DechertOnPoint

Second Quarter 2011

Financial Services Quarterly Report

In this issue

UK Bribery Act 2010 – What It Means for the Financial Services Industry
p. 1

New U.S. Reporting Requirement Regarding Cross-Border Holdings
p. 4

Banking Regulatory Consequences for German Banks Holding Investment Funds
p. 6

Recent French Tax Instruction Renders French SICAV More Attractive to Non-Resident Investors
p. 9

News on the Regulatory Front in Luxembourg
p. 11

UK Remuneration Code – Poacher's Paradise?
p. 13

Ireland Proposes a Voluntary Corporate Governance Code for Its Funds Industry
p. 15

Recent Developments in Chinese Securites Regulation
p. 20

Risky and Complex? Recent Trends in Investor Suitablity Regulation in Asia
p. 22

Upcoming and Recent Events
p. 28

Dechert LLP

UK Bribery Act 2010 – What It Means for the Financial Services Industry

by **Jonathan Pickworth**, **Andrew Hearn** and **Deborah Williams**

The UK Bribery Act 2010 ("Act") comes into force on 1 July 2011. It amounts to a landmark in the UK's desire to play a leading role in international efforts to combat corruption. The UK's commitment was underlined by the Secretary of State for Justice:

> *Tackling this scourge is a priority for anyone who cares about the future of business, the developing world or international trade.*[1]

Although UK legislation, the jurisdictional reach of the Act is broad and it is perfectly capable of applying even where the acts in question are committed outside the UK, by non-UK nationals, and even if the corruption in question benefits (or is intended to benefit) a non-UK business.

Background

The impetus for the UK Government to enact this new legislation was the criticism levelled at it over recent years for its failure to take enforcement action effectively against corruption, particularly involving companies.

The Act replaces, and builds upon, a myriad of existing anti-corruption legislation in the UK, which was viewed by some as outdated, complex and disjointed. In reality, the main issues with the earlier legislation were that (a) it was not enforced rigorously, and (b) it allowed no easy way to secure prosecutions of corporate entities (English law making it hard for a prosecutor to attribute the necessary mental element of a crime to a corporate entity).

Celebrating 35 Years
Dechert's Financial Services Group
1976–2011

Dechert 35 FSG

The Act provides a unified and modernised list of bribery offences. It allows for prosecution of corruption—in the UK as well as overseas. And, critically, it creates a new corporate offence of failing to prevent bribery, which will allow criminal action to be brought against corporate entities much more easily than ever before because it is a strict liability offence. The difficulty of proving that the corporate entity had the necessary mental element to commit the offence is removed (as explained further below).

The jurisdictional reach of the Act is broad and it is perfectly capable of applying even where the acts in question are committed outside the UK, by non-UK nationals, and even if the corruption in question benefits (or is intended to benefit) a non-UK business.

Scope of the Act

The Act has far-reaching implications for individuals and companies both in the UK and overseas. Many of the main players in the financial services industry, already subject to extensive regulation by the Financial Services Authority ("FSA") and other bodies, are likely to have anti-corruption policies and procedures in place to minimise the risk of falling foul of existing global regulation—particularly the U.S. Foreign Corrupt Practices Act ("FCPA")—and to meet the FSA's Systems and Controls requirements. However, the Act is far wider in its scope than the FCPA, and those within the industry will need to adapt and build upon existing policies to avoid exposure to criminal liability under the Act.

The Act is broader than the FCPA in the following key ways:

- ***Receipt of bribes*** – The Act extends to the receipt of bribes, not just the giving of them.
- ***Domestic bribery*** – The Act prohibits bribery both in the UK and abroad.
- ***It is not limited to the bribing of foreign officials*** – Although the Act contains a specific offence of bribing a foreign public official (Section 6), the offences it contains (relating to the giving and receiving of bribes and the failure to prevent bribery) are not limited to the bribery of public officials. They extend to all forms of commercial bribery.
- ***Facilitation payments are not exempt*** – The Act does not exempt facilitation payments from its scope. To the contrary, the Guidance on the Act makes it clear that such payments can constitute bribery under the Act.
- ***New strict liability offence*** – The new corporate strict liability offence of failing to prevent bribery has no equivalent in the FCPA.

The Act extends to the receipt of bribes, not just the giving of them.

Failure to Prevent Bribery

As noted above, in addition to the offences of (i) bribing another person (Section 1), (ii) receiving a bribe (Section 2) and (iii) bribing a foreign public official (Section 6), Section 7 of the Act introduces a new, strict liability offence where a relevant commercial organisation ("RCO") fails to prevent bribery.

The Section 7 offence is committed by an RCO if a person associated with the RCO bribes another person, with the intention of obtaining or retaining business or an advantage in the conduct of business for the RCO.

This is by far the most onerous provision of the Act for the reasons set forth below.

Strict liability nature – Unlike the other offences under the Act, the new Section 7 offence of failure to prevent bribery is a strict liability one. There is no requirement to prove that senior management had the necessary mental element normally required. The only defence available to an RCO that is prosecuted under Section 7 will be to show that it had "adequate procedures" in place (see next page). Lack of intent or "turning a blind eye" will provide no defence to an RCO.

Associated persons – For the Section 7 offence to have occurred, a person "associated" with the RCO must have committed a bribery offence *anywhere in the world* under Sections 1 or 6 (though they need not have been prosecuted for it), with the intention of obtaining or retaining business or an advantage in the conduct of

business for the RCO. Under Sections 1 and 6, it is an offence not only to give a financial or other advantage, but also to offer or promise such an advantage. The meaning of "associated person" in Section 8 of the Act is very broad and is "a person who performs services for or on behalf" of the RCO. This can include, but is not limited to, the RCO's employees, agents and subsidiaries. The Guidance acknowledges that, in addition to employees of the RCO, its agents or subsidiaries, contractors and suppliers could also be "associated" persons if they are performing services for or on behalf of an RCO. However, this is not likely to be the case if the contractor is merely acting as a seller of goods. The Guidance suggests that, where a contractor is just one link in a long supply chain involving several entities, it is likely that it will only be treated as an "associated" person of its contractual counterparty (subject to the facts of the case).

Critically, it creates a new corporate offence of failing to prevent bribery, which will allow criminal action to be brought against corporate entities much more easily than ever before because it is a strict liability offence.

Carrying on business (or part of a business) in the UK – An RCO is defined in Section 7 as including (i) any company or partnership formed/incorporated in the UK carrying on business anywhere, and (ii) any company or partnership (wherever formed) that carries on business, or part of a business, in any part of the UK. The second limb of this definition is extremely broad, but the Guidance indicates the Government's view that it should be approached in a common sense way so that, for example, the mere fact that a foreign corporate entity has a UK listing, or that a foreign parent company has a UK subsidiary, should not, in itself, make it an RCO. Nevertheless, whether this requirement is met will always be fact dependent and will be for a court to decide. The financial services industry may well be particularly cautious of this, in light of the wide interpretation given to a similar provision under the Financial Services and Markets Act ("FSMA") in relation to the carrying on of a regulated activity in the UK.[2] It is clear that the FSA may consider that organisations could carry on an activity for the purposes of FSMA without much of a physical presence in the UK. However, whether Section 7 of the Act will be given as wide an interpretation is not clear.

Only defence is "adequate procedures" – Once it is established that a business is an RCO, any bribery committed by an "associated" person *anywhere in the world* exposes the RCO to a potential Section 7 prosecution, provided the bribery was committed with the intention of obtaining or retaining business or an advantage in the conduct of business for the RCO. The breadth of this offence is therefore extremely wide. That breadth makes it all the more important for an RCO to ensure that it can confidently rely on the one defence that exists to a Section 7 prosecution—that it had "adequate procedures" in place designed to prevent persons associated with it from taking part in bribery offences under the Act.

"Adequate procedures" are not defined in the Act, but the Guidance sets out the following six key principles intended to assist organisations in minimising their risk of corporate liability under the Act: proportionate procedures; top-level commitment; risk assessment; due diligence; communication (including training); and monitoring and review.

What is clear is that having adequate procedures is about much more than simply having a book of procedures. For the procedures to be adequate, a company will need to be able to demonstrate a genuinely compliant culture. For this reason, those companies with good and effective FCPA compliance programmes already in place will have a distinct advantage. Such programmes will need upgrading though to bring them into line with the requirements of the Act—which undoubtedly sets a new gold standard—but at least for those companies, the culture is already established.

Key Considerations for the Financial Services Industry

The following considerations are likely to be particularly relevant for the financial services industry:

Intermediaries – The use of intermediaries is widespread in the financial services industry (for example, insurance) and, given that intermediaries who contract

(*continued on page 26*)

New U.S. Reporting Requirement regarding Cross-Border Holdings

by **David Harris**, **Julien Bourgeois** and **Philip Hinkle**

Many U.S. investment managers and other parties will need to consider by September 30, 2011 whether they are required to report to the Federal Reserve Bank of New York monthly "snapshot" information on a new Treasury form, "TIC SLT."[1] The scope of the applicable requirements may surprise many investment managers—so they should devote sufficient time to consider their reporting obligations.

TIC SLT Reporting Requirement

TIC SLT provides a monthly snapshot from U.S.-resident "Required Reporters" of the fair value of a Required Reporter's aggregate holdings of foreign securities ("holdings") and the fair value of a Required Reporter's issuances of securities that are held by foreign residents ("issuances"). The reporting entity must list the fair value of such holdings and issuances, categorized separately by (1) type of holding (*e.g.*, bonds or equity securities) and (2) the country (a) where the foreign holding's issuer is organized or (b) in which the foreign holder of an issuance is organized or domiciled. The Required Reporter must also summarize all reportable holdings and issuances in certain broader categories such as type of issuer.

Types of Required Reporters on TIC SLT

Required Reporters on TIC SLT include:

- ***U.S.-Resident Investors*** – A U.S.-resident end-investor that invests for its own account, or on behalf of others, in foreign securities that are held directly by the end-investor.[2] An investment manager must report these types of holdings by its funds and other clients (*e.g.*, managed accounts) on the investment manager's TIC SLT, unless it finds that another Required Reporter, most likely a U.S. custodian of its asset management clients, will report these holdings. While a Required Reporter would include a manager of a U.S. fund that holds foreign securities directly, others could include, for example, a manager of a U.S. feeder fund that owns interests in an offshore master fund.
- ***U.S.-Resident Issuers*** – A U.S. resident that issues a security in a foreign market, where the security is held directly by a foreign resident. An investment manager to a U.S. fund that sells its shares to foreign investors would be required to report on the fund's behalf.
- ***U.S. Custodians for U.S. Residents*** – A U.S.-resident custodian that holds foreign securities for the account of U.S. residents (in which case the U.S.-resident end-investors need not file a TIC SLT report for those foreign securities).
- ***U.S. Custodians for Foreign Residents*** – A U.S.-resident custodian or a U.S.-resident central securities depository that holds U.S. securities on behalf of a foreign resident.

