negotiation of service contracts;
- Initial and continuous operational due diligence of the HF Managers and the fund administrator, the custodian bank and the prime brokers, if applicable;
- Recommendation of investment guidelines for HF Managers and negotiation of investment management agreements;
- Operative launch of commercial relationships and negotiation of broker agreements with prime brokers;
- Risk management and controlling and monitoring of compliance with investment guidelines, as well as examination of counterparty risks; and
- Provision of online reporting, allowing BVK to review any and all positions of the MACs at any time.

In addition, an independent administrator that calculates the net asset values of the MACs and renders other services, as well as a custodian bank, are contractually bound to provide services to the MAP. BVK thus outsourced all middle office and back office operations to specialized service providers, without giving up the unrestricted control of the MAP as shareholder or the ability to replace the service providers at any time, pursuant to the relevant agreements.

Legal Structural Objectives

With regard to the legal set-up of the MAP, the following objectives in particular had to be taken into account:

- BVK, as managing and representative body of twelve professional and local pension schemes ("BVK Pension Funds"), intended to reorganize part of its alternative investment portfolio (hedge funds, commodities and currencies) in connection with the set-up of the MAP. The investments that had been made via Luxembourg SIF FCPs (defined below) ("Asset Class FCPs") in other collective investment vehicles ("Target Funds") of different investment managers ("Portfolio Managers") should be made by contractually integrating such Portfolio Managers into the MAP.
- The BVK Pension Funds should be the sole eligible investors for the MAP and the portfolios of the Portfolio Managers to be integrated. The assets managed by the Portfolio Managers should be held directly by the respective sub-fund and controlled by the MAP and its service providers.
- Any dependence on the MAP operator and other service providers to the MAP should be avoided. In the interest of the BVK Pension Funds, it should be possible to replace these service providers as easily as possible.
- It was necessary to safeguard the eligibility of the indirect investments of the BVK Pension Funds under the provisions of the relevant investment law and insurance supervisory law.

Structuring of BVK Managed Account Platform

On the basis of the above structural objectives, it was determined to use the following legal structure.

A Luxembourg Specialised Investment Fund ("SIF") pursuant to the Law on Special Investment Funds dated 13 February 2007 ("SIF Act"), in the form of a

stock corporation (*Société Anonyme – S.A.*) with variable capital (*Société d'Investissement à Capital variable – SICAV*) ("SIF SICAV S.A."), was chosen as the platform vehicle. The reasons for choosing a Luxembourg SIF included its flexibility regarding the investment policy, the lean regulatory regime accommodating to such vehicles (supervised by the *Commission de Surveillance du Secteur Financier – CSSF*), as well as its possible classification as a foreign collective investment scheme from a German regulatory perspective. In particular, the legal form of a Luxembourg stock corporation was selected in order to set up an independent corporate fund (rather than a contractually structured special fund dependent on a management company), which grants voting rights to its investors and is independent of the integrated service providers.

Moreover, for efficiency reasons, the SIF SICAV S.A. was structured as an umbrella fund with several subfunds. Each individual sub-fund is managed by a Portfolio Manager. If possible, the brokers/prime brokers preferred by each Portfolio Manager are contractually integrated with the relevant sub-fund and have entered into agreements with the MAP's custodian bank.

The SIF SICAV S.A. has a central administrator and a central custodian bank. The MAP operator has been integrated into the MAP by way of a tailored service agreement.

When defining the contractual relations with the Portfolio Managers and the MAP operator, particular attention was paid to the ability to replace the service providers. When drafting the relevant agreement, it was also important to ensure that, in case of the loss of a Portfolio Manager (e.g., due to insolvency or after notice of termination), the portfolio of the respective managed account would be properly liquidated and/or that it could be hedged until the authorization of a new Portfolio Manager.

The legal form of a stock corporation ensures the desired controls and powers by the BVK Pension Funds. As sole (indirect) investors collectively represented by BVK and thus speaking with one voice, the BVK Pension Funds may appoint and dismiss the members of the executive board and exercise their voting rights with regard to any issue reserved to shareholders under Luxembourg law.

Legal Questions

Within the structuring process, a number of specific legal questions arose. Key issues are discussed as follows.

Influence Over MAP and Control of Assets

BVK's desired "control" of the MAP and the assets managed by the sub-funds is structurally ensured on various levels:

- The assets of the MAP's individual sub-funds managed by the Portfolio Managers are managed for the respective sub-fund and held in custody by the MAP's custodian bank and/or the integrated (prime) brokers. No collective investment vehicle outside BVK's sphere of influence is interposed to accept a number of other investors in addition to the BVK Pension Funds.
- As any and all shares of the MAP's sub-funds are held by the Asset Class FCPs, and thus indirectly by the BVK Pension Funds, control is ensured by the exercise of voting rights.
- There is close communication between the members of the executive board of the SIF SICAV S.A. and the platform operator. Furthermore, periodic and prompt reporting by the SIF SICAV S.A. to the investors is required.

Permissibility of an Investment in MAP Under Insurance Supervisory Law

The BVK Pension Funds are subject to state regulation, which is largely in parallel to the regulatory framework governing the investments of German insurance companies. Therefore, it was necessary to structure the SIF SICAV S.A. and each individual MAC in a way to meet these regulatory requirements. A detailed discussion of the applicable legal requirements is beyond the scope of this article. Briefly, however, it is generally the case that the reorganization of the existing investments of the Asset Class FCPs, which will invest in the MAP's sub-funds in the future and will accordingly reduce their investments in (offshore) fund vehicles, is advantageous under insurance supervisory law, as such investments will be made onshore in Luxembourg and have increased liquidity and greater transparency.

Umbrella versus Stand-alone

An initial question regarding structure involved whether the launch of one/several umbrella SICAV or the use of a stand-alone SICAV would be advantageous for each managed account with regard to the legal and practical consequences. It was determined to select an umbrella SICAV, primarily for reasons of practicability

and possible cost savings. Since an umbrella SICAV is a single legal entity (despite a basically unlimited number of possible sub-funds), it can be managed under corporate law in a more efficient way than a number of individual SICAVs, each with an executive board, general shareholders' meetings, disclosure requirements and so forth. In the case of an umbrella SICAV, efforts to amend organizational documents would not need to be undertaken for individual investment vehicles. The legal relationships with central service providers also can be implemented and later amended in a more efficient way and with less documentation requirements.

This increased efficiency should result in considerable cost savings with increasing volume. Furthermore, the launch of new sub-funds is easier than the launch of a new SIF SICAV S.A. investment vehicle for each individual managed account.

A potential disadvantage to using an umbrella SICAV might be increased liability risks, if such risks are required to be assumed despite the legal separation of liability among the individual sub-funds under Luxembourg law and under relevant contracts (contractual "ring fencing"). Any residual risks existing in this regard were analyzed for the United States and the UK, which are eligible as potential (prime) broker locations. Such risks were assessed as negligible, provided that appropriate contractual ring fencing protections are included in the relevant agreements.

Factors considered with regard to the selection of an umbrella SICAV include that only one central administrator and one custodian bank can be appointed under the CSSF's administrative practice (but the authorization of different (prime) brokers is permissible). While the integration of a single custodian bank seems to be less problematic, the integration of a single administrator could create problems in practice, if the trading strategies of the sub-funds are incompatible with the range of services of the administrator. Although subdelegation would not be excluded in principle, it is not certain whether the administrator would engage in such sub-delegation in practice. Alternatively, it might be decided to establish several sectoral umbrella SICAVs, which focus on certain alternative investment segments and have different administrators. In any event, BVK's determination was based upon the premise that the selected administrator could cover almost the entire range of the strategies of the individual managed accounts of the MAP to be traded.

