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LAWFLASH

REGIME FOR MARKETING FOREIGN FUNDS IN THE UAE

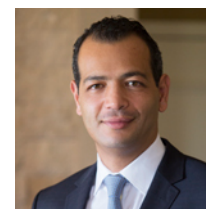
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Exploring the rules governing marketing in the UAE of interests in foreign (non-UAE) funds, and in particular the various exemptions from the general requirement that such foreign funds be registered with the Securities and Commodities Authority of the UAE and marketed in the UAE by locally licensed placement agents.

BACKGROUND

The regime for marketing foreign funds in the United Arab Emirates (UAE) has been in a state of continuing evolution for the last several

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months. In July 2016, the Securities and Commodities Authority (SCA) issued Chairman Decision No. 9/R.M. of 2016 Concerning Regulations as to Mutual Funds (the Fund Regulations), which replaced both the Board of Directors Resolution No. 37 of 2012 (Concerning the Regulation of Mutual Funds) and the Board of Directors Resolution No. 13 of 2013 (on Amending the Regulation of Investment Funds) (collectively, the Previous Fund Regulations). Subsequently, in January 2017, the SCA issued Chairman Resolution No. 3/R.M. of 2017 Concerning the Regulation of Promotion and Introduction (the Placement Agent Regulations). These Placement Agent Regulations appear to supplement rather than replace those sections of the Fund Regulations that relate to promoting foreign funds, since Placement Agent Regulations do not stipulate that they replace the Fund Regulations fully or in part.

THE FUND REGULATIONS

Rules for Marketing Foreign Funds

The Fund Regulations contain just one article dealing with the promotion of foreign funds. It provides that no foreign fund may be promoted in the UAE unless the foreign fund

- is registered with the SCA, and
- is distributed by a local promoter licensed in the UAE.^[1]

In order to register a foreign fund with the SCA, an application must be submitted to the SCA together with supporting documentation including the fund's prospectus. It may take up to 30 business days from submission for registration to be approved or denied. If approved, such registration remains valid until December of that year, whereupon it must be renewed with at least one month's notice and will then remain valid for another 12 months. With the exception of the aforementioned details, the conditions and process applicable to a fund desiring registration with the SCA are currently unclear.

Exceptions

RELATED RESOURCES

SECTORS

- Financial Services

SERVICES

- Investment Management
- Private Investment Funds

REGIONS

- Middle East

Under the Fund Regulations, the only two exceptions to the requirements for SCA registration of the foreign fund and use of an SCA-licensed local distributor are

1. reverse solicitation,^[2] where marketing takes place at the initiative of an investor in the UAE who has offered to purchase interests in the foreign fund, provided that such request is not the result of marketing by the foreign fund or any of its placement agents (the Reverse Solicitation Exemption). The existence of a reverse solicitation must be “substantiated” by the foreign fund and/or its placement agents—accordingly, in our view it will be necessary to maintain records documenting any reverse solicitations; and
2. where the foreign fund is promoted to federal or local governmental agencies or their wholly owned subsidiaries^[3] (the Private Placement Exemption).

These exceptions represent two important departures from the Previous Fund Regulations. First, reverse solicitation is now, for the first time, an express exception to the rules regarding marketing of foreign funds. This represents welcome certainty where previously promoters had to rely on a regime of “tolerated practices.” Second, the Private Placement Exemption has been narrowed. Under the Previous Fund Regulations,^[4] interests in foreign funds could be privately placed to (x) federal or local government financial portfolios; (y) companies, institutions, or entities trading on their own account whose main purpose, or one of their main purposes, is to invest in securities; and (z) investment managers who have discretionary investment mandates. The Fund Regulations limit this private placement to federal or local governmental agencies or their wholly owned subsidiaries.

THE PLACEMENT AGENT REGULATIONS

Rules for Marketing Foreign Funds

The Placement Agent Regulations maintain the basic position that any marketing of interests in foreign domiciled funds to investors in the UAE requires that such interests be registered with the SCA.