Types of Reportable Securities on TIC SLT

Reportable securities include:

- ***Foreign Securities held by U.S. Residents*** – Foreign securities include most securities (equity and debt) issued by entities established under the laws of a foreign country and all securities issued by international and regional organizations (even if these organizations are located in the United States).
- ***U.S. Securities held by Foreign Residents*** – Securities issued by U.S. residents and owned by foreign residents. A security is deemed to be held by a foreign resident if the holder of record is not a resident of the United States according to the issuer's records.

Certain securities are specifically excluded from reporting on TIC SLT, including, for example: short-term securities with an original maturity of one calendar year or less; CDs; and derivative contracts as defined under the Financial Accounting Standards Board's Accounting Standards Codification ("ASC") 815.[3]

The scope of the applicable requirements may surprise many investment managers.

In addition, "direct investments" (as opposed to "portfolio investments") must be reported on a different reporting system administered by the U.S. Department of Commerce and its Bureau of Economic Analysis ("BEA"). These direct investments include U.S.-resident ownership of 10% or more in a foreign company and vice versa, and most positions and transactions with a company with which the investor is in a direct investment relationship.

Consolidation and Reporting Level

A Required Reporter must file a single report of the reportable holdings and issuances of all U.S.-resident parts of its own organization (including funds managed). The reporting entity (in theory) is the top U.S.-resident entity within its organization.

A reporting entity only need file a TIC SLT report if the consolidated total value of all reportable holdings and issuances across its organization is equal to or exceeds $1 billion (the "Exemption Level") on the last business day of the reporting month ("Reporting Day"). The consolidated total of an entity's holdings and issuances must include the reportable holdings or issuances of all U.S.-resident parts of the reporting entity's organization, in addition to all "investment companies, trusts, and other legal entities created by the reporting entity."

These broad consolidation rules could capture a large number of U.S. investment managers directly or through the activities of affiliates.

The consolidated total should be calculated based on the fair value of securities as of the Reporting Day in accordance with ASC 820, using the spot exchange rate as of the close of business on that day.

These broad consolidation rules could capture a large number of U.S. investment managers directly or through the activities of affiliates.

Reporting Schedule

The Reporting Days are scheduled to be September 30 and December 30 for 2011 and the last business day of each month thereafter. Once the consolidated total of reportable holdings and issuances is equal to or greater than the Exemption Level on a Reporting Day, a Required Reporter must submit a TIC SLT report for that Reporting Day by the 23rd calendar day of the following month ("Due Date") (or the next business day of that month if the Due Date falls on a weekend or holiday) to the Federal Reserve Bank of New York electronically or via post or fax. Once a Required Reporter has had to submit a TIC SLT report during a year, the entity must submit a report for each remaining Reporting Day in that calendar year, regardless of whether the entity still has consolidated total reportable holdings and issuances equal to or in excess of the Exemption Level.

Practical Considerations

Failure to file required reports may give rise to potential civil and criminal liability. Given the complexity of these reporting obligations, it is important that U.S. investment managers (and notably fund managers)

consider their obligations under the TIC SLT reporting requirements and whether they or their custodians are fulfilling the new reporting obligations regarding their holdings and issuances.

In addition, in connection with assessing their new reporting obligations under TIC SLT, it would be prudent for investment managers to consider whether they are fulfilling their reporting obligations under the other components of the TIC reporting system and other related Treasury, Fed and BEA reporting regimes.

---

1 For additional information, please refer to "Treasury Is Adopting New Reporting Requirement Regarding Cross-Border Holdings Applicable To U.S. Investment Managers," *available at* http://www.dechert.com/Treasury_is_Adopting_New_Reporting_Requirement_Regarding_Cross-Border_Holdings_that_Are_Applicable_to_US_Investment_Managers_05-05-2011/. TIC SLT is a new part of the Treasury International Capital reporting system, which allows the U.S. Department of the Treasury and the Federal Reserve to gather information on cross-border holdings and cross-border transactions. For an overview of other parts of the TIC reporting system, and other related reporting regimes that may also apply to U.S. investment managers or their affiliates, see Julien Bourgeois and Philip Hinkle, *Foreign Holdings and Transactions with Foreign Persons: Reporting Responsibilities of U.S. Investment Managers*, The Investment Lawyer, Vol. 15, No. 9 (Sept. 2008).

2 A "U.S. resident" is any "individual, corporation or other entity that is incorporated or otherwise legally established in the United States, including branches, subsidiaries and affiliates of foreign entities located in the United States." A "foreign resident" is any "individual, corporation or other entity legally established outside of the United States, regardless of the actual center of economic activity of the entity." Notably, an investment manager may be required to report as part of its TIC SLT both (1) the foreign securities held by, and (2) the shares issued to foreign residents by, the U.S. funds managed by the investment manager.

3 Derivatives are reportable on another form, "TIC D."

David J. Harris
Washington, D.C.
+1 202 261 3385
david.harris@dechert.com

Julien Bourgeois
Washington, D.C.
+1 202 261 3451
julien.bourgeois@dechert.com

Philip T. Hinkle
Washington, D.C.
+1 202 261 3460
philip.hinkle@dechert.com

Banking Regulatory Consequences for German Banks Holding Investment Funds

by **Hans Stamm** and **Sebastian Göricke**

Banks (both in Europe and globally) are significant investors in investment funds. This results in specific banking regulatory implications for the banks themselves and also for fund sponsors. Specifically, under Basel III Capital Adequacy Rules,[1] European banks will be required to hold a minimum percentage of their total assets in "liquid assets". Such "liquid assets" could, subject to implementation of Basel III, include certain funds.

German banks holding investments in open-ended collective investment funds ("Funds") must, from a regulatory perspective, take into account in particular: the German Regulation Governing Large Exposures (*Großkredit-und Millionenkreditverordnung*, "GroMiKV") and the German Solvency Regulation (*Solvabilitätsverordnung*, "SolvV").

According to the GroMiKV, German banks are subject to certain restrictions (and special reporting obligations to BaFin) on the amount of loans that may be granted to any single borrower. For these purposes, an investment by a German bank into a Fund is deemed to be a loan.

On 5 October 2010, the German regulator, Federal Financial Supervisory Authority ("BaFin"), passed a new regulation (the "New Regulation") that amended the GroMiKV and SolvV. The New Regulation implemented the changes of the European so-called Banking Directive[2] and Capital Requirements Directive[3] due to the Capital Requirements Directive II,[4] Directive 2009/27/EC and Directive 2009/83/EC. Hence, rules similar to those described in this article should apply to European banks outside of Germany. For German

banks, the New Regulation came into effect on 31 December 2010.

German Regulation Governing Large Exposures

According to the GroMiKV, German banks are subject to certain restrictions (and special reporting obligations to BaFin) on the amount of loans that may be granted to any single borrower. For these purposes, an investment by a German bank into a Fund is deemed to be a loan.

For the investment in Funds, the basic approach is that the respective borrower is the Fund. However, if certain requirements are met, the bank is allowed to "look through" the Fund and treat the assets of the Fund as the borrowers. This approach is more favorable, since the single loan amounts are then much lower. In case of a fund-of-funds, it is also possible to look through to the target funds, provided that the target funds fulfill the necessary requirements described below. The bank can decide in its discretion for each Fund and target fund, respectively, whether it wants to apply the look-through approach.

The following two requirements (regarding fund managers and reporting), inter alia, must be met to use the look-through approach.

Fund Manager

The manager of the Fund must be: (i) a German fund manager that is regulated according to the German Investment Act (*Investmentgesetz*), (ii) a fund manager based in the European Economic Area (EEA), subject to regulation based on the UCITS Directive,[5] or (iii) a fund manager based outside the EEA, subject to rules comparable to the UCITS Directive.

As we interpret the relevant rules of the GroMiKV, the Funds managed by the eligible fund manager are not themselves required to be UCITS Funds for the look-through approach to be available, provided the investment manager holds a license within the meaning of the UCITS Directive.

Reporting

Another key requirement for the look-through approach is that the fund manager of the Fund must regularly (in general, daily) and timely provide the composition of its portfolio to the investing bank. However, if it is not likely that the exposure limits of the bank according to the GroMiKV will be breached, a monthly update on the portfolio is sufficient.

Solvency Regulation

According to the German Solvency Regulation, German banks must have sufficient regulatory capital, including so-called core capital ("*Kernkapital*", "Tier I Capital") for each investment they hold. Such regulatory capital requirement is calculated based on the "risk weighted assets" (RWA) as defined in SolvV.

The definition of an "investment fund" as a RWA in essence covers any open-ended fund with terms comparable to UCITS Funds. If a Fund does not fulfill these requirements, it will be treated as an investment into a participation (*Beteiligung*) in a company and is subject to different rules (leading in general to a higher risk weighting).

A German bank may calculate the RWA based on either of the general rules prescribed by the SolvV – the Standard Approach (*Kreditrisiko-Standardansatz*, "KSA") or the Internal Rating Based Approach (*Interner ratingbasierter Ansatz*, "IRBA").

Dechert LLP

Standard Approach

Under the Standard Approach, the risk weighting for the calculation of the core capital requirements of an interest in a Fund must be determined based on the rating of the Fund, provided the Fund is rated by a recognized rating agency within the meaning of the SolvV (i.e., BaFin has accepted such rating agency for rating of investment funds).

If no rating is available, the German bank may "look through" the Fund and may determine the core capital requirement based on the risk weighting of the assets of the Fund, provided that the Look-Through Criteria, as defined below, are fulfilled. If the German bank has knowledge of the actual composition of the assets of the Fund based on the Look-Through Criteria, it takes into account the risk weighting of these assets. If the actual composition of the assets of the Fund is not available, the German bank must calculate the risk weighting based on the maximum allowed investments (according to the fund documents) of the Fund, on the assumption that the risk weighting, and therefore the capital requirement, is the highest possible within the investment limits of the relevant Fund.

In any other case, the risk weighting of the Fund will be 100% of the nominal amount invested in the Fund, unless otherwise determined by BaFin, as further described below.