Integration of a Central Investment Manager

Another important issue to be resolved was the question whether the respective Portfolio Managers should be directly instructed by the MAP as to the management of the relevant sub-fund, or whether it would be beneficial to interpose the MAP operator and/or a group company as a central investment manager to authorize the Portfolio Manager within the framework of a sub-delegation.

During the discussions with the various platform operators, it appeared, for a number of reasons, that the additional assignment of the function of an investment manager to a platform operator might not be practicable.

There was no typical model of delegation and further sub-delegation, and it was determined that one model partially practised in the market (offshore) could not be implemented in Luxembourg for reasons of supervisory law. A corresponding analysis led to the conclusion that, depending on the complexity of the strategies pursued by the Portfolio Managers, a MAP operator could not unconditionally be requested to assume the role of an investment manager. Furthermore, a benefit of not having a central investment manager is that there is no risk that all sub-funds of the MAP would be affected if a central investment manager fails.

Accordingly, the MAP was structured without interposing a central investment manager, since this was determined to be more beneficial in principle, provided that adequate security mechanisms are implemented in the contractual provisions with the MAP operator and the Portfolio Managers.

Conclusion

The set-up of a proprietary MAP for investments in hedge funds (and other asset classes) may considerably increase the transparency and security of such assets without causing higher costs for investors in the medium term. These investment solutions likely will continue to make their way into the market, for the benefit of insurance holders, pension fund contributors and/or other end-investors.

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Cybersecurity: It's Not Just for Geeks

by **Vivian Maese**

As more and more of our business and personal information is stored on computers, we all feel a little sick when the news headlines inform us of the latest computer virus, security breach or data loss.

In October, two interesting developments occurred within a few days of each other. First, on October 13, 2011, the Securities and Exchange Commission clarified that information security is, in fact, a risk type that must be considered when public companies disclose risks to investors, consistent with Regulation S-K Item 503(c).[1] Second, the Office of the National Counterintelligence Executive published a report, entitled "Foreign Spies Stealing U.S. Economic Secrets in Cyberspace: Report to Congress on Foreign Economic Collection and Industrial Espionage 2009-2011" (The "Report").[2] The Report confirms what we suspected, but did not want to admit – that we are economically vulnerable in cyberspace, thereby making the SEC guidance both necessary and timely.

Public companies can no longer avoid dealing with information security. It must be a priority, and senior company management and the Board of Directors must pay attention to the details provided by their information security specialists as part of their overall risk management obligations. The SEC guidance also puts to rest the frequent internal debate concerning whether or not to inform clients or the public about security incidents. The disclosure of a security problem is mandatory if it is material to a public company.

In the disclosure guidance, the SEC includes the following as "Risk Factors":

- Discussion of aspects of the registrant's business or operations that give rise to material cybersecurity risks and the potential costs and consequences;
- To the extent the registrant outsources functions that have material cybersecurity risks, description of those functions and how the registrant addresses those risks;
- Description of cyber incidents experienced by the registrant that are individually, or in the aggregate, material, including a description of the costs and other consequences;
- Risks related to cyber incidents that may remain undetected for an extended period; and
- Description of relevant insurance coverage.

The Report confirms what we suspected, but did not want to admit – that we are economically vulnerable in cyberspace, thereby making the SEC guidance both necessary and timely.

Good risk factor disclosure is an art. The disclosure needs to be concise, readable and informative. In the case of cybersecurity disclosure, it has to provide particular detail in the context of the business, but not so much that a disclosure compromises the company's cybersecurity efforts by providing a roadmap for bad actors who want to infiltrate the company's systems. In ordinary circumstances, the construction of risk factor disclosures is challenging. Cybersecurity disclosures will be harder – they will require that lawyers, senior management and technologists communicate with each other, and they don't all speak the same language. From counsel's point of view, it is important to know what questions to ask in order to get the answers needed in order to do the job. A useful start is always, "What keeps you up at night?" Next, ask whether the

company has a comprehensive information security program in place, and listen to the details.

In a relatively few years, almost all corporate data has become available in electronic form. Information security programs need to keep up with advances in technology. Here are some more questions to ask:

- What is the organization doing to protect itself from unwanted intrusion?
- Is access to information carefully controlled, well documented and permitted on a "need-to-know" basis?
- Is there an inventory of the software applications and the data used by those systems?
- Does the company classify its data by category (e.g., personally identifiable information ("PII"), proprietary, trade secret, confidential, public, internal use only, restricted)?
- Does the company have an approach to the protection of information by data classification?

The disclosure of a security problem is mandatory if it is material to a public company.

Third parties (i.e., outsourcing providers) who perform services for the company are a potential "break" in the chain of control in an organization, and the SEC requires that the company consider these outsourcing arrangements as a "Risk Factor." In the outsourcing context, the company should have a dynamic inventory of its third-party service providers, what they do, what data is in their custody and where in the world the data is located. The company should conduct diligence regarding the providers of outsourced services prior to contract.

It is important to know what questions to ask in order to get the answers needed in order to do the job. A useful start is always, "What keeps you up at night?"

The questions suggested above also apply in the outsourcing context. The outsourcing contract should be carefully crafted, and clear about risks, rights and remedies. It used to be that once the contract was signed, it could be filed away and not reviewed again. Not anymore. In order to appropriately and adequately disclose risks, third-party diligence should continue after the agreement has been signed. Audits, reviews, monitoring, testing and escalation procedures are important elements of good governance. New technologies are making the monitoring job easier than it has been in recent years, meaning more process automation and scenario simulation is available, and less manual and physical checking is required. If the company is contemplating an outsourced relationship to a virtual data center (aka the "cloud"), there is an enhanced risk profile to consider.

Third parties (i.e., outsourcing providers) who perform services for the company are a potential "break" in the chain of control in an organization, and the SEC requires that the company consider these outsourcing arrangements as a "Risk Factor."

In the context of both the SEC guidance and the Report to Congress, it is probably time to revisit the company's existing contracts, upgrade data security obligations and ensure that a governance plan is in place. Policies, procedures and contracts are all useful and important tools in the risk mitigation toolbox, particularly when supplemented by auditing and testing.[3]

It is also interesting to note that Section 922 of the Dodd-Frank Act provides real incentives to blow the whistle on a company when original information about potential securities laws violations leads to sanctions in excess of one million dollars. Well known, robust compliance programs can be helpful to the company in this context. If the company has not done an internal "data audit," it is time to do one. Between the proliferation of data breach laws, the disclosure requirements and the increasing capability of bad actors, prudence dictates preparedness. All important projects begin with an inventory. The company should know what data and what class of data is resident in which software applications. The company should know where those software applications run – in-house, or third party, and where in the world they run. The company should be able to demonstrate that it has security procedures in place both in-house and at the third party.

Cyber incidents damage trust, harm reputations and tarnish a company's brand, in addition to costing a lot of money to remediate. The company needs a good contract, good practices and procedures, and the ability to demonstrate (i.e., document and retain evidence of action) that the procedures are routinely followed and audited. The theft of valuable trade secrets can do real damage to the company's competitiveness and, in some cases, the viability of the franchise.

If the company is providing good answers to the questions above, great news! Keep it fresh.

If not, it is possible for the company to create a holistic, dynamic and comprehensive approach to the protection of its various types of information – from intellectual property to PII that will satisfy regulatory obligations and manage risk to the satisfaction of the company's investors and the Board.