The regulations also specify that a foreign fund being marketed by way of a private offering in the UAE by an SCA-licensed placement agent may only be offered to pre-identified^[5] Qualified Investors^[6] (as defined below) each making a minimum subscription of AED 500,000 (or AED 1,000,000 if the foreign fund is incorporated in a free zone).^[7]

Exceptions

The Placement Agent Regulations preserve and expand on the exceptions to the foreign fund marketing rules set out in the Fund Regulations:

- The Reverse Solicitation Exemption^[8] has been retained in the same form. Therefore, if a foreign fund manager has a preexisting and active relationship with an investor who is based in the UAE, and that investor has expressed an interest in the funds of that fund manager, those funds may be marketed to such investor in the UAE without the overseas fund manager engaging a local placement agent or obtaining prior approval from the SCA to target the investor directly. As neither the Fund Regulations nor the Placement Agent Regulations specify what kinds of investors may be targeted within the Reverse Solicitation Exemption, we strongly advise that a comprehensive paper trail be kept on file to demonstrate that any marketing was the product of a reverse solicitation. We are aware that a number of placement agents and business brokers consider the Reverse Solicitation Exemption's scope to include family offices and High Net Worth Individuals (as defined below).
- The Private Placement Exemption^[9] has been extended, as compared to the Fund Regulations, by permitting the promotion of foreign funds to Qualified Investors *other than* High Net Worth

Individuals. This means that SCA registration of the fund and an SCA-licensed distributor will be required in order to market foreign funds to High Net Worth Individuals, but to market to other Qualified Investors, they will not.

“Qualified Investor” means

1. an investor capable of managing its own investments including
 - the federal government and local governments, governmental corporations, and authorities or their wholly owned subsidiaries,
 - international commissions and organizations,
 - persons licensed to practice business in the UAE, provided that one of their main purposes is investment, and
 - solvent natural persons with annual income of at least AED 1,000,000 or assets (excluding principal residence) of at least AED 5,000,000, provided they acknowledge that they have sufficient knowledge and expertise, whether themselves or by reason of assistance from a financial advisor, to assess the offering instrument and the advantages and risks of the investment (a High Net Worth Individual); and
 2. an investor represented by an investment manager licensed by the SCA.
- There is also now an exception for financial products listed in any market, so any foreign funds that are so listed may be promoted in the UAE without requiring SCA registration or SCA-licensed distributors.

In addition, the SCA has confirmed in the past, by an explanatory note, that it will not extend its jurisdiction to securities-related business activities conducted outside the UAE, provided such activities are performed offshore. As far as we are aware this explanatory note still stands, notwithstanding that the SCA’s regulations have been updated.

It should be noted that compliance with the Fund Regulations and the Placement Agent Regulations does not mean that an offering would automatically meet securities regulations in other jurisdictions in the Gulf Cooperation Council (GCC) since no “passporting” rights exist within the GCC in a manner similar to, for example, the European Union marketing passport currently in place for fund managers authorized under the Alternative Investment Fund Managers Directive 2011/61/EU. Moreover, financial free zones within the UAE, which currently include the Dubai International Financial Centre and Abu Dhabi Global Market, are subject to different legal regimes, including in relation to rules regarding the marketing of foreign funds. Fund managers and issuers should seek independent advice in each of the relevant jurisdictions.

CONCLUSION

Any marketing of interests in foreign-domiciled funds to investors in the UAE requires that the interests be registered with the SCA and distributed by a local promoter licensed in the UAE, unless

- the fund interests are being marketed to
 - federal or local governmental agencies or their wholly owned subsidiaries,
 - international commissions and organizations,
 - UAE companies whose objectives include carrying out investments, or
 - SCA-regulated asset managers;
- the marketing is being conducted in response to a reverse solicitation;
- the fund is listed; or
- the marketing is performed entirely offshore vis-à-vis the UAE.

CONTACTS

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

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[1] Fund Regulations, Article 35(1).

[2] Fund Regulations, Article 2(3)(b).

[3] Fund Regulations, Article 2(3)(c).

[4] Previous Fund Regulations, Article 2(4),(5) and (6).

[5] Placement Agent Regulations, Article 12(12).

[6] Placement Agent Regulations, Article 12(2).

[7] Placement Agent Regulations, Article 12(14).

[8] Placement Agent Regulations, Article 2(3)(e).

[9] Placement Agent Regulations, Article 2(3)(c).

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