The following criteria ("Look-Through Criteria") must be fulfilled in order to use the "look-through" approach: (i) the interests are issued by an entity that is subject to regulatory supervision in a Member State of the EEA or in another state that provides the same level of supervision as a Member State; (ii) the offering document of the Fund sets forth all types of eligible assets and the investment limits for the Fund (if any); and (iii) an annual report is prepared for the Fund, setting forth the Fund's assets and liabilities, net profits and business activities, during the relevant reporting period. The SolvV is silent as to whether, in the case of a fund-of-funds, the Standard Approach would permit the look-through approach to be applied to the target funds.

In any case, BaFin can determine that the risk weighting of an interest in a Fund is 150% or more of the nominal amount invested in the Fund, if the Fund holds especially high-risk assets.

Internal Rating Based Approach

The risk weighting for the calculation of the core capital for interests in a Fund applying the Internal Rating Based Approach is not based on the (external) rating of the Fund, but rather is determined on the basis of the risk weighting of the actual assets of the Fund and, in case of a fund-of-funds, based on the assets of the target funds, provided the German bank has knowledge of the actual composition of the assets.

If the actual composition of the assets of the Fund is not available, and provided that the Look-Through Criteria are fulfilled, the bank may calculate the core capital requirement based on the maximum allowed investments (according to the fund documents) of the Fund, on the basis that the risk weighting, and therefore the capital requirement, is the highest possible within the investment limits of the relevant Fund.

If the Look-Through Criteria are not met, the interest in the Fund will be treated as an investment into a participation (*Beteiligung*) in a company, and is subject to different rules, which should in general lead to a higher capital requirement for the German bank.

Summary

Under both the GroMiKV and SolvV, German banks are permitted to "look through" the Fund to the underlying assets and calculate the large credit exposure and the core capital requirements based on the underlying assets, provided, amongst other things, they have access to the data on the underlying investments. If this data, however, is not available or, due to confidentiality reasons, cannot be made available, it would in general result in less favorable calculations for German banks.

---

1 See Basel III: International framework for liquidity risk measurement, standards and monitoring issued December 2010, available at http://www.bis.org/publ/bcbs188.pdf.

2 2006/48/EC.

3 2006/49/EC.

4 2009/111/EC.

5 2009/65/EC.

Hans Stamm
Munich
+49 89 21 21 63 42
hans.stamm@dechert.com

Sebastian Göricke
Munich
+49 89 21 21 63 62
sebastian.goericke@dechert.com

Recent French Tax Instruction Renders French SICAV More Attractive to Non-Resident Investors

by **Olivier Dumas***

By reducing tax costs arising from investments in French "sociétés d'investissement à capital variable" ("SICAV" – an investment company with variable capital) for non-residents, the French government has made this investment vehicle more attractive for foreign investors. Recent tax "instruction" (the term used to describe tax guidance issued by the French Treasury) dated 28 March 2011 allows French SICAVs to separately classify the income distributed to non-residents, allocating such income based on its geographical origin or its legal nature. This removes an obstacle to the use of SICAVs as master funds for non-French feeder funds.

SICAVs, although registered as corporations (*sociétés anonymes*), are exempted from French corporate tax and constitute an attractive investment vehicle for French investors. Until recently, however, this was not the case for foreign investors.

Before the new tax instruction, income distributed by a SICAV to its investors based outside France (non-resident investors), regardless of the nature or source of such income, was subject to a withholding tax (up to 50% in the absence of any international tax treaty). Although withholding taxes can be reduced or avoided under international tax treaties and SICAVs can transfer to their investors certain tax credits attached to the income distributed, French law only provides the benefit of these treaties to natural persons or to legal entities. UCITS, contractual funds, and other investment vehicles without legal personality, such as trusts or limited partnerships, could not claim the benefit of such international tax treaties and thereby avoid being subject to withholding taxes.

The disadvantageous tax regime applicable to the non-resident investors in SICAVs had, until now, prevented SICAVs from fully taking advantage of new opportunities offered by the UCITS IV Directive.

In particular, the UCITS IV Directive will allow the establishment in EU Member States (e.g., Luxembourg or Ireland) of feeder funds designed for "exportation" of investments into other Member States. The typical structure is that one or more feeders accepting domestic investors in their home Member States would then invest in a master fund where asset management would be carried out on a centralised basis (typically in the Member State of the investment manager). The previous tax regime would have prevented France from becoming a favorite venue for these master funds because payments to their non-French feeder funds would have been subject to substantial tax withholdings.

The French Treasury reacted quickly to avoid that outcome. After consulting with supervisory authorities and finance professionals, the Treasury issued a new tax instruction on 28 March 2011, with immediate effect, that allows SICAVs to separately classify (*couponner*) the income distributed to non-resident investors, and attribute this income based on its geographical origin (French or foreign assets) and its nature (e.g., dividends, coupons).

The disadvantageous tax regime applicable to the non-resident investors in SICAVs had, until now, prevented SICAVs from fully taking advantage of new opportunities offered by the UCITS IV Directive.

Pursuant to the instruction, the income received and distributed by a SICAV will maintain both (i) its origin (either French or foreign) and (ii) its nature—generated by investment products with fixed-income (e.g., interest) or with variable income (e.g., dividends)—as if the underlying company directly distributed such income to the non-resident investors.

In concrete terms, the new tax regime applicable to French SICAVs has several consequences:

- The instruction provides tax exemptions (*franchise d'impôts*) whereby no French withholding tax will be applied to the portion of the distributions that is attributable to income generated by foreign securities and distributed by a SICAV to its non-resident investors. SICAVs will therefore effectively be fiscally transparent, as is currently the case for FCP (*Fonds Commun de Placement*).

  Non-resident investors in a French SICAV will generally be able to benefit from tax treaties, to the extent available, signed between their respective country and the country where the income was generated. However, the SICAV will not under French tax law be required to provide assistance with respect to the tax reimbursement sought under such treaties.

- With regard to the portion of the distributions that relates to income generated by French securities and distributed by a SICAV to its non-resident investors, it will be necessary to distinguish between fixed-income (e.g., interest) and variable income (e.g., dividends). Generally, fixed income will be exempted from withholding taxes, while variable income will be subject to specific withholding taxes (based on their nature).

It should be noted, however, that the European Commission has initiated proceedings against France, claiming that French tax regulations applied to foreign funds that invest in France do not comply with the EU principle of free circulation of capital. The European Commission considers the French tax regulations to be discriminatory, since different treatment is applied to French funds (FCPs or SICAVs) than to other European funds that cannot benefit from tax treaties signed with France. Currently, a withholding tax is applied to variable income originated from France and distributed to other European funds, whereas French funds (transparency or tax exempt regime) do not have to pay tax with respect to this variable income.

The issues related to, and potential consequences of, these proceedings are significant. They include: recognition in France of various tax regimes applicable to foreign investment vehicles; amendment of French tax treaties; tax harmonization within the EU; and fight against tax evasion (by location in a tax haven jurisdiction). Depending upon the outcome of these proceedings, the consequence will probably be that the French tax regime applicable to French funds may change again in the near future—if the Court of Justice of the European Union rules against France, France will be required to revise its tax regulations and notably its tax treaties.

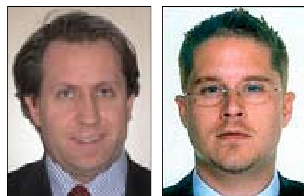
Regardless of the outcome of the proceedings now in front of the Court of Justice of the European Union, the recent tax instruction clearly improves the situation for non-resident investors in SICAVs and opens the door to French master feeder structures. European feeder funds will be able to invest in French master funds with limited tax imposition. In our view, this reform will contribute to render more attractive a French tax system that is already rather favorable to investors.

Olivier Dumas
Paris
+33 1 57 57 80 09
olivier.dumas@dechert.com

---

* *The author would like to thank Jennifer Foubet for her research for this article.*

News on the Regulatory Front in Luxembourg



by **Marc Seimetz** and **Jean-Louis Frognet**

The Luxembourg financial supervisory authority, the *Commission de Surveillance du Secteur Financier* (the "CSSF") has been very active lately in issuing a number of new rules in relation to Luxembourg investment funds, as well as management companies. This article discusses several of the key new rules.

CSSF Circular 11/508[1]

Clarifying main adjustments to be made by UCITS management companies and self-managed SICAVs in order to timely comply with the provisions of the 2010 law relating to undertakings for collective investment

By 1 July 2011, each management company that is currently subject to Chapter 13 of the Luxembourg law dated 20 December 2002 relating to undertakings for collective investment (the "2002 Law") will be subject to Chapter 15 of the Luxembourg law dated 17 December 2010 relating to undertakings for collective investment (the "2010 Law").

In this context, each UCITS management company, as well as self-managed SICAV, has been requested to submit to the CSSF, no later than 1 June 2011, an update of its authorisation file duly completed with the new requirements.

The additional or updated information to be provided to the CSSF by the UCITS management companies concerns, in particular, the management company's:

- organisational rules (there exists an obligation to establish a procedures manual and internal reporting guidelines including the exchange of information with all delegates);
- staffing resources in Luxembourg;
- procedures for the reasonable and prompt handling of complaints received from investors;
- electronic data processing and accounting procedures;
- permanent compliance function, internal audit function and permanent risk management function;
- procedures concerning personal transactions and conflicts of interest;
- establishment of procedures, arrangements and policies in terms of rules of conduct; and
- risk management procedure covering all UCITS managed by the management company.

UCITS management companies are also required to provide information regarding the strategies established in relation to the exercise of voting rights attached to the instruments held in the portfolios of the UCITS that they manage. Although this specific requirement is new and was not part of the authorisation file in the past, it can be noted that many funds and managers already had such a policy in place.

Self-managed SICAVs must also provide additional or updated information to the CSSF, but only concerning their policies regarding handling of investor complaints, conflicts of interest, voting rights strategies, rules of conduct and risk management (including the permanent risk management function).

CSSF Circular 11/509[2]

Clarifying the practical and technical procedures to be followed by UCITS for cross-border marketing

Circular 11/509 designates notifications to be made by (i) Luxembourg UCITS intending to market their shares/units in another Member State, and (ii) foreign UCITS intending to market their shares/units in Luxembourg.

Luxembourg UCITS intending to market their shares/units in another Member State

Notification to the CSSF

The Luxembourg UCITS shall submit a notification letter to the CSSF including information on the arrangements for marketing in the host Member State, as well as the latest versions of the following documents: the UCITS certificate; the management regulations (in case of a common fund) or coordinated articles of incorporation (in case of an investment company); the prospectus as visaed by the CSSF; the Key Investor Information Document (the "KIID"); the annual reports; and the confirmation of the payment of tax to which the Luxembourg UCITS is subject in the host Member State.