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1 The SEC guidance is available at (http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm).

2 The Report is available at (http://www.ncix.gov/publications/reports/fecie_all/index.html).

3 See also, *McKinsey Quarterly* "Meeting the Cybersecurity Challenge," available at (http://www.mckinseyquarterly.com/meeting_the_cybersecurity_challenge_2821).DGDF.

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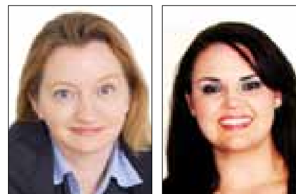
The New Irish Fitness and Probity Regime and its Application to Investment Funds



by **Michelle Moran** and **Lindsay Trapp***

During the month of November, board rooms and offices across Ireland were buzzing with the financial services catch phrase of 2011 – Fitness and Probity – leaking into conversations among directors, executives, lawyers and employees alike. Primarily designed with banks and insurance companies in mind, this new regime provides the Central Bank of Ireland (the "Central Bank") with extensive powers to designate and regulate, at an individual level, persons holding influential positions within all financial service providers regulated by the Central Bank, except credit unions.

Armed with 44 pages of draft guidance from the Central Bank explaining how to comply with the seven very short pages of Fitness and Probity Standards[1] (the "Standards"), the Irish financial services industry was in a race against the 1 December 2011 deadline for compliance while continuing to lobby for change, all with the new threat of sanctions for non-compliance looming overhead. As Irish investment funds ("Funds") are more akin to products than to "companies" in the traditional sense of the word, lawyers advising Funds were left grappling with how to navigate Funds through a system designed principally for large brick and mortar institutions. In particular, while there was a

level of acceptance for the new regime to apply to future Fund launches, lawyers were left with a real struggle to reconcile the levels of due diligence suggested in the draft guidance with:

- the performance of due diligence on individuals already holding influential positions, who would already have been approved by the Central Bank under the previous "Fit and Proper" regime; and
- the reliance of Funds on service providers that are themselves already heavily regulated and subject to the Standards in their own right.

The impetus for the Fitness and Probity regime lies primarily in the turmoil of the Irish banking system over the past several years and the general global shift toward greater levels of regulation in the financial sector. By setting out a code of competence and character requirements, the Central Bank is able to regulate not only the entities themselves at a high level but also the people running these entities.

The Central Bank was granted extensive powers under the Central Bank Reform Act 2010 (the "Act") to set out the Standards and, particularly, to investigate and suspend, remove or prohibit individuals from taking up or holding positions in regulated financial service providers ("RFSPs"), including Funds. The Act also provides the Central Bank with the ability to prescribe by regulation the types of positions within Funds, service providers to Funds (such as custodians, administrators and investment managers) and other RFSPs to which the Standards will apply – so-called "controlled functions" ("CFs").[2] Further, a sub-set of the CFs, "pre-approval controlled functions" ("PCFs"), are 41 specifically named senior management and head of function positions that are considered so influential and important to the workings of RFSPs that the Central Bank must provide prior written approval for the appointment of individuals to those positions from 1 December 2011.

The PCF positions are broken into two sections: those applicable for all RFSPs; and those positions specific to certain types of RFSPs. For all RFSPs, PCFs include the board of directors, CEO and the Heads of Finance, Compliance, Internal Audit, Risk and Anti-Money Laundering Compliance. Additionally, for fund administrators, the Heads of Transfer Agency and Fund Accounting are also considered to be PCFs and for custodians, the Heads of Trustee (fiduciary oversight) and Custody. For those CF positions that are not PCFs, the RFSP will be required to analyse internal functions and determine whether a position is related to ensuring, controlling or monitoring compliance by the RFSP or is likely to enable the person responsible for its performance to exercise a significant influence on the conduct of the affairs of the RFSP.

By setting out a code of competence and character requirements, the Central Bank is able to regulate not only the entities themselves at a high level but also the people running these entities.

The Standards are simple. To hold a CF, including a PCF, one must be: competent and capable; honest, ethical and act with integrity; and financially sound. The problem lies with how an RFSP is to determine whether the CFs and PCFs in its organisation comply with those requirements. The Central Bank leaves the onus on an RFSP to determine, through due diligence, whether the CFs and PCFs in its organisation are compliant with the Standards. What amounts to sufficient due diligence, however, is up to the RFSP. While the Central Bank's guidance provides some suggestions in this area, the threat of sanctions for employing a person that does not meet the Standards had RFSPs frantically trying to determine how much due diligence is enough.

The November rush was particularly related to the PCF category, as the Standards became applicable to PCFs from 1 December 2011, despite the fact that the Guidance was not yet finalised (application to other CFs begins later in 2012). Rather than require all PCFs currently in their positions to be approved or re-approved by the Central Bank, it was left to the RFSPs to determine whether the persons holding PCFs were compliant with the Standards. To ensure the Standards were being implemented, the Central Bank requested a written submission, by 31 December 2011, to include a list of all PCFs in each organisation and a confirmation by the head of the company that the named persons meet the Standards.

While requiring such a submission may seem reasonable enough for an institution with a dedicated human resources department, it created some very real challenges for Funds. In Ireland, the majority of Funds are comprised of four or five directors who supervise the Fund and delegate all day-to-day activity to third-party service providers that are often RFSPs themselves.

This business model gave rise to three key questions that had to be addressed:

- Who is a PCF within a Fund that operates on a delegation model basis?
- Is the Fund responsible for ensuring that the persons carrying out delegated functions are compliant with the Standards?
- What kind of due diligence is appropriate for existing PCFs?

The first question resulted in definite answers for: directors; "Designated Persons" who carry out managerial functions on behalf of the board of directors in self-managed investment companies; and any designated heads of risk, compliance or internal audit. Varying opinions, however, arose as to whether Money Laundering Reporting Officers were included and questions were raised in relation to the specific requirement for Funds to include the heads of transfer agency and accounting valuations (as those are functions carried out by delegation to third-party administrators).

Is the Fund responsible for ensuring that the persons carrying out delegated functions are compliant with the Standards?

The second question necessitated significant engagement by Funds – how could a Fund that has no staff undertake to ensure that all of the people carrying out important functions in delegate service providers were compliant with the Standards? Also, if a service provider is already required to implement the Standards, what would be the benefit of duplicating due diligence? There were additional concerns as to how service providers regulated outside Ireland, for example US or UK regulated investment managers, should be treated. To a collective sigh of relief from Funds, the Central Bank clarified in its final guidance on the Standards, issued on 23 November, that the Standards do not apply to functions outsourced to a financial service provider regulated by the Central Bank or by an EEA or non-EEA regulator that performs functions comparable to the Central Bank. However, if a Fund outsources any CF or PCF positions to an unregulated service provider, the Fund must ensure that the unregulated service provider requires compliance with the Standards by the persons who carry out delegated functions on behalf of the Fund.

Realising the monumental task being asked of RFSPs, the Central Bank extended the deadline for the completion of due diligence to 31 March 2012. This welcome extension aside, Fund lawyers were still left with the third question, regarding how to advise clients on what due diligence should be undertaken regarding existing PCFs in the Fund. The aim for Fund lawyers was to provide a solution that was pragmatic and reasonable (given that Fund directors already must undergo a detailed authorisation process with the Central Bank) but robust enough to ensure that clients are not subjected to sanctions under the Act. Additionally, Fund lawyers were faced with the fact that, if a client Fund does not have either a human resources or compliance department, it might rest upon the lawyer to coordinate the due diligence exercises and to maintain associated records on an ongoing basis.