After verification that the file is complete, the CSSF shall transmit the complete documentation to the competent authorities of the host Member State and

shall, without delay, notify the Luxembourg UCITS of this regulator-to-regulator transmission. The Luxembourg UCITS shall be authorised to market its shares in the relevant host Member State from that date.

This specific procedure is applicable each time a Luxembourg UCITS proposes to market its shares/units in another Member State, including when a Luxembourg umbrella UCITS proposes to market shares/units of additional sub-fund(s) where the marketing of shares/units of other sub-funds has already been notified in that Member State.

Notification to the competent authorities of the host Member State

The Luxembourg UCITS shall notify the competent authorities of the host Member State directly in case of amendments to the information regarding the arrangements for marketing previously communicated in the initial notification letter or of amendments of the share classes to be marketed. This notice must be sent before implementing the relevant amendment.

Foreign UCITS intending to market their shares/units in Luxembourg

The relevant foreign UCITS must ensure that the CSSF receives the documentation referred to in the UCITS Directive as well as the UCITS certificate from the competent authorities of the foreign UCITS' home Member State.

In case of any amendment having an impact on the notification letter previously sent to the CSSF, or of a change of the share classes to be marketed in Luxembourg, the UCITS shall directly inform the CSSF before implementing this amendment.

CSSF Press Release 11/10 Dated 1 April 2011 on UCI Prospectuses

Changes in the CSSF visa procedure following the introduction of the KIID

In Press Release 11/10, the CSSF indicated, among other matters, that:

- the main elements of the KIID must be kept up-to-date and UCITS must transmit to the CSSF their initial KIID and any subsequent amendments thereto (which are not subject to formal approval);
- the KIID is prepared and published under the responsibility of the directors of the SICAV or of the management company;
- the CSSF will not visa-stamp the KIID (but will continue to do so for the full prospectus); and
- the CSSF has the authority to control the compliance with the rules applicable to the KIID and can thus require the withdrawal of a non-compliant KIID.

It remains to be seen how this will work out in practice and how the CSSF will handle verifications of KIIDs. Indeed, it is currently foreseen that there will be significant numbers of KIIDs, sometimes as many as several thousand KIIDs per large umbrella UCITS.

It remains to be seen how this will work out in practice and how the CSSF will handle verifications of KIIDs.

It is expected that further regulations will be issued in the near future.

---

1 CSSF Circular 11/508 dated 15 April 2011 on the new provisions applicable to Luxembourg management companies subject to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment and to investment companies which have not designated a management company within the meaning of Article 27 of the Law of 17 December 2010 relating to undertakings for collective investment (the "Circular 11/508").

2 CSSF Circular 11/509 dated 15 April 2011 on the new notification procedures to be followed by a UCITS governed by Luxembourg law wishing to market its units in another Member State of the European Union and by a UCITS of another Member State of the European Union wishing to market its units in Luxembourg (the "Circular 11/509").

Marc Seimetz
Luxembourg
+352 45 62 62 23
marc.seimetz@dechert.com

Jean-Louis Frognet
Luxembourg
+352 45 62 62 29
jean-louis.frognet@dechert.com

UK Remuneration Code – Poacher's Paradise?

by **Jason Butwick**

Since 1 January 2011, all UK banks and building societies and most UK investment firms have been obliged to comply with the FSA's Remuneration Code (the "Code").[1] The FSA introduced the Code in response to EU legislation,[2] and similar provisions relating to remuneration apply in each EU Member State. The Code applies to most hedge fund managers, UCITS firms, private equity firms, other regulated asset managers, broker dealers and firms that engage in corporate finance or venture capital. The Code sets out a series of principles (comprising rules and guidance) covering the method of assessment, process for determination and manner of payment of remuneration for certain employees.

Firms are required to apply the Code in a manner proportionate to their size and the nature of their activities. In order to assist firms to comply with the Code in a proportionate manner, the FSA introduced the concept of proportionality tiers. The tiered system allows firms to apply the Code in a differentiated manner. The largest banks and building societies are in tier 1 and are required to apply the Code most strictly. Firms that generate income from agency business without putting their balance sheet at risk (such as most hedge fund managers) are in tier 4 and may disapply a number of principles of the Code.

Firms, even those that were not covered by the Code before this year, were expected to be broadly compliant with the Code by 1 January 2011. However, under transitional arrangements, they had until 1 July 2011 to comply with certain principles of the Code relating to remuneration structures.

The unfortunate, and presumably unintended, consequence of the juxtaposition of these two different approaches to notification and guidance, is that something of a poacher's paradise is created.

There has been significant activity among firms to ensure compliance with the Code and many (if not most) firms, including those in proportionality tier 4, are sitting smug in the knowledge that they are already compliant with the Code with a few weeks to spare before the 1 July 2011 deadline. They have drawn up their Code Staff list,[3] notified those persons of their

status as Code Staff (and explained to those persons the implications of being Code Staff) and have prepared their Remuneration Policy Statements.[4]

A fair number of other firms have scrambled their elite compliance and HR squads to help them demonstrate compliance by the deadline. There are probably other firms that have still failed to turn their minds properly to compliance with the Code. However, such firms are not the focus of this article.

The focus of this article is a (presumably unintended) anomaly arising out of the provisions of the Code in connection with guaranteed variable remuneration. First, a quick recap.

All firms, including those newly covered by the Code, were required to be broadly compliant by 1 January 2011. Those newly covered by the Code were given until 1 July 2011 to ensure compliance with Principle 12 of the Code relating to remuneration structures. Principle 12 includes the rules relating to guaranteed variable remuneration. In brief, a firm must not provide guaranteed variable remuneration unless it is exceptional, occurs in the context of hiring new Code Staff and is limited to the first year of service.[5] The Code sets out evidential and guidance provisions which, in essence, require the firm to take reasonable steps to ensure that the guarantee is no more generous in terms or amount than the variable remuneration on offer at the previous employer.

A firm must not provide guaranteed variable remuneration unless it is exceptional, occurs in the context of hiring new Code Staff and is limited to the first year of service.

The guidance also provides that guarantees in the form of retention awards are only likely to be compatible with the Code where a firm is undergoing a major restructuring.

The guidance within the Code itself has been supplemented by further guidance issued by the FSA on 1 April 2011 as part of a consultation exercise. Under this additional guidance, the FSA does not require firms to give prior notification to the FSA for sign-on awards. Such awards should be noted in the firm's Remuneration Policy Statement. While the Remuneration Policy Statement is not submitted to the FSA, it has to be available to the FSA upon request.

By contrast, for Code Staff who do not fall within a *de minimis* exemption,[6] firms are required to give prior notification to the FSA of any retention award and individual guidance should be sought (in other words, FSA approval is required).

On any analysis, a retention award that is subject to FSA approval is less attractive than a stringless guarantee.

The unfortunate, and presumably unintended, consequence of the juxtaposition of these two different approaches to notification and guidance, is that something of a poacher's paradise is created. Imagine that a particular firm (let us call it Rich Bank) decides that it wants to recruit the star manager at another firm (let us call that firm, One Man Bank). Rich Bank instructs a head-hunter to start negotiations with said star manager and offers a guaranteed sign-on bonus to that star manager. Yes, Rich Bank has to take reasonable steps to ensure that the guarantee is not more generous in amount or terms than the variable remuneration awarded or offered by One Man Bank, but since a bird in the hand is worth more than two in the bush . . . star manager's head is turned. He likes his job at One Man Bank, but he sees a guarantee from Rich Bank and, not unreasonably, asks One Man Bank to match it.

One Man Bank, however, is stuck. There is no "major restructuring" that it can point to as justification for a retention award. In any event, it cannot offer a retention award (under the guidance for consultation) without FSA approval. On any analysis, a retention award that is subject to FSA approval is less attractive than a stringless guarantee.

So Rich Bank gets its man. In the meantime, One Man Bank needs to recruit someone else to run its key fund and spends even more than the potential retention award, to recruit a superstar manager from another firm, with an even larger guarantee.

So what, if anything, can firms do to protect themselves?

First, it is worth noting that the requirement for individual guidance only really arises in relation to Code Staff who do not fall within the *de minimis* threshold. Indeed, for non-Code Staff, the Guidance does not even require prior notification—only that firms document the awards appropriately. Second, firms should do all of the things they normally do to prevent attrition: keeping the individual happy, tying him or her to the business through the culture of the firm and by introducing an incentivisation structure that provides long-term rewards for the long-term creation of value. Indeed, it would be rare for a star employee to leave a firm solely to receive a guaranteed payout of the same amount of money they already expect to receive. Normally, there would be other reasons—whether unhappiness with an aspect of the current working conditions or the prospect of a better platform for their work product. Remove these other reasons for leaving and the guarantee alone should not be enough.

---

1 SYSC 19A.

2 Capital Requirements Directive (Directive 2010/EU.).

3 Firms are required to identify "Code Staff" to whom the Code applies and notify such persons of their status and the implications. Code Staff is defined to include senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes such employee into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on a firm's risk profile. SYSC 19A.3.5 R and 19A.3.6 G.

4 The FSA expects firms to ensure that their remuneration policies, practices and procedures are clear and documented and the FSA requires firms to have completed a Remuneration Policy Statement by 1 September 2011. The FSA has provided templates for Remuneration Policy Statements, available at http://www.fsa.gov.uk/pages/Library/Policy/guidance_consultations/2011/11_09.shtml.

5 SYSC 19A.3.40 R.

6 Certain rules of the Code relating to remuneration structures will not apply to Code Staff where they satisfy a *de minimis* exemption. In essence, to satisfy the exemption, their total remuneration must be less than £500,000 *and* no more than 33% of total remuneration may be variable. SYSC 19A.3.34 G.

Jason Butwick
London
+44 20 7184 7569
jason.butwick@dechert.com

Ireland Proposes a Voluntary Corporate Governance Code for Its Funds Industry

by **Declan O'Sullivan**

Background

The Irish Funds Industry Association ("IFIA") has published a draft Voluntary Corporate Governance Code for the Funds Industry (the "Code). The publication of the Code comes a year after Matthew Elderfield, Head of Financial Regulation with the Central Bank of Ireland, proposed, in his address to the Irish Funds Industry conference, that the industry undertake a voluntary corporate governance code that would set out the roles and responsibilities of fund boards ("Boards"), while taking into account the unique features and risks associated with the funds industry.