In a bid to minimise the pain involved in exercising this compliance burden, Dechert undertook to provide a standardised approach to due diligence for existing PCFs in Funds, by developing standardised fillable pdf forms based on: the Central Bank's guidance; the Standards; and the Central Bank's draft individual questionnaire to be completed by PCFs going forward. The Dechert questionnaire requested personal biographical information, an updated CV and confirmations as to a number of questions in relation to ethics, integrity and financial soundness. In addition to being easy for PCFs to complete, the standardised format reduced the amount of time required to review each submission (as problematic responses were easily highlighted).

While the new regime takes a step toward ensuring a solid foundation of expertise in financial institutions, only time will tell whether such a foundation will prevent future problems in the financial services industry.

While the matter of due diligence with respect to existing PCFs has been addressed and is underway, the practical issues for Funds do not end there. Going forward, all appointments to a PCF or, if relevant, a CF, in a Fund will require due diligence to be undertaken. For all PCFs, the Fund must complete due diligence on any proposed persons before being able to refer those persons to the Central Bank for pre-appointment approval and, for CFs, the Fund must undertake due diligence before hiring/appointing them.

Aside from the due diligence requirements, the pre-approval requirements have impacted the approval process for Qualifying Investor Funds ("QIF"), which is designed so that Funds that do not propose any novel investment or structuring features can be authorised by the Central Bank within 24 hours of submitting an application. Previously, if an individual proposed as a director of a new QIF had already been approved by the Central Bank to serve as a director of another Fund, he or she could simply submit an updating declaration with the new QIF's application for authorisation. Going forward, however, such an individual will need to submit an individual questionnaire five business days in advance of the proposed date of the new QIF's application for authorisation so that he or she may receive prior written consent to act as director for the QIF.

To have the benefit of an online platform for the individual questionnaire process is welcomed; however, the efficiencies of the platform will be of more use to large financial institutions with staff that already have to administer such records. The Central Bank will issue the RFSP with a user account and then the RFSP will create sub-user accounts for persons they propose to be appointed to PCFs going forward. While this will likely work well for institutions with a human resources or compliance department that can manage the administration of this online system, it will be more difficult to administer from a Funds perspective and it is likely that this will become part of legal firms' offerings going forward.

Although the requirements were designed with very different structures in mind, Funds and their lawyers have made great efforts to find a way to embrace these new requirements while maintaining a practical approach. It is expected this same attitude will carry forward to the January 2012 implementation of the Corporate Governance Code for Investment Funds and Management Companies (the "Code"), a corporate governance document tailor-made for Funds, written by the Irish Funds Industry Association at the request of, and in conjunction with, the Central Bank. Although the Fitness and Probity regime is a stand-alone regulatory system, the regime's due diligence process will help to ensure that the Code's requirements for time capacity and balanced expertise on Boards are met.

As the global financial services industry increases regulation of businesses, it is possible that more and more countries may turn to an approach of regulating individuals, similar to that undertaken in Ireland. While it is important to ensure that all parties in a Fund, or other RFSP, are competent and capable of carrying out their responsibilities, it is impossible to tell whether a person who has acted with integrity in the past will always carry forth that trait into the future. As such, while the new regime takes a step toward ensuring a solid foundation of expertise in financial institutions, only time will tell whether such a foundation will prevent future problems in the financial services industry.

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* Declan O'Sullivan also contributed to this article.

1 Fitness and Probity Standards (Code issued under Section 50 of the Central Bank Reform Act 2010).

2 All CFs, including PCFs, are listed in the Act (Sections 20 and 22) Regulations 2011 and (Sections 20 and 22) (Amendment) Regulations 2011.

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UCITS IV and AIFM: Two Directives that Pose a Tax Brain Teaser in France

by **Bruno Leroy**, **Pierre Bouron** and **Olivier Dumas***

The European Union has adopted two directives that facilitate the cross-border marketing of shares or units of investment vehicles within the EU: UCITS IV, applicable in France since August 2011; and AIFM, which should be applicable in France in July 2013 (collectively, the "Directives").

Pursuant to the Directives, it is now possible for UCITS or alternative investment funds (AIF) to set up an investment vehicle in an EU Member State, managed by a company located in another EU Member State. The goal of the Directives is to promote the development of a Pan-European market for these types of investment vehicles. However, the EU has not provided any specific tax regime for such structures, which may lead to new tax issues.

The Question of Tax Residency

Foreign Management Company Managing a French Investment Vehicle

A foreign entity that conducts commercial activities in France may, under certain circumstances, be deemed to have a "permanent establishment" within France and therefore be subject to French taxation. However, the question of permanent establishment should not be an issue for a management company that is tax resident in another Member State and manages a French investment vehicle. Indeed, since the management companies that passport into another Member State pursuant to one of the Directives should be subject to tax in their country of registration/incorporation, the French Tax Administration ("FTA") should not challenge this tax residency, so long as the management company does not carry out activities in France through a local office or French employees.

The goal of the Directives is to promote the development of a Pan-European market for these types of investment vehicles. However, the EU has not provided any specific tax regime for such structures, which may lead to new tax issues.

French Management Company Managing a Foreign Investment Vehicle

With regard to the investment vehicle, the issue is more complex. Investment vehicles registered/organized in France are tax-exempt, and their profits are subject to tax at the level of the investors. Therefore, such investment vehicles should not be considered as tax resident in France, and, in fact, should not be considered as having a tax residency at all.

If a foreign investment vehicle is managed by a management company located in France, and the

management company makes binding decisions on behalf of the investment vehicle, the FTA might determine that the investment vehicle itself is located in France, pursuant to the "effective place of management" concept, and thus consider the investment vehicle to have a permanent establishment in France. To reduce the likelihood that the FTA may question the tax residency of a foreign investment vehicle: (i) the implementation scheme of the investment vehicle should provide for a precise allocation of the powers and functions between the management company and the investment vehicle; and (ii) the investment vehicle should have enough substance (e.g., office, assets, employees) to be able to carry out its activities in the jurisdiction where it is registered. If the foreign investment vehicle does not meet these two conditions, the FTA might subject the investment vehicle to the imposition of French corporate income tax.

Furthermore, in order to respect the EU principle of free movement of capital, the FTA distinguishes between foreign investment vehicles that are transparent (or pass-through) entities, and those that are structured as companies. In the case of a transparent foreign investment vehicle that is similar to a French tax-exempt investment vehicle (e.g., an FCP), the FTA should not be entitled to subject the foreign investment vehicle to corporate income tax in France.

However, if the foreign investment vehicle is organized in the form of a company (e.g., an investment company such as a Luxembourg SICAV, SICAR, SIF or QIF), it may be difficult to compare the foreign investment vehicle to a similar French entity.

If the FTA recharacterizes the tax residency of a foreign investment vehicle, this could lead to withholding tax issues.

Withholding Tax Issues

If a foreign investment vehicle were to be considered as having a permanent establishment in France, it would be subject to the 25% withholding tax on dividends paid to the investors. This withholding tax would correspond to the taxation, in France, of the foreign investors in the French investment vehicle.

The country in which the investment vehicle is organized could have the same position, and therefore also apply a withholding tax on payments made to the end-investors. As investment vehicles are generally not eligible for the benefits of double tax treaties, this could create a double taxation and generate important issues for investors who wish to claim tax credits for the withholding taxes paid. On the other hand, if the foreign investment vehicle has no permanent establishment in France, there should be no tax issues in France.

If the foreign investment vehicle does not meet these two conditions, the FTA might subject the investment vehicle to the imposition of French corporate income tax.

The EU Court of Justice is currently investigating the French withholding tax rules and their compatibility with the EU principle of the free movement of capital, particularly in the context of investment vehicles. The EUCJ decision should provide more clarity and guidance regarding these issues.

In addition to the issues discussed above, the Directives may present other tax issues, such as those involving VAT and cross-border mergers of management companies or investment vehicles.

Conclusion

We believe that the Directives should be amended or supplemented by other directives, to clarify the tax issues that could seriously challenge the effectiveness of the Directives and the implementation of a Pan-European investment regime.

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* Damien Fenard also contributed to this article.

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Recent Developments in the Luxembourg Financial Sector

by **Marc Seimetz**, **Kristel Gilissen** and **Jean-Louis Frognet**

Luxembourg Undertakings for Collective Investment: Additional Prospectus Information for Investors

The Luxembourg law of 17 December 2010 on undertakings for collective investment (the "2010 Law") entered into force on 1 January 2011. The 2010 Law implemented the European Directive 2009/65/EC (the "UCITS IV Directive") into Luxembourg legislation, as well as introducing several non-UCITS IV related changes.

Article 151(1) of the 2010 Law (which applies to both undertakings for collective investment in transferable securities, governed by part I of the 2010 Law ("UCITS") and other undertakings for collective investment, governed by part II of the 2010 Law ("UCIs")) provides that "the prospectus must include the information necessary for investors to be able to make an informed judgment of the investment proposed to them, and, in particular, of the risks attached thereto." The prospectus is required to include, in addition to the disclosure on the fund's investments, a clear and easily understandable description of the fund's risk profile.

Article 151(1) was included in the former Luxembourg law regarding UCIs,[1] although with a slightly different wording that still referred to the simplified prospectus. According to the UCITS IV Directive and the 2010 Law, UCITS should replace their simplified prospectus with a key investor information document ("KIID") by 1 July 2012. However, Article 151(1) does not refer to the KIID, but only refers to the (full) prospectus.

On the basis of Article 151(1), and since 23 November 2011,[2] the Luxembourg supervisory authority, the *Commission de Surveillance du Secteur Financier* (the "CSSF"), requires a paragraph to be included in the prospectus of each UCITS and UCI, referring to the exercise of an investor's rights against the UCITS or UCI. The CSSF indicates that the required paragraph (text set forth below) should be included in the prospectus of each newly created UCITS or UCI. For all existing UCITS and UCIs, the required paragraph should be included in the next update of the prospectus, but in any event no later than 30 June 2012.

The required disclosure is as follows (and should be adapted according to the legal form of the fund in question):

> *The investment company,[3] draws the investors' attention to the fact that any investor will only be able to fully exercise his investor rights directly against the UCI(TS), if the investor is registered himself and in his own name in the shareholders' register[4] of the UCI(TS). In cases where an investor invests in the UCI(TS) through an intermediary investing into the UCI(TS) in his own name but on behalf of the investor, it may not always be possible for the investor to exercise certain shareholder rights[5] directly against the UCI(TS). Investors are advised to take advice on their rights.*

Although there is the grandfathering period as mentioned above, it is recommended to plan right away to have this new wording included in the next prospectus update of UCITS and UCIs, it being understood that this requirement does not apply to other types of Luxembourg funds (e.g., specialised investment funds).

Family Office Activities in Luxembourg

The Luxembourg Government in November 2011 proposed a bill of law (n° 6366) concerning the activities of family offices in Luxembourg (the "Bill"). If enacted, the Bill would amend the Luxembourg law dated 5 April 1993 on the financial sector (the "1993 Law") and the Luxembourg law dated 12 November 2004 on the fight against money laundering and terrorist financing.

Purposes of the Bill

The purposes of the Bill are to: (i) provide a specific legal framework for the activities that are offered by certain professionals under the denomination of "family office", as such activities are currently not specifically defined or regulated in Luxembourg; and (ii) restrict the exercise of such activities to certain categories of regulated professionals. According to the explanations accompanying the Bill, it aims to protect both clients and the integrity of the financial sector, as well as respond to a market need for the creation of a new category of professionals (with associated regulatory conditions) in the Luxembourg private banking industry.

Performance of Family Office Activities in Luxembourg

According to the Bill, "Family Offices" will be introduced as a new category of "financial professionals" in the 1993 Law and authorisation as a "Family Office" will only be granted to legal persons with a share capital of at least €50,000.

In addition to said "Family Office", a limited number of other professionals located in Luxembourg will be authorised to perform family office activities (i.e., "advice or services of a patrimonial nature" for natural persons, families or patrimonial entities related to these natural persons or families). These additional professionals include, among others, credit institutions, asset managers, domiciliation agents, lawyers, notaries and auditors.

The professionals performing family office activities will be subject to specified obligations related to, among other matters, professional secrecy, transparency of remuneration and the fight against money laundering and terrorist financing.

Next Steps and Grandfathering

The Bill is now subject to the Luxembourg legislative approval process and, if voted, will enter into force on the first day of the month following its publication in the Luxembourg official gazette.

Under the current draft of the Bill, any person located in Luxembourg who performs family office activities at the time the law enters into force, without then being one of the professionals authorised to do so, will have six months to comply with the terms of this new law and apply for an authorisation.

The Bill is yet another step in the direction of an increase of the regulatory protection system in order to ensure that financial services activities can only be performed after the obtaining of an appropriate license.

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1 Article 110 (1) of the law of 20 December 2002 regarding undertakings for collective investment, as amended.

2 The date on which the CSSF's newsletter n°130 of November 2011 was published.

3 To be adapted depending on the legal form and structure of the fund.

4 This should refer to the "unitholders'" register if the fund in question is a mutual investment fund (*fonds commun de placement, "FCP").*

5 This should refer to the "unitholder" rights, if the fund in question is an FCP.

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Proposals for OTC Derivatives Regulation in Hong Kong

by **Angelyn Lim** and **Amy Teh**

Introduction

The Hong Kong Monetary Authority ("HKMA") and the Hong Kong Securities & Futures Commission ("SFC") published a consultation paper (the "Consultation Paper") on 17 October 2011 regarding the proposed regulatory regime for the OTC derivatives market in Hong Kong. This move was prompted by commitments to reform made by the G20 leaders to reduce counterparty risk, improve overall transparency, protect against market abuse and, ultimately, enable regulators to better assess, mitigate and manage systemic risk in the global OTC derivatives market.

The HKMA and SFC have formed a joint working group to develop the requisite legislative framework and detailed regulatory requirements. In addition, the HKMA is in the process of establishing a trade repository ("HKMA-TR") for the collection of data relating to OTC derivatives transactions, and the Hong Kong Exchanges and Clearing Limited is in the process of establishing a new clearing house in Hong Kong to serve as a central counterparty ("CCP"). Details of the data to be collected are expected to be issued imminently by the regulators.

This move was prompted by commitments to reform made by the G20 leaders to reduce counterparty risk, improve overall transparency, protect against market abuse and, ultimately, enable regulators to better assess, mitigate and manage systemic risk in the global OTC derivatives market.

The Proposals

The key aspects of the regulatory regime proposed by the HKMA and the SFC are as follows:

- the introduction of mandatory reporting and clearing obligations (and, potentially, trading obligations) by the establishment of an appropriate market infrastructure; and
- the regulation of key players in the OTC derivatives market, in particular, authorised institutions ("AIs"), licensed corporations ("LCs") and other large players whose trading positions may pose systemic risk to the market.