In his address, Mr. Elderfield discussed the new corporate governance standards that the Central Bank was introducing into the banking and insurance sectors. He recognised that the funds sector posed a different risk profile than that of banks or insurance companies. However, he also commented that the development of the funds industry over the years, in terms of both scale and complexity, had increased demands on both Boards and individual directors.

The IFIA set up a steering group to develop the Code and it reviewed extensively some of the codes from other jurisdictions and engaged with the Central Bank and with the industry generally.

The Central Bank has approved a draft code and, as the code is to be an industry code, it was agreed that it should be subject to industry consultation. This consultation process is now underway. It is expected that the Code will be available from July and will be adopted by the industry on a "comply or explain" basis from September.

What's New?

Much of the Code codifies existing statutory and regulatory rules and this article focuses on "what's new" for the Boards of Irish funds and their individual directors.

The Code recognises that Irish authorised investment schemes can be authorised as corporate structures—investment companies, and as non-corporate

structures such as unit trusts, contractual funds and investment limited partnerships. For investment companies, the Board is the focal point of the governance regime, but for a non-corporate fund, the accountable entity is the management company or general partner. The Code will apply to both types of entity and refers throughout to both the "CIS"—collective investment schemes and "ManCo"—management companies. This article will refer to such entities collectively as "Funds".

What is Corporate Governance?

The Code refers to the IOSCO definition of governance—which is a "*framework for the organisation and operation of investment CIS that seeks to ensure that investment CIS are organised and operated efficiently and exclusively in the interests of their investors, and not in the interest of CIS insiders*".

The Code stresses that the Board retains primary responsibility for corporate governance and recognises that many of the delegates of the Board, such as the custodian and administrator, will be selected before Board composition is finalised.

There is a general requirement that the governance structure put in place should be sufficiently sophisticated to ensure that there is effective oversight of the activities of the Fund, taking into consideration the nature, scale, complexity and outsourcing arrangements of the activities being conducted.

Composition of the Board

The aspect of the Code that attracted, by a considerable margin, the most debate was the question of the composition of the Board, and it is probably worth restating in full some of the key provisions.

Part 4.1 of the Code provides as follows:

> *The Board shall be of sufficient size and expertise to oversee adequately the operations of the [Fund]. Three directors is recommended as the minimum size for the Board. It is recommended that the Board comprise a majority of non-executive directors and at least one independent director, who would not be an employee of any service provider firm receiving professional fees from the [Fund].*

This provision contains three new requirements for Irish funds: a minimum of three directors; a majority of non-executive directors; and at least one independent director. Previously, the only substantive requirement with respect to Board composition was that there are two Irish-resident directors. This requirement remains, along with a requirement that at least two directors be "reasonably available to meet the Central Bank at short notice, if so required".

This provision and the linked definitions will be the subject of much further debate during the formal consultation process.

A "non-executive director" is defined as *"a director who is not involved in the discretionary investment management activity of the [Fund]"*. It would be desirable if the final text of the Code clarified that representatives of the promoter/investment manager may act as directors and be considered to be non-executive directors, provided that they are not directly involved in discretionary investment management activity.

The Code defines an "independent director" on the basis of giving reasonable weight to a number of criteria, such as whether the individual was an employee of the promoter of the Fund.

The aspect of the Code that attracted, by a considerable margin, the most debate was the question of the composition of the Board.

Having one director that fulfils these criteria should not be problematical for Funds. Previously, there had been no formal independence requirement, although in most instances the Irish-resident directors were independent; indeed, the representative body for Fund directors in Ireland is the Independent Directors Forum.

The requirements with respect to independence, particularly the requirement that the independent director *"would not be an employee of any service provider firm receiving professional fees from the [Fund]"*, is most likely to impact Funds that have two Irish directors provided by Irish law firms, fund administration companies, consultancy firms or a combination of these.

The Code recognises that independent directors "*add an additional layer of oversight of the activities of a [Fund]"* and they are expected to "*have a knowledge and understanding of the investment objective, policies and outsourcing arrangements to enable them to contribute effectively".* There is no guidance as to how this knowledge and understanding should be demonstrated.

The Code does require that there be a balance of skills and expertise, and the Code strongly recommends that at least one director be an employee of the promoter or investment manager.

No Numerical Restriction

Much of the focus during the initial consultation process concerned whether any numerical restrictions would be placed on the number of directorships that a director could hold. Those who argued against a numerical test stated that this was not an appropriate test as not all individual directorships require the same time commitment.

Accordingly, the initial proposal with respect to a numerical restriction has been replaced with a "time spent" test. The relevant provisions of the Code are parts 4.5 and 4.6, which state:

> *4.5 Each member of the Board shall have sufficient time to devote to the role of director and associated responsibilities. Each [Fund] should specify at the outset and, on a periodic basis, as appropriate (particularly where umbrella funds establish additional sub-funds), the time commitment it expects from each director. In specifying the time commitment, the [Fund] should have regard to the possibility that meetings in excess of the recommended four meetings of the Board may be required from time to time to deal with items at short notice, and should ensure that a sufficient buffer is included in the designated time commitment to allow for this. The Board shall indicate the time commitment expected from directors in letters of appointment.*
>
> *4.6 Directors are required to disclose to the Board their other time commitments, including time devoted to the role of directors of collective investment schemes domiciled in foreign jurisdictions. The Board must satisfy itself that the directors have sufficient time to fully discharge their duties and in proposing to appoint directors who otherwise have fulltime jobs, the [Fund] should be required to take fully into account the time constraints associated with the full time job (and also from other directorships held).*

Funds will not wish to unwittingly disqualify a director that has exhausted his time commitment capacity.

While the absence of numerical restrictions is to be welcomed, the additional requirements placed on a Fund to specify the time commitment it expects from each director and to ensure that directors have sufficient time to discharge their duties will require a deal of consideration, as Funds will not wish to unwittingly disqualify a director that has exhausted his time commitment capacity. It is hoped that the additional requirements will not militate against the appointment as directors, of ably qualified individuals who might have full time jobs.

For their part, directors are required to disclose to the Board their other time commitments.

While there are no numerical restrictions with respect to Fund Boards or for certain classes of non-Fund directorships (such as directorships of group/promoter controlled companies or subsidiaries), any Fund that has a director holding in excess of eight non-Fund directorships will be required to justify the holding of such directorships on a "comply or explain" basis.

"Comply or Explain"

As the Code is voluntary, the provisions are not formal rules, but are a set of principles for Boards to adopt in order to provide good governance. Most comparable corporate governance codes adopt similar "Comply or Explain" provisions.

These are new requirements and the requirement to have written procedures will lead to much more focus on what actually constitutes a conflict.

The Code requires, in Part 13.1, that any deviation from the Code be explained in the annual report of the Fund or, alternatively, in a publicly available medium such as a website referenced in the annual report. It is expected that any such explanations will be set out clearly and carefully, with the aim of illustrating how such deviation is consistent with good governance.

Conflicts of Interest

The Code requires the Board to take into account possible conflicts of interest when considering board appointments, to document its procedures for dealing with conflicts and to review compliance with these procedures at least annually. Where conflicts of interest arise, they must be noted in the Board minutes. If there are ongoing conflicts, the Code requires that consideration be given to changing the members of the Board. These are new requirements and the requirement to have written procedures will lead to much more focus on what actually constitutes a conflict. The Code prescribes a general duty for directors to disclose conflicts.

Other Requirements

Appointment of a Chairman

The Code contains a new requirement, for non-UCITS Funds, to appoint a Chairman who must be a non-executive director.

Monitoring of Delegated Functions

While most Boards will do so as standard practice, the Code requires Boards to "*have mechanisms in place for monitoring the exercise of delegated functions*". Interestingly, it specifies the monitoring of investment performance. The Code further states that the Board cannot abrogate responsibility for functions it delegates. It may be queried whether this is taking the responsibility of the Board too far.

The Code also requires the Board to monitor the effectiveness of the internal control procedures of delegates.

Explanation of Decisions to Central Bank

The Code requires Board to "*be in a position to explain its decisions to the Central Bank*"; this also is something Boards will do as standard practice.

Valuation of Assets

The Code reiterates the ultimate responsibility of the Board for valuation of Fund assets and the requirement for a Board to have in place a valuation policy. It should be noted that the role of the Board in this regard is under consideration with respect to the role of the "Valuer" under the Alternative Investment Fund Managers Directive.

The Code further states that the Board cannot abrogate responsibility for functions it delegates.

Frequency of Meetings

The Code provides that if Boards meet less frequently that quarterly, they must justify and explain this, on the basis of the "comply or explain" requirements discussed above. This is a significant additional requirement. Many non-UCITS Funds would meet less frequently than quarterly and would be happy to explain why they do so.

Board Minutes

The Code requires that "*detailed minutes of all Board meetings shall be prepared with decisions, discussions and points for further actions being documented. The minutes of meetings shall provide sufficient detail to evidence appropriate Board attention where necessary and shall be approved at a subsequent Board meeting*."

Attendance by Directors

While there is no prescribed attendance requirement, the Code does state that "*all Directors are expected to attend and participate*" and "*that an attendance schedule should form part of the annual informal Board performance review process*". It will be difficult for a Board, as part of such review, to ignore serial non-attendance by directors, and this should be borne in mind when considering Board composition at the outset.

Training

Part 8 of the Code states that the Board "*shall ensure that all Directors have received adequate training to enable them to discharge their duties*". This is a new requirement and it is difficult to see why a Board should have to take on this responsibility.

Reserved Powers

The Code requires that all reserved powers be scheduled, "*documented and updated in a timely manner*". Consideration will need to be given to what matters should be considered to be reserved powers.

External Audit

The Code sets out the obligations of the Board with regard to maintenance of proper books of account, appointment of auditors and financial statement production. It requires the Board to notify the Central Bank, in advance, of a change of auditor and the reason for such a change.

Compliance and Risk Management

The Code seeks to implement, for non-UCITS Funds, the requirements with regard to compliance and risk management and associated reporting that are in place for UCITS Funds.

Board Committees

The Code recognises that Board may establish committees and requires that such committees have documented terms of reference evidencing all authorities delegated to them.

Review Mechanisms

A feature of the Code is that it contains a number of review mechanisms that are also new. As stated above, compliance with conflicts of interest procedures must be reviewed annually.

In addition, the Code will require the Fund Board to review:

- the Board membership at least once every three years;
- the Chairman at least once every three years; and
- the overall Board's performance and that of individual directors annually, with a formal documented review taking place at least once every three years.