"OTC derivatives transactions" will follow the existing definition of "structured products" introduced by the Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance 2011, but will exclude certain specified transactions.[1]

Manner in Which Goals Are Proposed to be Achieved

Regime to be Set Out in the Securities and Futures Ordinance, Cap 571, Laws of Hong Kong ("SFO")

The main legislative framework of the new regulatory regime will be set out in the SFO, with the details to be enacted through subsidiary legislation to ensure sufficient flexibility to keep abreast of evolving issues and products.

Joint Regulation by the HKMA and SFC

The new regime will be jointly overseen and regulated by the HKMA (overseeing and regulating the OTC derivatives activities of AIs) and the SFC (doing the same with LCs and other persons).

Reporting and Clearing Eligible Transactions

Mandatory reporting and clearing obligations will initially apply only to single currency interest rate swaps, overnight index swaps, single currency basis swaps and non-deliverable forwards (referred to in the Consultation Paper as "reportable transactions"). The obligations will be extended, in phases, to include other interest rate derivatives, foreign exchange derivatives and equity derivatives.

Mandatory Reporting

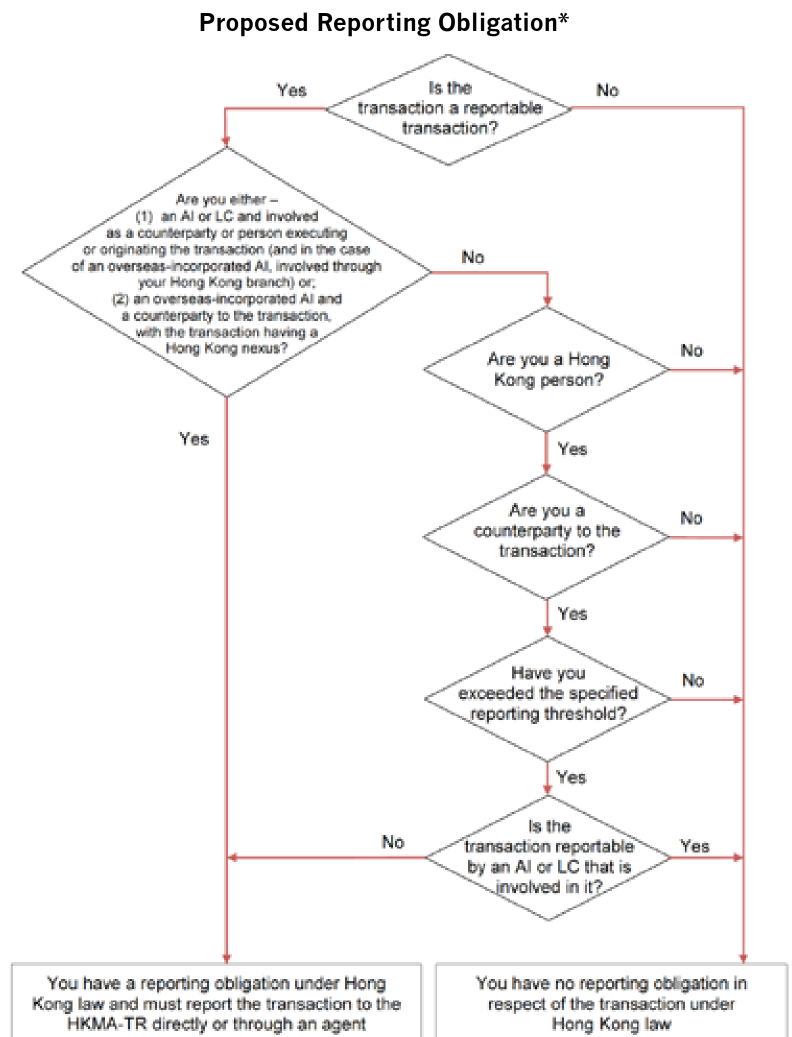
This obligation will apply to:

- LCs and locally-incorporated AIs that are either counterparty to, or have originated or executed, the transaction;
- overseas-incorporated AIs that are counterparty to, or have originated or executed, the transaction through their Hong Kong branch, or transactions that have a Hong Kong nexus and to which the overseas-incorporated AI is a counterparty; and
- Hong Kong persons that are a counterparty to the transaction, but only if such persons have exceeded a specified reporting threshold.

Reporting must be made to the HKMA-TR by T+1 (the end of the business day immediately following the trading day). Exemptions are permitted for Hong Kong persons who have a reporting obligation, if their transactions involve an AI or LC that has an obligation to report such transactions.

The proposed reporting regime is diagrammatically summarised in the flow chart that follows.

Proposed Reporting Obligation*



Mandatory Clearing

Clearing eligible transactions will be through a designated CCP, and applies if:

- an AI, LC or Hong Kong person is a counterparty to the transaction or an AI or LC has originated or executed the transaction (and, in the case of an overseas-incorporated AI, its involvement as a counterparty or the person originating or executing the transaction, is through its Hong Kong branch); and
- both counterparties have exceeded a specified clearing threshold.

Exemptions are available where both counterparties to the transaction are overseas persons and the transaction has been centrally cleared according to the laws of an acceptable overseas jurisdiction (or is exempted from mandatory clearing).

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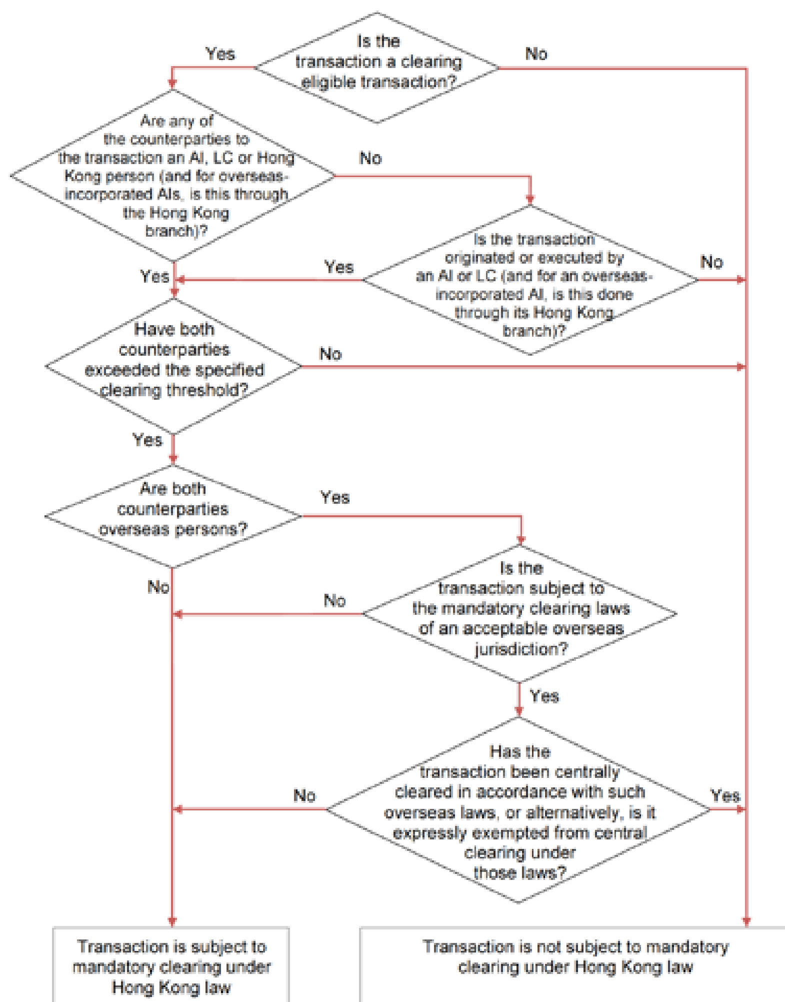
The proposed clearing regime is diagrammatically summarised in the flow chart below.

Proposed Clearing Obligation*



Mandatory Trading

It is not proposed at this stage to move OTC derivatives transactions to an exchange or central trading platform, although the SFO may be amended to allow for such an obligation to be introduced in the future if considered appropriate.

Regulation of CCPs

The proposed mandatory clearing obligation will require eligible transactions to be cleared through designated CCPs that are either recognised clearing houses or authorised automated trading services providers. There is some concern whether overseas CCPs should be allowed to clear transactions in domestic products that are of systemic importance. Higher capital requirements and margin requirements may be required for OTC derivatives transactions that are not cleared through a CCP.

Regulation of Intermediaries

Key players in the OTC derivatives market, other than AIs, that are active in providing dealing, advising and clearing agency services will need to be licensed under the SFO with a (new) Type 11 regulated activity licence. There are no details available as yet on the requirements for this new licence, save that it will likely be defined in a similar fashion to the existing Type 1, 2, 4 and 5 regulated activity definitions.[2]

Regulatory Oversight of Large Players

The regulators and SFC are still considering how best to regulate large players (i.e., financial institutions, commercial entities and others that are essentially price-takers or end-users in the OTC derivatives market).

Progress in Other Asia-Pacific Jurisdictions

Other countries in the Asia-Pacific region are also progressing towards implementing a similar OTC derivatives regulatory framework: legislation has already been introduced in Japan to require mandatory reporting and central clearing which will come into effect in November 2012; South Korea is finalising its plans for a mandatory clearing regime and a CCP is to be established in mid-2012; and in June 2011, the Australian Council of Financial Regulators issued a discussion paper on the topic. The Monetary Authority of Singapore is aiming to conduct a consultation imminently, and targets implementation by the end of 2012, although the Singapore Stock Exchange has, in the meantime, launched its new clearing services for OTC-traded financial derivatives (which will be expanded). In India, regulators are currently assessing their local derivatives market with a view to putting in place future regulatory initiatives.

Next Steps

The consultation period in Hong Kong ended on 30 November 2011 and the report is awaited. The HKMA and the SFC aim to conduct consultations on subsidiary legislation in early 2012 and to work towards an implementation deadline of the end of 2012. As currently proposed, there will be a 3–6 month grace/transition period after the deadline.

In preparation therefor, and given the relatively short implementation deadlines being proposed (not only by the Hong Kong regulators but also Asian regulators generally), AIs, LCs and other impacted market participants would be well advised to start considering installing the appropriate systems to ensure that their reporting obligations may be discharged accurately and promptly within the prescribed time periods. This will be particularly relevant to firms that operate on a cross-border basis, which will need to be aware of the impact of applicable legislation in all the different jurisdictions in which they operate.

There is unlikely to be uniformity in the new regulations to be introduced across the Asia-Pacific region given the differing nature and sophistication of the markets and products involved, which may, potentially, lead to minor opportunities for an element of regulatory arbitrage.

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* Source: "Consultation paper on the proposed regulatory regime for the over-the-counter derivatives market in Hong Kong, October 2011", issued by the HKMA and the HKSFC.

1 The excluded transactions are: (a) transactions in securities and futures contracts that are traded on a recognised market; (b) transactions in structured products that are offered to the public and the documentation for which is authorised under Section 105 of the SFO; and (c) transactions in currency-linked instruments, interest rate-linked instruments or currency and interest rate-linked instruments offered by AIs to the public and documentation for which is exempted from the prohibition under Section 103(1) of the SFO by virtue of Section 103(3)(ea) of the SFO.

2 Type 1 (dealing in securities); Type 2 (dealing in futures contracts); Type 4 (advising on securities); Type 5 (advising on futures contracts).

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Russian Foreign Strategic Investments Law: A Step Forward on the Way to Liberalization or a Decorative Dash?

by **Alexander Egorushkin**

At the Berlin forum of German business leaders held in November 2010, Russian Prime Minister Vladimir Putin declared that the clearance procedure for foreign investments in Russian strategic sectors would be simplified in the near future. This procedure is governed by Russian Federal Law No. 57-FZ "On the Procedure for Foreign Investments in Business Entities Having Strategic Significance for State Defense and National Security" (the "Foreign Strategic Investments Law"). The Foreign Strategic Investments Law has been heavily criticized by foreign investors and Russian business as it creates excessive administrative barriers, which de facto have no social benefits, to investment in Russian businesses. The Russian government responded to this criticism by introducing amendments to the law, which were adopted by the State Duma, the Federation Council and signed by the President into law in November 2011 (the "Amendments"). The Amendments will come into force on December 18, 2011. This article examines the main changes contained in the Amendments and assesses their possible implications for foreign investors.

New Exemption for International Financial Institutions

According to the Foreign Strategic Investments Law, acquisitions of more than 25% of Russian companies qualifying as "strategic" ("Strategic Companies") and more than 5% in Russian Strategic Companies carrying out activities associated with subsoil research and/or the exploration and extraction of certain minerals from federal-level subsoil property ("Strategic Subsoil Companies") by a foreign state or an international organization are subject to prior consent by the Russian Federal Government Commission for Control over Foreign Investment (the "Governmental Commission").

The Amendments introduce a partial exemption from this rule for international financial institutions ("IFIs")

in which the Russian Federation participates or with which the Russian Federation has entered into an international agreement. However, this exemption does not exclude all transactions involving IFIs from the scope of the Foreign Strategic Investments Law.

First, under the Amendments, the Russian government approves the list of such IFIs (the "List"). The Amendments are silent as to the legal status of those IFIs that the Russian government does not include in the List; however, it seems reasonable to assume that the exemption will only apply to IFIs on the List. As a result, any acquisition of qualifying stakes in Russian Strategic Companies by IFIs will still be subject to control by the Russian government, but the control mechanism will change from a formal one-shot clearance as currently envisaged in the Foreign Strategic Investments Law to "permanent exemption" for IFIs on the List, albeit without any clear and formal criteria for initial inclusion of IFIs on the List.

Second, this exemption does not affect the absolute ban on acquisition of qualified control (i.e., more than 50% of Strategic Companies and more than 10% of Strategic Subsoil Companies) by IFIs set out in the Foreign Strategic Investments Law. As a result, any acquisition of qualified control over Russian Strategic Companies by IFIs will still be prohibited. Note (discussion below) that the 10% threshold will be increased to 25% of Strategic Subsoil Companies after the Amendments come into force.

New Treatment of Transactions Involving Russian Beneficiaries

When the Foreign Strategic Investments Law came into force, it was heavily criticized for applying to transactions where the acquirer of a Russian Strategic Company is a foreign entity controlled by a Russian beneficiary. While the Amendments were being prepared, Russian government officials declared that this issue would be addressed, and, according to the Amendments, the Foreign Strategic Investments Law will not apply to "relationships related to transactions" between companies "controlled by the Russian state or Russian individuals who are Russian tax residents."

Unfortunately, the term "relationships related to transactions" is not defined, and the Amendments do not specify whether only such relationships – but not the transactions themselves – are outside the scope of the Foreign Strategic Investments Law. Neither do the Amendments specify whether simple oral pre-transaction negotiations between parties or written non-binding documents signed by the parties and reflecting their intentions (such as a Memorandum of Understanding) qualify as "relationships related to transactions."