These requirements are significant, as Funds generally do not require directors to retire by rotation or, indeed, prescribe a retirement age.

Committees are required to review their terms of reference at least annually.

Conclusion

The financial crisis and increased shareholder activism has led to heightened scrutiny regarding corporate governance. The impact of the financial crisis in Ireland has led to widespread and far-reaching changes to the way banks and insurance companies are run. It is appropriate, as part of that process, that attention also be given to the corporate governance model in place for the investment funds industry, which is a significant contributor to the Irish economy and which has emerged intact and with its reputation enhanced from the financial crisis.

In formulating a comprehensive Corporate Governance Code, Ireland is looking to ensure that it is best of breed in terms of quality fund domiciles as it readies itself for the advent of the Alternative Investment Fund Managers Directive.

Declan O'Sullivan
Dublin
+353 1 436 8510
declan.osullivan@dechert.com

Dechert LLP

Recent Developments in Chinese Securities Regulation

by **Keith T. Robinson**, **Henry Wang** and **Karl Paulsen Egbert**

Qualified Foreign Institutional Investors Now Permitted to Trade Stock Index Futures in China

The China Securities Regulatory Commission (the "CSRC") recently issued guidelines allowing Qualified Foreign Institutional Investors ("QFIIs") to trade stock index futures, with effect from May 4, 2011.[1]

The Guidelines represent a helpful step in the on-going liberalisation of the Chinese securities markets. Trading in stock index futures remains relatively less established in China than in other markets, having only been approved for use by Chinese securities firms and money managers in April 2010. There is one designated futures exchange, the China Financial Futures Exchange (the "CFFEX"), and only the CSI 300 Index futures contract is currently traded on the CFFEX. Prior to the issuance of the Guidelines, QFIIs were not allowed to trade stock index futures in any form in mainland China. This restriction may have been prompted by concerns that stock index futures may increase volatility on domestic stock markets. As a result, the Guidelines subject futures trading by QFIIs to a number of limits, the most significant of which restricts a QFII's use of stock index futures to hedging purposes only. However, while the Guidelines note that QFIIs should apply to the CFFEX to obtain a hedging quota, "hedging" is not itself defined, and it is unclear how the CFFEX will evaluate a QFII's proposed use of stock index futures.

Hedging activities of QFIIs are also subject to value and volume limitations. Under the Guidelines, a QFII may not (a) hold stock index futures with an aggregate value in excess of its investment quota at the end of any trading day or (b) trade an amount of stock index futures in excess of its investment quota within any trading day. While the Guidelines are not clear on this point, "value" presumably is determined with

reference to the notional value of the futures contracts held or traded by a QFII. If the value of futures contracts exceeds the quota due to price fluctuations, the QFII is required to reduce the value of futures contracts held, within ten trading days.[2]

Trades may be conducted with no more than three mainland futures companies and only in accordance with the CFFEX's trading rules regarding settlement, trade execution, and margin management. The Guidelines also impose oversight and compliance responsibilities on custodian banks and futures firms, and these entities are required to report to the CSRC any irregular or illegal trading activity by QFIIs. Custodians are further subject to ongoing CSRC reporting requirements as to the securities activities of QFIIs.

QFIIs should benefit from the increased flexibility provided by the Guidelines. It is expected that Chinese regulators will closely monitor whether these Guidelines are successful in limiting the impact of securities index futures on market stability. If the Guidelines prove to be adequate, the CSRC may relax some of the restrictions, or permit QFIIs to trade futures on other reference assets or use other forms of derivatives.

China to Permit U.S. Banks to Offer Funds to Domestic Market

Talks between Chinese and U.S. officials at their annual Strategic and Economic Dialogue summit, held in early May 2011, resulted in several breakthroughs for U.S. financial institutions. At the summit, chaired by U.S. Treasury Secretary Timothy Geithner and Chinese Vice Premier Wang Qishan, China agreed to broaden its financial sector reforms as part of its new five-year plan for its economy. A press release from the U.S. Treasury indicated that such reforms will "further develop [China's] financial services market based on the principles of national treatment and non-discrimination [and] will provide new and significant opportunities to U.S. firms."

The most welcome development was China's agreement in principle to further open its domestic fund market to U.S. financial services companies. Currently, overseas asset managers can access the Chinese fund market solely by means of joint ventures with Chinese companies, which can be costly to establish and burdensome to manage. As announced by the U.S. Treasury, China has agreed to permit U.S. banks with subsidiaries incorporated in China to sell domestic mutual funds to Chinese consumers on the same terms as Chinese banks.[3] Such U.S. banks also would be able to obtain licenses to act as mutual fund custodians and as Margin Depository Banks in QFII futures transactions. These developments should assist non-Chinese firms in building brand awareness with Chinese investors. The Chinese domestic asset management market is growing rapidly, with assets under management reaching nearly $400 billion in 2010. It does not appear, however, that the agreement paves the way for offering non-Chinese funds to Chinese retail investors.

The practical impact of liberalisation remains to be seen—U.S. banks will still need to submit to a lengthy licensing process with Chinese regulators, and the criteria for obtaining a license may not be transparent. The timeline for implementation is not yet known. It also remains to be seen whether Chinese consumers will purchase funds from U.S. banks instead of more familiar domestic financial institutions.

The Strategic and Economic Dialogue summit also yielded other agreements. The U.S. Treasury noted that China "continues to make measured progress in increasing total quotas under the QFII program", which have increased nearly 25 percent in the past year to $21 billion. China also committed to move toward "market-determined interest rates to better price risk and more efficiently allocate capital in its economy".

---

1 The full title is *Guidelines for Investment in Stock Index Futures by Qualified Foreign Institutional Investors* (hereinafter, the "Guidelines"). The final Guidelines are substantially the same as the draft Guidelines published for consultation in January 2011.

2 For purposes of this quota, long and short positions cannot be offset and must be aggregated.

3 As announced by the U.S. Treasury, this liberalisation will also extend to foreign banks outside of the United States.

Keith T. Robinson
Washington, D.C.
+1 202 261 3438
keith.robinson@dechert.com

Henry H. Wang
Beijing
+86 10 5829 1318
henry.wang@dechert.com

Karl Paulson Egbert
Washington, D.C.
+1 202 261 3499
karl.egbert@dechert.com

Dechert LLP

Risky and Complex? Recent Trends in Investor Suitability Regulation in Asia

by **Angelyn Lim** and **Karl Paulson Egbert**

On the heels of one of the most volatile periods in recent market history, politicians and commentators have questioned whether some investment products are too risky or too complex for retail investors. In response, regulators in Hong Kong, Thailand and Singapore have proposed new "suitability" rules—requirements that sales intermediaries evaluate the knowledge and sophistication of their retail investors and attempt to classify investment products according to the risk or complexity of such products.

Hong Kong – "Derivatives" Products and Retail Investors

The Hong Kong Securities and Futures Commission (the "SFC") recently put into place new suitability rules, effective 4 September 2011.[1] Licensed sales intermediaries in Hong Kong already had been required to "ensure the suitability of [an investment] recommendation or solicitation" for a client.[2] Under the new rules, licensed intermediaries must specifically evaluate their retail clients' knowledge of derivatives and then separate clients into two categories based on whether or not the investor is knowledgeable regarding derivatives.[3] If a client without knowledge about derivatives wishes to purchase a derivative product, the licensed intermediary is required to explain the risks and/or take additional steps to ensure that the client understands the risks involved in investing in that product.

A problem arises when attempting to determine whether a fund is a "derivative product." Without additional guidance, some industry participants wondered whether funds with limited derivatives exposure might be considered derivative products. Given the widespread use of derivatives, such an interpretation would result in additional scrutiny in the sale of nearly all funds. In response, the SFC, in a letter to the

Hong Kong Investment Fund Association, outlined factors that could be used to determine whether a fund is a derivative product, including "the function derivatives play in the structure of the fund, the duration, and the extent of derivatives" used and whether the use of derivatives creates leverage.[4] But, even taking this guidance into account, the "derivative product" determination is not a bright line test. The responsibility for making this determination lies solely with the sales intermediary. In a recent FAQ, the SFC reminded intermediaries that, while fund managers could provide information in an offering document about a fund's use of derivatives, the intermediary must rely on its own "independent" evaluation of a fund.[5]

The requirement for such an independent evaluation is a significant departure from current practice where distributors rely heavily on "product training sessions" conducted by product issuers to educate distributors about the relevant products. It remains to be seen how these arrangements and evaluations will play out in

practice. In the absence of further SFC guidance, there may be no consensus whether a particular fund should be considered a "derivative product". Furthermore, the rules may create tension between the independent evaluations by distributors and the desire of issuers to have their shares sold to the broadest possible retail client base.

Under the new rules, licensed intermediaries must specifically evaluate their retail clients' knowledge of derivatives and then separate clients into two categories based on whether or not the investor is knowledgeable regarding derivatives.

Thailand SEC and Investor Suitability

The Securities and Exchange Commission of Thailand (the "SEC") recently amended its rules on sales of investment funds to retail investors, effective 1 July 2011. Under these amended rules, "investment unit" sellers, including securities firms, asset management companies, "limited brokers", dealers and underwriters (collectively,"Covered Institutions"), are required to perform "know your customer" and suitability tests before making sales to retail investors. Using this information, Covered Institutions are required to develop a risk profile for each retail investor (and update such profile at least bi-annually), and attempt to match the investor to suitable funds in eight categories (described below). In addition, Covered Institutions are required to distribute a prospectus to potential unitholders. Finally, Covered Institutions must apply their procedures to meet these requirements, in all electronic securities distribution channels.

For purposes of the suitability and "know your customer" tests, funds are to be classified in eight categories of increasing perceived risk:

- domestic money market funds;
- foreign money market funds;
- government fixed income funds;
- other fixed-income funds;
- balanced funds;
- equity funds;
- sector funds; and
- alternative funds.

The suitability process for a particular investor will depend in part on the types of funds about which the investor requests information. For example, suitability tests will not be required for investors interested in only domestic money market funds. In contrast, investors who wish to purchase higher-risk products must agree that they understand the risks of such products. Investors whose risk profiles do not match the investment products they wish to purchase would not be prohibited from buying higher risk products, but would have to sign a waiver in order to do so.

The new rules form part of a broader initiative by the SEC to develop Thailand's capital markets. The success of these rules will depend on how the rules are implemented. The eight categories may require substantial refinement to adequately reflect actual investment risk. For example, it is unclear whether a domestic Thai money market fund would be safer than a diversified international money market fund. Similarly, some higher-yield fixed-income products may be riskier than equity funds. Finally, the paperwork required to comply with these regulations could prove burdensome for

potential investors and slow the growth of the domestic Thai fund market, which has nearly doubled since 2005 to nearly $70 billion as of May 2011.[6]

The new rules form part of a broader initiative by the SEC to develop Thailand's capital markets. The success of these rules will depend on how the rules are implemented.

Singapore – "Delivering Fair Dealing Outcomes to Customers"

In Singapore, the suitability process also depends on the nature of the investment product.[7] Under recently approved guidelines, there are two broad categories used to determine whether additional scrutiny is needed for retail investor purchases of more complex products.[8]

For less complex products, known as "excluded investment products" or "EIPs", intermediaries are not required to conduct various due diligence procedures. A product may be classified as an EIP if it is "established in the market" and has terms and features that are generally understandable by retail investors. The Singapore MAS specifically noted certain products that it believes may not be understood by retail investors, including products that contain derivatives or "innovative features" or that require customers to put up margins that vary depending on the market value of the investment. Products that do not meet the criteria to be considered EIPs will be instead considered "non-excluded investment products or "NEIPs". The MAS has determined that collective investment schemes, other than real estate investment trusts, do not qualify as EIPs.

The Singapore MAS specifically noted certain products that it believes may not be understood by retail investors, including products that contain derivatives or "innovative features".

Sales representatives must conduct additional steps prior to selling NEIPs to retail customers, including requirinig such customers to complete a Customer Knowledge Assessment (for listed NEIPs) or Customer Account Review (for unlisted NEIPs). In particular, customers would be required to disclose their education levels, and any relevant investment experience or work experience with the desired product or similar products. If a sales representative, using information obtained during this process, determines that a desired product is not suitable for a customer, the representative must inform the customer in writing and request confirmation in writing that the customer still wishes to proceed. If the customer proceeds, the representative must inform the customer that various civil law remedies will no longer be available if the customer suffers losses.[9] In the case of listed NEIPs, a member of "senior management" who is independent of the account opening process would also be required to sign off on the transaction.[10] The MAS views this requirement as more procedural than substantive, noting that it is "unnecessary for the senior management . . . to have in-depth knowledge of the product or the customer to enable them to . . . ensure that appropriate safeguards have been imposed".[11] Nonetheless, the potential consequences to senior management

are unclear in the case of an investor who may subsequently claim to have been misled during the product selling process.

Unless regulators provide further guidance, distributors in each of these jurisdictions may feel that they have been left to their own devices.

Conclusion

Unless regulators provide further guidance, distributors in each of these jurisdictions may feel that they have been left to their own devices. It would not be unreasonable for industry participants in such jurisdictions to expect to receive supplemental guidance from the respective local regulator as the new regimes come into effect. The "derivative product" classification in Hong Kong is inherently subjective and may prove difficult to apply. Similarly, in Singapore, the determination of what constitutes an EIP is dependant upon an opinion of what products are "established in the market". In contrast, the framework in Thailand for classifying funds is prescriptive and detailed, although the eight recommended categories may not adequately reflect the relative risks or complexity of the full range of investment products available. In each case, the best approach may be to develop a suitability process that focuses on risks to investors regardless of the regulatory classification of an investment, while at the same time attempting to implement the new suitability regimes.

The best approach may be to develop a suitability process that focuses on risks to investors regardless of the regulatory classification of an investment.

---

[1] The effective date was extended by the SFC from 4 June 2011.

[2] Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission, paragraph 5.2.

[3] Professional investors are subject to another regime and would not be subject to the categorisation requirement. For more information on professional investors, please see the DechertOnPoint available at http://www.dechert.com/Financial_Services_Quarterly_Report_03-29-2011.

[4] Stephen Po, Securities and Futures Commission to the Hong Kong Investment Funds Association, dated April 6, 2011.

[5] Securities and Futures Commission, "Frequently Asked Questions on the Code of Unit Trusts and Mutual Funds", updated June 11, 2011 available at http://www.sfc.hk/sfc/doc/EN/faqs/products/FAQs%20on%20UT%20Code%20_updated%20on%2010%206%2011_%20%20qs%2027A%20_2_.pdf.

[6] "Net asset value and growth of mutual funds 1992-May 2011" as calculated by the Association of Investment Management Companies, available at http://www.aimc.or.th/en/21_overview_detail.php?nid=14&subid=0&ntype=2.

[7] The Monetary Authority of Singapore ("MAS") indicated on October 21, 2010 that it would proceed with the requirements discussed herein, but it has not yet indicated when formal implementing guidance will be released. Nonetheless, the MAS stated that it expected that market participants would begin implementing procedures to comply with such requirements immediately, as a best practice.

[8] As in Hong Kong, these requirements do not apply to certain sophisticated investors: "accredited investors, institutional investors, expert investors and high net worth individuals who are clients of private banks".

[9] Specifically, the representative must inform the customer that he or she cannot rely on Section 27 of the Financial Advisers Act to file a civil claim. Section 27 provides that financial advisers must have a reasonable basis for making any of their investment recommendations.

[10] The MAS notes that "senior management" refers to the Chief Executive Officer, Principal Officer or executive directors of the intermediary. MAS, *Response to Feedback Received – Policy Consultation on Regulatory Regime for Listed and Unlisted Investment Products*, 21 October 2010.

[11] MAS, *Response to Feedback Received – Policy Consultation on Regulatory Regime for Listed and Unlisted Investment Products*, 21 October 2010.

Angelyn Lim
Hong Kong
+852 3518 4718
angelyn.lim@dechert.com

Karl Paulson Egbert
Washington, D.C.
+1 202 261 3499
karl.egbert@dechert.com

UK Bribery Act 2010 – What It Means for the Financial Services Industry

(continued from page 3)

directly with an RCO are likely to be considered "associated" persons for the purposes of Section 7 of the Act, measures should be taken to ensure that the risk of bribery is minimised and that the RCO can feel confident, and can demonstrate, that it has adequate procedures in place. Although what is needed may depend on the nature of the RCO's business (for example, its size and the precise sectors and countries in which it operates), such measures may include: (i) vetting potential intermediaries; (ii) ensuring that intermediaries are familiar with corruption policies and are adequately trained; (iii) ensuring that adherence to anti-corruption policies (and the consequences if they are breached) is set out in written agreements; (iv) ensuring that those agreements also require the intermediary to impose similar contractual requirements on any third parties with whom the intermediary contracts to do work for the benefit of the RCO; and (v) conducting periodic reviews to detect any problems that have been encountered and to update anti-corruption policies accordingly. Similar consideration should be given in relation to all parties that could be considered "associated" persons under the Act.

A non-UK parent company should not attempt to avoid liability under the Act by contracting directly with agents for or on behalf of its UK subsidiary, since the non-UK parent company could be considered an RCO for the purposes of the Act in any case.

Corporate hospitality – The Guidance makes clear that the provision of corporate hospitality is entirely permissible, provided it is not being used as a bribe; the key will be to ensure that hospitality is offered for a legitimate purpose (such as to improve the image of a commercial organisation or establish cordial relations) and is both appropriate and proportionate. The latter involves a subjective assessment, which may be influenced by factors such as the seniority of the people involved, and what conduct is generally regarded as an accepted norm in a particular sector. Corporate policies and procedures should be reviewed and amended to ensure that (a) adequate guidance in clear language is in place to enable "associated" persons to know what conduct is or is not acceptable, and (b) relevant procedures are in place for securing approvals and reimbursement. Such approvals may, for example, require advance approval from different levels of management depending on the value of the hospitality being provided. Overall, perhaps too much has been written about the impact of the Act on corporate hospitality; used appropriately and proportionately, it is unlikely to give rise to any issue for most organisations. The Guidance sets out some useful examples of what may be acceptable hospitality that would fall outside of the Act—for example, the provision by a UK mining company of reasonable travel and accommodation to allow foreign officials to visit distant mining operations so that those officials can satisfy themselves as to the physical operations. Likewise, taking to a

business lunch a client or contact who refers work, should not, in itself, fall within the Act.

Relationships between regulators – The financial services industry is likely to be already aware of the information-sharing powers of both domestic and international regulators. One of the key methods by which a regulator may be alerted to the commission of a bribery offence is by way of information-sharing. In the UK, bribes are reportable to the Serious Organised Crime Agency under the Proceeds of Crime Act 2002 and, inevitably, reports may be shared with other regulators such as the Serious Fraud Office and the FSA. In addition to criminal penalties under the Bribery Act, action can be taken by regulators, including the FSA, in respect of corruption concerns.

Apart from the consequences for the business where the bribery offence occurred, the impact on the investor/lender, both financially and reputationally, may also be substantial.

High-risk jurisdictions – Particular thought should be given to high-risk countries in which corporate entities operate, to ensure that adequate procedures are in place, having regard to the risk of conducting business there. In deciding whether a country is high-risk, regard may be had for sources such as Transparency International's rating of countries by reference to their perceived prevalence of corruption. It is important to bear in mind that claiming that the practice of bribery is prevalent somewhere, or a that a particular action is regarded as customary there, will provide no defence under the Act (except in those rare instances where it can be shown that what occurred is positively permitted under local legislation or case law).

Impact of the Act

Personal convictions for corruption offences under the Act may lead to substantial prison sentences, unlimited fines and ancillary orders (such as the confiscation of revenues that flow from an illegal act) and disqualification as a director. Corporate convictions expose corporate entities to unlimited fines (not to mention reputational damage), and the penalties may extend to confiscation orders and will (or, in the case of a Section 7 conviction, may) lead to debarment from tendering for Government contracts across the EU in perpetuity—and this is without even mentioning the devastating cost and impact of a protracted and public investigation.

Personal and corporate convictions for approved persons and regulated entities could also be taken into account by domestic and overseas regulators in considering whether to grant authorisation to carry out regulated activities. For example, in the UK, the FSA is able to take into account, among other things, domestic and overseas convictions (as well as ongoing regulatory investigations) when assessing the integrity of regulated firms for the purposes of authorisation, and whether a person is "fit and proper" for the purposes of granting "approved person" status.[3]

Although the bribery offences under the Act carry criminal liability, there may well be wider financial and commercial implications. Any investment in (or loans to) a business that has corruption compliance issues could become impaired if the business falls foul of the Act, leading to very serious repercussions. Apart from the consequences for the business where the bribery offence occurred, the impact on the investor/lender, both financially and reputationally, may also be substantial. Comprehensive anti-corruption due diligence is therefore recommended prior to any significant investment being made.