In any case, it seems clear from the Amendments that transactions between a seller having a foreign beneficiary and an acquirer having a Russian beneficiary would still be subject to clearance requirements, since these relationships are not between Russian beneficiaries alone, as is required by the Amendments in order for the exemption to apply.

Finally, it is also not clear whether and how this exemption would apply to transactions between parties controlled by a Russian joint stock company whose shares are dispersed among many shareholders and where no shareholders unilaterally or jointly control the Russian joint stock company. This is because the Amendments refer to companies that are controlled by the Russian state or Russian individuals, which would likely not apply in such case.

Size of Stakes in Strategic Subsoil Companies Subject to Clearance Increased

According to the Foreign Strategic Investments Law as currently enacted, any transaction entered into by a private foreign investor is subject to prior consent by the Governmental Commission, to the extent that such transaction results, *inter alia,* in:

- the exercise, whether directly or indirectly, of the rights attached to 10% or more of the voting shares in a Strategic Subsoil Company by a private foreign investor; or
- the possession by a private foreign investor of the right to appoint 10% or more of the collegial executive body and/or the unqualified right to elect 10% or more of the board of directors or other collegial managing body of the Strategic Subsoil Company.

The Amendments increase the 10% thresholds mentioned above to 25%, which represents a positive step forward in liberalizing investment in Russian subsoil companies.

Number of Strategic Activities Decreased

The Foreign Strategic Investments Law expressly lists 42 types of strategic activities to which it applies. It is important to note that simply carrying out any of the enumerated activities is sufficient grounds for a Russian company to be considered as a Strategic Company, regardless of whether the activity in question is a core activity for the company. Due to such a formalistic approach, many Russian companies are considered Strategic Companies simply because an ancillary activity of theirs is on the list of strategic activities set out in the Foreign Strategic Investments Law. For example, many banks involved in encryption activities are regarded as Strategic Companies under the Foreign Strategic Investments Law. However, these encryption activities are carried out by banks for the purpose of ensuring the safety and security of their clients' personal data, not as a core profit-generating activity. Accordingly, the Amendments propose to exclude from the list of strategic activities, encryption activities carried out by a 100% privately held private bank.

It is important to note that the initial version of the Amendments introduced by the Russian government to the State Duma also excluded activities related to the use of any agent of infection belonging to the fourth pathogen group (i.e., an agent that is highly unlikely to cause human disease) from the list of strategic activities. However, after the second reading, the exemption was removed from the Amendments.

Additional Issuance of Shares in Strategic Subsoil Companies

According to the current version of the Foreign Strategic Investments Law, any acquisition by a foreign investor of shares in a Strategic Subsoil Company resulting in 10% of the shares in such a company being held by a foreign party must be cleared by the Governmental Commission. Based on a literal interpretation of this rule, arguably, even if a foreign shareholder already holding more than 10% of the shares in a Strategic Subsoil Company acquires more shares in the company as a result of an additional issuance of shares and the foreign shareholder's percentage shareholding remains unchanged or even decreases but does not fall below 10%, then such an acquisition will still be subject to the clearance requirements of the Foreign Strategic Investments Law.

The Amendments address this issue by providing that clearance requirements do not apply to any acquisition of shares in Strategic Subsoil Companies if the shareholder's percentage shareholding does not increase.

Procedural Changes

The Amendments also slightly change the clearance procedure. For example, it is proposed that in addition to the Russian Federal Security Service (FSB), the Ministry of Defense of the Russian Federation will also be involved in the review process. In addition, detailed regulations will be introduced with respect to entering into an agreement, setting out the acquirer's obligations related to the clearance procedure.

In summary, the Amendments introduce largely technical changes and do not substantially change current rules. Unfortunately, the Amendments sometimes are poorly drafted and raise more questions than provide answers, but the new exemptions for IFIs and the changes with respect to subsoil companies should hopefully result in increased foreign investment.

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Upcoming and Recent Events

JANUARY 18 AND 19, 2012

The Eurozone Sovereign Debt Crisis and the Regulatory Response: European Bank Actions and Investment and Acquisition Opportunities

Greenwich, CT and New York

The ongoing Eurozone Sovereign Debt Crisis and changing regulatory environment have compelled many European banks to consider a variety of asset disposition transactions and capital raising structures. Dechert has advised on a variety of precedential bank recapitalizations, acquisitions and asset dispositions. During this interactive roundtable discussion, we will share our perspective on what future deals may look like in light of government-sponsored solutions yet to be determined.

JANUARY 10, 2012

Updating Your Compliance Calendar for 2012

London

The U.S. federal securities laws impose a variety of reporting and compliance obligations that apply in certain circumstances to UK investment managers and the funds they manage. This is the first meeting in 2012 in a series of monthly compliance seminars to assist UK investment managers in planning for the year ahead.

DECEMBER 14, 2011

The New World for S&L Holding Companies: The Impact on Trust Banks, Insurance Company HCs and Intermediate Holding Companies

Webinar

The Dodd-Frank Act abolished the Office of Thrift Supervision and distributed its responsibilities for thrift and thrift holding company supervision to other agencies. It also imposed new supervisory standards on thrift holding companies. In this webinar, topics discussed included: enhanced supervision of thrift holding companies and activities restrictions; capital requirements and dividend restrictions; grandfathered diversified thrift holding companies and intermediate holding companies; exemption from holding company status for parents of thrifts engaged only in trust activities; impact of FRB supervision on insurance companies; and application of new control concepts and passivity requirements.

NOVEMBER 16, 2011

The Volcker Rule: Intended and Unintended Impacts on U.S. and Foreign Entities

Webinar

The Volcker Rule will bring sweeping changes to the operations of the U.S. and foreign banking organizations. Topics addressed included the following issues: Which entities will be subject to coverage under the Volcker Rule and where are the surprises? What are the key issues for comment under the agencies' proposed rules? How will the definition of "proprietary trading" impact financial companies? What are the key issues regarding investment, sponsorship and advisory services involving covered funds? How are foreign banking organizations and activities impacted?

NOVEMBER 14, 2011

Domestic and European Failed Bank Investments and Living Bank Recaps: New Investment Rules, Adapting to the FDIC SOP and Foreign Bank Considerations

Webinar

Significant developments in Europe suggest that large European financial institutions will be engaging in significant capital raising transactions and large asset sales. Topics addressed included: opportunities for potential investors; European and U.S. regulatory issues; and potential impact on U.S. banks.

NOVEMBER 9 AND 10, 2011

Dos and Don'ts of Fund Distribution in Asia

Paris and London

This seminar provided an overview of the applicable regulations governing the distribution of funds on both a private placement basis and a retail basis in the key Asian distribution hubs of Hong Kong, Singapore and Taiwan, as well as in Mainland China.

NOVEMBER 9, 2011

A Step Closer to Systemic Regulation: SIFI Designation and FRB Regulation of SIFIs and Large Bank Holding Companies

Webinar

Topics addressed during this webinar included the following issues: What constitutes a systemically important financial institution in the FSOC's new proposed guidance? What are the implications for investment companies and asset managers? How will federal regulation and examination impact companies designated as SIFIs? What will enhanced capital and other regulations mean for large BHCs and SIFIs?

OCTOBER 20, 2011

Private Equity and the SEC: Registration Was Only the Beginning

New York

For private equity fund managers recently required to register with the SEC, registration is only the beginning. In this seminar, panelists provided insight regarding what private equity fund managers should focus on beyond their compliance program, and how best to position themselves to avoid issues or complications.

For more information, or to receive materials from the seminars and webinars listed above, please contact Beth Goulston at +1 202 261 3457 or beth.goulston@dechert.com.

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