1 The full title for the guidance issued on 30 March 2011 (the "Guidance") is "The Bribery Act 2011 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (Section 9 of the Bribery Act 2010)".

2 See FSA Perimeter Handbook: PERG 2.4.

3 See FSA Handbook (for example, PRIN, COND, APER, FIT handbooks).

Jonathan Pickworth
London
+44 20 7184 7608
jonathan.pickworth@dechert.com

Andrew Hearn
London
+44 20 7184 7466
andrew.hearn@dechert.com

Deborah Williams
London
+44 20 7184 7680
deborah.williams@dechert.com

Upcoming and Recent Events

JULY 27, 2011
Whistleblower Issues for Asset Managers
Webinar

This webinar will discuss the U.S. SEC's new whistleblower program under the Dodd-Frank Act, with a particular focus on its impact on the asset management industry. Partners from Dechert's Financial Services, White Collar and Securities Litigation, and Labor and Employment Practices will provide practical guidance as to steps that asset managers should take to comply with the new rules and encourage internal reporting of compliance issues.

JULY 13, 2011
Insider Trading Investigations in a Post-Galleon World
Webinar

Both the SEC and U.S. Department of Justice have made it clear they are actively pursuing allegations of insider trading as a key part of their enforcement agenda. In this webinar, Dechert partners with extensive experience advising and defending funds and their principals in insider trading matters will discuss whether the Galleon convictions represent a trend, what financial firms and advisers can expect from DOJ and SEC investigations of insider trading, and what to do if the government comes knocking on your door.

JULY 12, 2011
SEC's Final Rules Define Scope of Investment Adviser Registration Requirements for Non-U.S. Investment Advisers
London

The SEC on June 22, 2011 adopted rules and rule amendments that together define the scope of the Foreign Private Adviser Exemption, Private Fund Adviser Exemption and Venture Capital Fund Adviser Exemption, on which investment advisers with their principal office and place of business outside the U.S. may seek to rely, from 21 July 2011. In this seminar, we will explore the scope and requirements of these registration exemptions, related SEC guidance and the implications of changes to Form ADV for registered advisers and exempt reporting advisers.

JULY 7, 2011
FATCA: Exemptions and Viable Escape Routes
Hong Kong

Under the U.S. Foreign Account Tax Compliance Act (FATCA), investment funds that hold U.S. investments will be subject to an expansive 30% U.S. withholding tax with effect from 1 January 2013, unless they comply with complex new U.S. tax rules. In this breakfast seminar, we will examine the scope of the new rules as well as possible exemptions and other options.

JUNE 14, 2011
Regulatory Roundup: Update on Recent U.S. Regulatory Developments
London

This seminar examined a variety of pending and proposed regulatory changes from U.S. regulators. Topics included: FINRA Rule 5131 (designed to keep broker-dealers from using IPO allocations as an incentive to attract or retain investment banking business); Advisers Act Rule 205-3 (proposed amendments to dollar amount tests in the SEC rule that permits registered investment advisers to charge performance-based compensation to "qualified clients"); and a joint rule proposal regarding incentive compensation.

JUNE 9, 2011
The Regulatory Reset of the U.S. and UK OTC Derivatives Markets
London

This seminar covered the historic regulatory overhaul of the U.S. and UK over-the-counter derivatives markets, and the detailed rulemaking process underway.

MAY 23, 2011
Changes in American Tax Rules and Regulations and the Impact on European Asset Management
Paris

Panelists discussed recent changes in SEC registration for French managers, the implementation of the Volcker rule and its impact on the asset management industry, FATCA developments, reaction of European markets to the new U.S. regulations and views from France, Luxembourg and Germany.

MAY 19, 2011
U.S. and European Financial Institutions: Structuring and Protecting Investment Opportunities in Difficult Times
London

Financial institutions in the U.S. are facing an array of transitional issues as the Dodd-Frank Act is implemented. At the same time, banks in Europe must significantly increase their capital to satisfy new requirements under Basel III Regulations. Partners from Dechert's international finance group examined investment opportunities and challenges in U.S. banking markets.

MAY 12, 13, 2011
UCITS IV: Practical Implications for U.S. Promoters
New York and Boston

This seminar focused on the regulatory challenges and practical implications of UCITS IV for U.S. promoters offering and distributing a UCITS product on a cross-border basis.

APRIL 11, 2011
The German Funds Market: Europe's Powerhouse
New York

In this seminar, the leaders of Dechert's German financial services team addressed issues relevant to accessing Europe's largest investment fund market.

APRIL 6, 2011
AIFMD: Scope and Practical Impact
New York

Members of Dechert's international financial services team considered the Alternative Investment Fund Managers Directive (AIFMD) from a U.S. perspective, highlighting what U.S. alternative investment managers need to know and prepare.

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

Financial Services Contacts

For more information, please contact the authors, one of the partners or counsel listed or any Dechert lawyer with whom you regularly work. Visit us at www.dechert.com/financial_services.

Karen L. Anderberg
+44 20 7184 7313

David L. Ansell
+1 202 261 3433

Peter D. Astleford
+44 20 7184 7860

Adrienne M. Baker
+1 617 728 7151

Margaret A. Bancroft
+1 212 698 3590

Sander M. Bieber
+1 202 261 3308

Stephen H. Bier
+1 212 698 3889

Gus Black
+44 20 7184 7380

Thomas C. Bogle
+1 202 261 3360

Julien Bourgeois
+1 202 261 3451

Laura M. Brank
Moscow:
+7 499 922 1122
London:
+44 20 7184 7870

Kevin F. Cahill
+1 949 442 6051

Susan M. Camillo
+1 617 728 7125

Christopher D. Christian
+1 617 728 7173

Elliott R. Curzon
+1 202 261 3341

Carl A. de Brito
+1 212 698 3543

Douglas P. Dick
+1 202 261 3305

Peter Draper
+44 20 7184 7614

Olivier Dumas
+33 1 57 57 80 09

Ruth S. Epstein
+1 202 261 3322

Joseph R. Fleming
+1 617 728 7161

Brendan C. Fox
+1 202 261 3381

Richard Frase
+44 20 7184 7692

Robert M. Friedman
+1 212 649 8735

David M. Geffen
+1 617 728 7112

John Gordon
+44 20 7184 7524

David Gubbay
+44 20 7184 7420

David J. Harris
+1 202 261 3385

Christopher P. Harvey
+1 617 728 7167

Richard L. Heffner, Jr.
+44 20 7184 7665

Robert W. Helm
+1 202 261 3356

Richard M. Hervey
+1 212 698 3568

Richard Horowitz
+1 212 698 3525

Andrew Hougie
+44 20 7184 7373

Basil H. Hwang
+852 3518 4788

Jane A. Kanter
+1 202 261 3302

Geoffrey R.T. Kenyon
+1 617 728 5694

Matthew K. Kerfoot
+1 212 641 5694

Robert H. Ledig
+1 202 261 3454

Angelo Lercara
+49 89 21 21 63 22

Angelyn Lim
+852 3518 4718

Stuart Martin
+44 20 7184 7542

George J. Mazin
+1 212 698 3570

Gordon L. Miller
+1 202 261 3467

Michelle Moran
+353 1 436 8511

Jack W. Murphy
+1 202 261 3303

Antonios Nezeritis
+352 45 62 62 27

John V. O'Hanlon
+1 617 728 7111

Declan O'Sullivan
+44 20 7184 7629

Reza Pishva
+1 202 261 3459

Edward L. Pittman
+1 202 261 3387

Jeffrey S. Puretz
+1 202 261 3358

Achim Pütz
+49 89 21 21 63 34

Jon S. Rand
+1 212 698 3634

Robert A. Robertson
+1 949 442 6037

Keith T. Robinson
+1 202 261 3438

Kevin P. Scanlan
+1 212 649 8716

Marc Seimetz
+352 45 62 62 23

Jeremy I. Senderowicz
+1 212 641 5669

Frederick H. Sherley
+1 704 339 3151

Michael L. Sherman
+1 202 261 3449

Hans Stamm
+49 89 21 21 63 42

Mark Stapleton
London:
+44 20 7184 7591
Moscow:
+7 499 922 1100

Stuart Strauss
+1 212 698 3529

Richard J. Temko
+32 2 535 5430

Patrick W.D. Turley
+1 202 261 3364

Brian S. Vargo
+1 215 994 2880

Thomas P. Vartanian
+1 202 261 3439

James Waddington
+44 20 7184 7645

Henry Wang
+8610 5920 4306

M. Holland West
+1 212 698 3527

Jennifer Wood
+44 20 7184 7403

Anthony H. Zacharski
+1 860 524 3937

Jay Zagoren
+1 215 994 2644

Kathleen Ziga
+1 215 994 2674

Financial Services Quarterly Report Editors

Jim Baird
+44 20 7184 7469

Wendy Robbins Fox
+1 202 261 3390

About Dechert LLP

An international law firm with offices throughout the United States, Europe and Asia, Dechert has the resources to help clients succeed wherever they do business. We focus on core transactional and litigation practices, providing world-class, top-ranked services to major corporations, financial institutions and private funds worldwide.

Dechert's core practices are financial services, corporate and securities, complex litigation, finance and real estate and intellectual property. The firm also has well-established practices in tax, insolvency, employment and environmental law.

We welcome your feedback. Please let us know if there are any topics you would like to see covered in future reports.

Would you or your colleagues like to receive the *Financial Services Quarterly Report* and our other *DechertOnPoint*s? Click here to subscribe.

Dechert
LLP

www.dechert.com

© 2011 Dechert LLP. All rights reserved. Materials have been abridged from laws, court decisions, and administrative rulings and should not be considered as legal opinions on specific facts or as a substitute for legal counsel. This publication, provided by Dechert LLP as a general informational service, may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

The United States Treasury Department issues Circular 230, which governs all practitioners before the Internal Revenue Service. Circular 230 was amended to require a legend to be placed on certain written communications that are not otherwise comprehensive tax opinions. To ensure compliance with Treasury Department Circular 230, we are required to inform you that this letter is not intended or written to be used, and cannot be used, by you for the purpose of avoiding penalties that the Internal Revenue Service might seek to impose on you.

U.S. Austin • Boston • Charlotte • Hartford • Los Angeles • New York • Orange County Philadelphia • Princeton • San Francisco • Silicon Valley • Washington, D.C. • **EUROPE** Brussels Dublin • London • Luxembourg • Moscow • Munich • Paris • **ASIA** Beijing • Hong Kong